

How to Protect Users' Copyright Rights in the Age of Social Media Platforms and Their Unread Terms of Service

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There are few things worse about the web than being forced to read thousands of words of dense legalese in order to upload a photo or send a message to a friend. The typical TOS [Terms of Service]—a legal necessity, but a human calamity—both enables the Internet and sucks the life-force out of it, one run-on sentence at a time.¹

I. Introduction

THERE IS AN UNDERLYING CONTRADICTION between copyright protection and social media platforms, as copyright protection restricts copying and social media platforms promote sharing.² In order for users to post their original content on social media platforms, copyright law requires the platforms to have a license to display copyright protected work. Social media platforms grant themselves such a license in their terms of service, that users are required to read and agree to before they are able to use the platform and post content. However, the problem is that social media platforms go beyond the narrow license that is necessary and instead use terms of service to

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1. Megan Garber, *Behold, a Terms of Service Agreement that Is Actually User-Friendly*, THE ATLANTIC (Apr. 12, 2012), <https://www.theatlantic.com/technology/archive/2012/04/behold-a-terms-of-service-agreement-that-is-actually-user-friendly/255803/> [https://perma.cc/8U79-5BR6].

2. H. Boshier & S. Yeşiloğlu, *An Analysis of the Fundamental Tensions Between Copyright and Social Media: The Legal Implications of Sharing Images on Instagram*, INT'L REV. L., COMPUTS. & TECH., 1–2 (2018).

grant itself an extremely broad license to the users' copyright protected content. This broad license allows the platform to transfer and sub-license the license, permitting the platform to use, copy, or sell the user's content without the user's further consent, let alone having to give credit or pay royalties to the content creator.

This comment will discuss the terms of service of five prominent social media platforms: Twitter, Instagram, Facebook, YouTube, and Pinterest. These platforms were chosen because they are some of the most commonly used in the United States. A 2018 report by the Pew Research Center found that 24% of American adults use Twitter, 35% use Instagram, 68% use Facebook, 73% use YouTube, and 29% use Pinterest.³

Section II of this comment reviews the relevant legal background of copyright law, terms of service, and the Digital Millennium Copyright Act ("DMCA"). Section III analyzes the problem of social media platforms granting itself a broad, transferable, and royalty-free sub-licensable license to the user's copyright protected content through their terms of service. This problem is worsened because most users fail to read or understand the platforms' terms of service. Section IV explains how users can continue to use social media platforms and protect their copyright rights. This section advises on both the social media platforms' ability to help protect users' copyright rights and steps users can take to protect their copyrights and still post their work on social media.

II. The Relevant Legal Background of U.S. Copyright Law and Terms of Service

A. What a Copyright Is and How it is Obtained

The Constitution granted Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁴ This power has been codified in Title 17 of the U.S Code section 102, where copyrights are defined as "original works of authorship fixed in any tangible medium of expression."⁵ Copyrights include eight categories of works: (1) literary works, (2) musical

3. Aaron Smith & Monica Anderson, *Social Media Use in 2018*, PEW RES. CTR., (Mar. 1, 2018), <http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/> [<https://perma.cc/3M6N-WP8C>].

4. U.S. CONST. art. I, § 8, cl. 8.

5. 17 U.S.C. § 102 (1990).

works, (3) dramatic works, (4) pantomimes and choreographic works, (5) pictorial, graphic, and sculptural works, (6) motion pictures and other audiovisual works, (7) sound recordings, and (8) architectural works.⁶ Under copyright law, a user's original photos, words, and videos posted on social media platforms may be subject to copyright protection.

Copyright owners are granted six exclusive rights, including the rights to: (1) reproduce the copyrighted work in copies; (2) prepare derivative works based upon the copyrighted work; (3) distribute copies of the copyrighted work to the public by sale or by other transfer of ownership, rental, lease or lending; (4) publicly perform the copyrighted work; (5) publicly display the copyrighted work; and (6) publicly perform sound records by the means of digital audio transmission.⁷ Additionally, copyright owners can enter into a license agreement, where the owner gives limited use of the copyrighted material to another person in exchange for payment, usually royalties.⁸

Copyright infringement occurs when the copyright owner's rights to reproduction, distribution, performance, public display, or derivative works are used by another without the copyright owner's permission.⁹ In a copyright infringement lawsuit, the plaintiff must prove that: (1) they own the valid copyright to the work and (2) that the defendant copied the work.¹⁰ The plaintiff may show that the defendant copied by proving the defendant had access to the work and the defendant's work is *substantially similar* to the copyrighted work, or that the defendant's work is *strikingly similar* to the copyrighted work.¹¹

While an author does not need the formalities of acquiring a copyright registration and providing notice to receive copyright protection, a copyright registration with the United States Copyright Office does provide legal benefits.¹² The greatest benefit of registering creative works is that it allows the owner to file lawsuits against copyright

6. *Id.*

7. 17 U.S.C. § 106 (2002).

8. David Carnes, *Does a Breach of License Equal a Copyright Infringement?*, LEGALZOOM, <https://info.legalzoom.com/breach-license-equal-copyright-infringement-22564.html> [<https://perma.cc/6JGB-ZXTA>].

9. *Definitions*, COPYRIGHT.GOV, <https://www.copyright.gov/help/faq/faq-definitions.html> [<https://perma.cc/9HFN-W22R>].

10. *Copyright Infringement*, DIG. MEDIA L. PROJECT, <http://www.dmlp.org/legal-guide/copyright-infringement> [<https://perma.cc/RX66-F3LG>].

11. *Id.*

12. *How to Obtain a Copyright?*, COPYRIGHT ALL., https://copyrightalliance.org/ca_faq_post/obtain-copyright/ [<https://perma.cc/UU68-USNV>].

infringers of their work.¹³ Additionally, registration can be used legally to establish the validity of a copyright and allow plaintiffs to seek statutory damages and attorney's fees.¹⁴

B. Social Media Websites' Terms of Service

Terms of service (or "terms" or "terms of use") are used by websites to regulate the relationship between the website's proprietor and the users who visit the website.¹⁵ Terms of service govern each user's access to and use of the platform's services and website.¹⁶ In general, the user's first step on a social media website is to read the platform's terms of service and "agree to the terms as a condition of creating an account and using the service."¹⁷ Social media platforms often have similar terms with common elements that include: an age requirement (e.g. users must be at least thirteen years old), a description of user rights and service rights, and the requirement for users to enter into a binding contract with the social media website.¹⁸ This contract is one-sided, as terms of service are essentially a take-it or leave-it agreement, where the user must agree to the terms in order to use the platform.

Terms of service on social media websites also address intellectual property rights including the user's copyright-protected content. Because copyright law protects the right to publicly display a work, platforms' terms of service must require their users to grant their platform a license in order for users to post their content to the platform. However, all five of the social media platforms discussed in this comment expand upon this license in their terms of service, by making their license sub-licensable, transferable, and royalty-free. Table 1 demonstrates the broad copyright licenses of Twitter, Instagram, Facebook, YouTube, and Pinterest obtained through each company's terms of service.

13. *Id.*

14. Kristen M. Koepsel, *Social Media Networks and The Uneasy Relationship with Copyright Law*, Md. Bus. J., Nov./Dec. 2012, at 20, 27 (2012).

15. Jack Blum, *Offer and Acceptance in Cyberspace: Ensuring that Your Client's Website is Protected by Enforceable Terms of Service*, Md. Bus. J., Jan./Feb. 2014, at 18-19.

16. Koepsel, *supra* note 14, at 26.

17. *Id.*

18. *Id.*

Table 1

The Social Media Platform	The Platform's Terms of Service
Twitter	By posting content, users "grant us [Twitter] a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed)." ¹⁹
Instagram	"[W]hen you share, post, or upload content that is covered by intellectual property rights (like photos or videos) on or in connection with our Service, you hereby grant to us 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 your content." ²⁰
Facebook	"[W]hen you share, post, or upload content that is covered by intellectual property rights (like photos or videos) on or in connection with our Products, you grant us a non-exclusive, transferable, sub-licensable, royalty-free, and worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content." ²¹
YouTube	"When you upload or post Content to YouTube, you Grant to YouTube, a worldwide, non-exclusive, royalty-free, transferable licence (with right to sub-licence) to use, reproduce, distribute, prepare derivative works of, display, and perform that Content in connection with the provision of the Service and otherwise in connection with the provision of the Service and YouTube's business, including without limitation for promoting and redistributing part or all of the Service (and derivative works thereof) in any media formats and through any media channels." ²²
Pinterest	"You grant Pinterest and our users a non-exclusive, royalty-free, transferable, sublicensable, worldwide license to use, store, display, reproduce, save, modify, create derivative works, perform, and distribute your User Content on Pinterest solely for the purposes of operating, developing, providing, and using Pinterest." ²³

19. *Terms of Service*, TWITTER (May 25, 2018), <https://twitter.com/en/tos#update> (hereinafter, TWITTER, TOS) [<https://perma.cc/4YNL-UM5Y>] (emphasis added).

20. *Terms of Service*, INSTAGRAM (Apr. 19, 2018), <https://help.instagram.com/581066165581870?ref=dp> (hereinafter, INSTAGRAM, TOS) [<https://perma.cc/DX3C-DDBN>] (emphasis added).

21. *Terms of Service*, FACEBOOK (Apr. 19, 2018), <https://www.facebook.com/legal/terms> (hereinafter, FACEBOOK, TOS) [<https://perma.cc/DX3C-DDBN>] (emphasis added).

22. *Terms of Service*, YOUTUBE, (May 25, 2018), <https://www.youtube.com/static?template=terms> (hereinafter, YOUTUBE, TOS) (emphasis added).

23. *Terms of Service*, PINTEREST (May 1, 2018), <https://policy.pinterest.com/en/terms-of-service> (hereinafter, PINTEREST, TOS) [<https://perma.cc/QX6Q-EW9Q>] (emphasis added).

C. The Digital Millennium Copyright Act and the Online Copyright Infringement Liability Limitation Act

The Digital Millennium Copyright Act (“DMCA”) is a federal copyright statute, 17 U.S.C. § 512,²⁴ which provides Online Service Providers (“OSPs”) protection from liability for copyright infringement claims arising from the conduct of their end users²⁵ (e.g., when a user uploads copyrighted work). Title II of the DMCA, also called the Online Copyright Infringement Liability Limitation Act, provides four “safe harbors” that may limit OSPs from liability. OSP websites must meet six requirements in order to be protected by the statute’s safe harbor.²⁶ Among the most important of the requirements is that the OSP must provide a designated agent to receive notifications of infringement claims and, if proper, remove the infringing material.²⁷ In other words, the OSP must have a system that allows people to report copyright infringement of their work and if an infringement has occurred on the platform, the OSP must remove the infringing material.

While the reporting and takedown measures the DMCA provides does protect users’ copyright rights on social media platforms to some extent, it’s important to note the statute is designed to protect OSPs from liability to copyright infringement and does so by absolving OSPs of the responsibility to proactively safeguard user work from infringement. Furthermore, while YouTube,²⁸ Twitter,²⁹ Facebook,³⁰ Instagram,³¹ and Pinterest³² all have DMCA copyright infringement reporting forms on their websites, users must understand that a DMCA report only protects the copyright owners from infringement of other third-party users, it does not provide the user any course of

24. Koepsel, *supra* note 14, at 27.

25. Joseph Drayton, *The Implications of the Digital Millennium Copyright Act on Social Media Sites*, AM. BAR (May 6, 2011), https://apps.americanbar.org/litigation/committees/intellectual/roundtables/0511_outline.pdf (original source has been removed from the website, follow the perma.cc link) [<https://perma.cc/3J37-G2AG>].

26. See *Viacom Int’l, Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110, 114 (2d Cir. 2010).

27. ELGA A. GOODMAN ET AL., 50A N.J. PRAC. BUS. LAW DESKBOOK § 36:41 (2018-2019 ed. 2018).

28. *Copyright Infringement Notification Requirements*, YOUTUBE HELP, <https://support.google.com/youtube/answer/6005900?hl=en> [<https://perma.cc/22CV-ES48>].

29. *Report Copyright Infringement*, TWITTER, <https://help.twitter.com/forms/dmca> [<https://perma.cc/LCB8-3HXA>].

30. *Reporting a Violation or Infringement of Your Rights*, FACEBOOK, <https://www.facebook.com/help/contact/634636770043106> [<https://perma.cc/DW23-GZLD>].

31. *Copyright Report Form*, INSTAGRAM, https://help.instagram.com/contact/552695131608132?helpref=faq_content [<https://perma.cc/4V4U-X4UZ>].

32. *Copyright Infringement Notification*, PINTEREST, <https://www.pinterest.com/about/copyright/dmca-pin/> [<https://perma.cc/EWA7-3W3G>].

redress if the social media platform itself uses the owner's content, especially if the owner granted the platform a license to use it through a terms of service. Therefore, while the DMCA does provide some help for users to protect their copyrights online, it does not resolve the problem of platforms granting themselves broad license to their users' work through their terms of service.

III. The Problem of Users Signing Away Some of Their Copyright Rights Through a Terms of Service

A. Terms of Service Grant Social Media Websites an Extremely Broad License to the Users' Copyrighted Content

Social media platforms' terms of service provide the platforms a license from the user that allows the platform to use the user's posted content, even if the user owns a copyright on the content.³³ To a certain extent this license is necessary, as it allows the platform to display the user's content and make it accessible to other users worldwide.³⁴ However, the terms of services of many social media platforms go further than simply allowing the website or mobile application to display the users' content, but instead grant itself a royalty-free, transferable, and sub-licensable license to use the users' content.³⁵ This broad-reaching license grants social media platforms the ability to use, share, change, and profit from user created content.³⁶ This means that platforms "are free to use your holiday snaps in their advertisements, repost your options . . . sell your [the user's] content or sub-license the use of your content to third parties"³⁷ without asking for the user's consent or providing payment.

For example, Instagram's Terms of Use specifically states that when users:

. . . share, post, or upload content that is covered by intellectual property rights (like photos or videos) on or in connection with our Service, you hereby grant to us a non-exclusive, royalty-free, transferable, sublicensable, worldwide license to host, use, dis-

33. Koepsel, *supra* note 14, at 29.

34. *What Should I Be Aware of When Sharing My Work on Social Media?*, THE MONITOR (last updated Mar. 22, 2019, 1:18 PM), <http://www.mmegi.bw/index.php?aid=77273&dir=2018/august/27> [<https://perma.cc/G35V-SBL5>].

35. Amelia Cooper & Elisa Blakers, *Who owns my social media content?*, LEXOLOGY, (May 16, 2017), <https://www.lexology.com/library/detail.aspx?g=a2627dc8-1d2a-4a2a-ae48-04f3f0cc2815> [<https://perma.cc/3FDF-ACET>].

36. *Id.*

37. *Id.*

tribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content.³⁸

Under this clause, Instagram cannot sell or transfer full ownership of a user's content, but it can transfer or sub-license its license to another company or person.³⁹ This means that Instagram can "license a user's photograph or video to any third party, for free, without seeking permission, giving any notice, or offering any payment to the user,"⁴⁰ or license the user's content to a third-party for a fee, which Instagram would keep.⁴¹ Additionally, by granting social media platforms a license, users could encounter legal battles if they both sell an image under an exclusive license and post the image on Instagram.⁴²

The social media platforms' ability to transfer and sub-license their license that can lead to infringement of the users' copyright rights. For example, many platforms including Instagram allow third-party companies access to users' information and content through application programming interfaces ("APIs").⁴³ Third-party companies, such as Olapic and Candid, use this granted access to collect Instagram users' images, Olapic's customers can then buy user images for advertising and promotional campaigns.⁴⁴ In doing so, Olapic acts as a marketing company, by collecting Instagram and Twitter users' images for brands to use.⁴⁵ This is concerning, as Instagram is using its copyright license to grant Olapic access, Olapic then sells the user images to third parties without providing any payment or credit to the user.

Many brands have begun to use images of their products created by their customers for advertising. This type of advertising helps brands convey authenticity and visual proof of their customers.⁴⁶

38. Instagram, *TOS*, *supra* note 20.

39. Steve Schlackman, *Losing Copyrights through Social Media*, ART L.J. ARTREPRENEUR (Jan. 19, 2016), <https://alj.artrepreneur.com/copyright-olapic-and-social-media/> [<https://perma.cc/9XGT-TBZP>].

40. Hayleigh Boshier, *Ten things you should know about Instagram's terms of use*, THE CONVERSATION (Sept. 12, 2018 7:22 AM), <http://theconversation.com/ten-things-you-should-know-about-instagram-terms-of-use-102800> [<https://perma.cc/YAU5-FSVU>].

41. *Id.*

42. *Id.*

43. Schlackman, *supra* note 39.

44. *Id.*

45. Sydney Ember & Rachel Abrams, *On Instagram and Other Social Media, Redefining 'User Engagement'*, N.Y. TIMES, (Sept. 20, 2015), <https://www.nytimes.com/2015/09/21/business/media/retailers-use-of-their-fans-photos-draws-scrutiny.html> [<https://perma.cc/7Y4B-JFJM>].

46. Allen Murabayashi, *Did I Just Give My #Permission? Hashtag Consent for Photo Usage is Trending*, PETAPIXEL (Sept. 22, 2015), <https://petapixel.com/2015/09/22/did-i-just-give-my-permission-hashtag-consent-for-photo-usage/> [<https://perma.cc/Y6LL-33X4>].

When customers post photos of the product, they can choose to hashtag the brand. Brands can also promote the use of a specific hashtag to identify their product on social media platforms. For example, Nike Women uses #betterforit, Nest uses #caughtondropcam, and the New York Times' The Learning Network uses #NYLTNreads.⁴⁷

Companies like Olapic capitalize on this user generated content by selling the collected images to brands. According to Olapic's website, their customers are "brands [that] need a content marketing strategy for the modern customer journey" who can "get content" through Olapic's "Content Engine" which the brand has "earned" from the brand's consumers.⁴⁸ This "earned" content likely implies that the brand can use the content posted by consumers that feature the brand's own product. A spokeswoman from Olapic has previously commented that brands do not always need to ask for permission to use a user's photo on their website because users give implied consent by tagging the company in the post.⁴⁹ However, if the work is protected by copyright law, a user's display of such content on their Instagram is not enough to imply the user's consent for the brand to use it legally. Brands should not be able to "earn" a copyright license simply through a user posting content that features the brand. But if Instagram has contracted with Olapic and granted them a sub-license, Olapic can sell the user's content without even needing the user's consent.

Olapic's promotion of possible copyright violations is made even more problematic as their website suggests that brands can "request" content from the brand's "influencers, loyalists, and even employees" through Olapic's "Creator Platform."⁵⁰ Unlike "earn," the word "request" appears to imply a copyright license, therefore Olapic may be suggesting that a user's copyright should be respected (at least requested) while another user's content is not valued as a copyright. This idea is likely explained through common sense, as "[a]mateurs with small followings are generally thrilled for the exposure (and increase in followers) that reposting [from brands] can bring. On the other hand, established social media icons and photographers who use social media professionally are more likely to consider legal action. In other words, savvy brands don't steal from professionals."⁵¹

47. *Id.*

48. OLAPIC, <http://www.olapic.com> [<https://perma.cc/3GEJ-FKAR>].

49. Ember & Abrams, *supra* note 45.

50. OLAPIC, *supra* note 48.

51. Murabayashi, *supra* note 46.

This copyright violation through a user's implied consent is not just theoretical but has proved to be a concern. In 2015, Shereen Way posted a photo of her four-year-old daughter on Instagram wearing pink Crocs.⁵² Way included "#Crocs" on the photo, identifying the Crocs brand.⁵³ Crocs, an Olapic customer, used Way's image on their website in a gallery of user-generated photos, without requesting Way's permission.⁵⁴ Instagram responded by stating that it is only responsible for how the brand uses consumers' photos posted on its site,⁵⁵ likely because Way's photo was posted on Crocs's website, instead of Crocs's Instagram page, it was not within the scope of Instagram's Terms of Service. Thus, under Instagram's terms, it was not responsible for any copyright violation since the infringement did not occur on its platform.

Additionally, while some companies attempt to request express permission in the comment section of a user's photo to use the image, it's not a perfect system.⁵⁶ Another Olapic customer, Giggle, an online baby products retailer, failed to ask Julie Wax's permission before they used her photo of her baby on their website.⁵⁷ Giggle's vice president of e-commerce and digital marketing admitted that this possible copyright and privacy violation was "a miss" and removed the photo from their website.⁵⁸

There appears to be some gray area in what the law requires for permission. Olapic has argued that users give implied consent by tagging the company in a post.⁵⁹ While Instagram has stated that implicit tagging is not enough, James Quarles, Instagram's global head of business and brand development said "it's absolutely clear from our standpoint that there has to be explicit permission given."⁶⁰ However, explicit permission is not required by Instagram's terms, as there are no restrictions placed on how other companies may use Instagram's content.⁶¹ Additionally, under Instagram's terms of use, if Instagram contracted with Olapic and granted them a sub-license neither implied consent nor express consent would be legally required.

52. Ember & Abrams, *supra* note 45.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

There can even be some concerns when brands do ask for explicit permission to use a photo. In 2015, photographer Tony German posted a photo on Instagram and used many hashtags including “#samsung” and “#galaxys3.”⁶² Samsung UK contacted German by commenting on the photo saying “[c]ould we and our retailers use it to show what our products look like? Please reply #yes to agree to our terms <http://is.gd/VbieQQ>.”⁶³ What seemed to be a simple request to use the photo turned out to be an “Image Use Agreement,” where the owner not only granted Samsung a license to use the image, but also waived their right to receive royalties and indemnified Samsung of any losses, damages, liabilities and claims.⁶⁴ This begs the question of whether a simple “#yes” in an Instagram comment is explicit enough to agree to a contract that clearly favors the brand and provides no benefit to the user other than possible recognition.

1. Case Law Has Helped to Protect User’s Copyright Rights

Fortunately, case law has shown that a user’s copyright may be protected when a third-party takes an image from a social media platform without permission. In 2011, *Agence France Presse v. Morel* (“*AFP v. Morel*”) became one of the first cases to determine how photos that individuals put on social media can be used by third parties for commercial purposes.⁶⁵ In the case, Daniel Morel, a professional photojournalist, took photos of the aftermath of the 2010 earthquake in Haiti and posted them on Twitter using Twitpic.⁶⁶ Lisandra Suero re-posted the photos on his Twitpic page and then Vincent Amalvy, an editor for the Agence France Presse (“AFP”), posted on Suero’s Twitter inquiring about the photographs and emailed Morel asking “do you have pictures?”⁶⁷ Before Morel responded, Amalvy downloaded the images from Suero’s Twitpic page.⁶⁸ AFP placed Morel’s photographs on their online photo database, Image Forum, and transmitted

62. Michael Zhang, *Please Reply #yes to Give Us Unlimited Rights to Your Photo*, PETAPIXEL (May 15, 2015), <https://petapixel.com/2015/05/15/please-reply-yes-to-give-us-unlimited-rights-to-your-photo/> [<https://perma.cc/P3ZT-AGCZ>].

63. *Id.*

64. *Id.*

65. Joseph Ax, *Photographer wins \$1.2 million from companies that took pictures off Twitter*, REUTERS (Nov. 23, 2013, 2:40 PM), <https://www.reuters.com/article/us-media-copyright-twitter/photographer-wins-1-2-million-from-companies-that-took-pictures-off-twitter-idUSBRE9AL16F20131122> [<https://perma.cc/7XHK-9TFL>].

66. *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 298 (S.D.N.Y. 2011).

67. *Id.* at 299.

68. *Id.*

them to Getty, an image licensing company.⁶⁹ The photographs were credited to “AFB/Getty/Lisandra Suero,” where Suero was falsely labeled as the photographer, and AFP and Getty were licensing agents. Getty then licensed the photos to a number of third-party news agencies including CBS and CNN.⁷⁰

Morel sued for copyright infringement and AFP defended that it “(1) had an express license to use Morel’s images, or alternatively, (2) they were third-party beneficiaries of a license agreement between Morel and Twitter.”⁷¹ The court rejected the first express license defense, finding that Twitter’s Terms of Service gives Twitter and its partners a license to use such content, and that AFP has not claimed it is a partner of Twitter.⁷² The court furthered that although Twitter’s Terms “encourage[d] and permit[ted] broad re-use of Content” this “does not clearly confer a right on other users to re-use copyrighted postings.”⁷³ The court rejected AFP’s third-party beneficiary defense for similar reasoning, finding that AFP was a Twitter “user” not a Twitter partner or sub-licenser, and Twitter’s terms did not necessarily require users to license photographs to other users.⁷⁴

AFP v. Morel presents both positive and negative outcomes for future copyright infringement cases. On the positive side, other users of the social media platforms will likely not be able to rely on a defense to copyright infringement by claiming protection through the platform’s terms of service. However, on the negative side, this case clearly states that platforms and their partners are given a license to the user’s copyrightable content through terms of service. This means that platforms have some ownership of the users’ copyrights, and it can choose to license to their “partners.” This is a broad relinquishment of copyright rights through terms of service that a user may never realize.

In the end, AFP and Getty offered Morel a \$2 million settlement on the eve of trial, which he rejected.⁷⁵ The jury found in favor of Morel and awarded him a \$1.2 million verdict,⁷⁶ the maximum statu-

69. *Id.*

70. *Id.* at 300.

71. *Id.* at 302.

72. *Id.* at 303.

73. *Id.*

74. *Id.*

75. *Agence France Presse v. Morel*, No. 10-cv-2730 (AJN), 2015 WL 13021413, at *1 (S.D.N.Y. Mar. 23, 2015).

76. *Id.* at 1.

tory penalty under the Copyright Act.⁷⁷ The judge found that this case presented “novel issues”⁷⁸ but furthered that “beyond the courts, academics and practitioners are similarly coming to terms with the implications of social media and traditional copyright law.”⁷⁹

2. One Small Limitation on the Terms of Service Granted License

Despite the broad copyright license social media platforms have managed to secure through its terms of service, the licenses are limited in one key way. Twitter’s,⁸⁰ Instagram’s,⁸¹ Facebook’s,⁸² YouTube’s,⁸³ and Pinterest’s⁸⁴ terms all state that a user can end their license by deleting their account. However, YouTube’s terms also require users to both close their YouTube account, and send a notice in writing to YouTube to effectively terminate their legal agreement with YouTube.⁸⁵ While Instagram’s terms provide that the user can end the license at any time by deleting their content or account, however, their content will continue to appear on the website and application if it was shared by others and had not been deleted.⁸⁶

Therefore, copyright owners need to be aware that once they post content on social media platforms, they are giving the platform a broad license to their copyrighted content. Even if they terminate this license by deleting their accounts, their content may continue to be displayed by other users on the platform.

B. The Greatest Challenge of Terms of Service is that Users Do Not Read Them Before “Agreeing”

The biggest lie on the internet may be “I agree to these terms and conditions.”⁸⁷ A 2017 Deloitte survey found that 91% of people con-

77. Ax, *supra* note 65.

78. Morel, No. 10-cv-2730 at *13.

79. Ax, *supra* note 65.

80. TWITTER, *TOS*, *supra* note 19.

81. INSTAGRAM, *TOS*, *supra* note 20.

82. FACEBOOK, *TOS*, *supra* note 21.

83. YOUTUBE, *TOS*, *supra* note 22.

84. PINTEREST, *TOS*, *supra* note 23.

85. YOUTUBE, *TOS*, *supra* note 22.

86. INSTAGRAM, *TOS*, *supra* note 20.

87. 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*, INFO., COMM. & SOC’Y at 3–4 (July 3, 2018), <https://www.tandfonline.com/doi/full/10.1080/1369118X.2018.1486870> [<https://perma.cc/7ZZ5-R3TW>].

sent to terms of service conditions without reading them.⁸⁸ The rate is even higher for younger people, as 97% of people between the ages of 18–34 agree to terms without reading them.⁸⁹ In a recent experimental study, researchers tested if participants would read the terms of service for a fictitious social networking service called NameDrop.⁹⁰ Based on the average adult reading speed, reading NameDrop’s terms of service would take 15–17 minutes.⁹¹ However, the study found that on average people read the terms of service for only fifty-one seconds.⁹² Even more concerning, 98% of participants failed to note that the terms included two “gotcha clauses,” where the user agreed to share their data with the United States National Security Agency (“NSA”), and provide their first-born child as payment for access.⁹³ The study found that 93% of the participants agreed to the terms, however almost all of the individuals that found the child assignment clause and the one individual who noted the NSA clause, declined the terms.⁹⁴ While this experiment may be an extreme example of how most people fail to read the terms that they agree to, it nevertheless demonstrates the validity of the concern that users of social media platforms most likely do not read the platform’s terms before they agreed to grant the platform a transferable, sub-licensable, and royalty-free license to their copyrighted content.

The reasons why users don’t read terms of service before agreeing to them is likely twofold: the language is too complex and the terms are too long.⁹⁵ The average person reads 200 words per minute and a typical terms of service agreement is nearly 12,000 words, meaning that it would take on average nearly an hour to read a terms of service.⁹⁶ Additionally, terms are usually written in dense legalese that can be difficult for an average user to understand.

88. Caroline Cakebread, *You’re not alone, no one reads terms of service agreements*, BUS. INSIDER (Nov. 15, 2017, 7:30 AM), <https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11> [<https://perma.cc/THG3-YL36>].

89. *Id.*

90. Obar & Oeldorf-Hirsch, *supra* note 87, at 1.

91. *Id.*

92. *Id.*

93. *Id.*, at 1, 10–11.

94. *Id.* at 1, 14.

95. Cakebread, *supra* note 88.

96. Melanie Ehrenkranz, *These Giant Scrolls Are the Hellish User Agreements You Probably Should Have Read (But Didn’t)*, GIZMODO (May 7, 2018, 12:05 PM), <https://gizmodo.com/these-giant-scrolls-are-the-hellish-user-agreements-you-1825822690> [<https://perma.cc/94MG-W56F>].

C. Terms of Service May Include Arbitration and Forum Selection Clauses

Another problem with some terms of service is that terms may require users to agree to binding arbitration for any legal action between the user and the platform. This requirement can deprive users of their right to civil recourse against platforms when there is an infringement of their intellectual property.⁹⁷ The problem with arbitration clauses is that they are often one-sided and designed to benefit the platform, not the user.⁹⁸ Scholars have previously argued that “[s]ocial networking sites have designed arbitration agreements that operate as poison pills that eliminate minimum adequate rights and remedies for consumers, while preserving the full array of remedies for these virtual businesses.”⁹⁹

Of the five social media platforms focused on in this comment, two platforms, Instagram¹⁰⁰ and Pinterest,¹⁰¹ have included arbitration clauses in their terms. However, Instagram does provide in their terms that claims related to intellectual property, including copyrights, do not have to be arbitrated and may be brought in court.¹⁰² It is both interesting and unclear why Instagram has chosen to exempt copyright claims from their arbitration clause. Perhaps Instagram has recognized that forced arbitration is unfair to settle disputes over a user’s intellectual property, or it may be a safeguard to protect a court from striking down its already broad grant of a transferable and sub-licensable license of the user’s copyright rights as unfair.

Forum selection clauses, which require a plaintiff to file in a specific court, may also negatively impact the plaintiff’s ability to file a claim, especially considering that social media platforms are used worldwide. Similar to an arbitration clause, a forum selection clause is designed to benefit the company rather than the consumer. The clause usually mandates that a claim must be filed exclusively in the home state of the business; the forum is selected so that a “business may benefit from more favorable laws in its chosen jurisdiction or may

97. Michael L. Rustad et al., Comment, *An Empirical Study of Predispute Mandatory Arbitration Clauses In Social Media Terms of Service Agreements*, 34 U. Ark. Little Rock L. Rev. 643, 644–45 (2012).

98. *Id.* at 645.

99. *Id.* at 645.

100. INSTAGRAM, *TOS*, *supra* note 20, at *How We Will Handle Disputes*.

101. PINTEREST, *TOS*, *supra* note 23, at *Arbitration*.

102. INSTAGRAM, *TOS*, *supra* note 20, at *How We Will Handle Disputes*.

simply seek to avoid defending suits all over the country.¹⁰³ Forum selection clauses are presumed valid and will be enforced unless it can be proven that enforcement is “unreasonable.”¹⁰⁴

Of the five platforms, Twitter,¹⁰⁵ Instagram,¹⁰⁶ Facebook,¹⁰⁷ YouTube,¹⁰⁸ and Pinterest¹⁰⁹ all include forum selection clauses that specify various courts and districts in California. This means that despite having consumers worldwide, these platforms’ terms of service may limit users’ abilities to file a claim in their home states or countries, which could discourage people from bringing copyright claims. This problem is also concerning because, as discussed above, users might not read or understand the terms of service and will not realize that a forum selection clause is in effect. This is just another example of how the terms of service are written to benefit the platform and consequently disadvantage the users.

It is also interesting to note that Pinterest’s terms state that their forum selection clause does not apply to European Economic Area consumers, and explicitly states that consumers will not be deprived of any access to the courts in the country that they live in nor any protections they have under the law of that country.¹¹⁰ This exception is likely to comply with Europe’s General Data Protection Regulation law (“GDPR”).

IV. How Users Can Continue to Use Social Media Platforms and Protect Their Copyright Rights

A. What Social Media Platforms Can Do to Help Protect User’s Copyrights

1. Rewrite Their Terms of Service and Limit Their License

It’s clear that social media platforms need to grant themselves a license to the user’s content in order for the platform to display the user’s content. However, the inclusion that the license is sub-licensa-

103. Rachel Cormier Anderson, Note, *Enforcement of Contractual Terms in Clickwrap Agreements: Courts Refusing to Enforce Forum Selection and Binding Arbitration Clauses*, 3 SHILDLER J. L. COM. & TECH. 11 (2007), <http://www.lctjournal.washington.edu/Vol3/a011Cormier.html>.

104. *Id.*

105. TWITTER, *TOS*, *supra* note 19.

106. INSTAGRAM, *TOS*, *supra* note 20.

107. FACEBOOK, *TOS*, *supra* note 21.

108. YOUTUBE, *TOS*, *supra* note 22.

109. PINTEREST, *TOS*, *supra* note 23.

110. *Id.*

ble, transferable, and royalty-free is unnecessarily broad and clearly intended to benefit the platform not the user. The problem of such a broad license is compounded by the fact that many users never read or fail to understand the terms of service, and therefore will not realize that by simply using social media platforms, the users are consenting to this license. This comment intends to shed light on the potential for social media platforms to use, copy, or, worst of all, sell their users' content without ever providing payment or having to ask the user for express consent. The current grant of a sub-licensable, transferable and royalty-free license through a terms of service is simply unfair to users.

This comment encourages the use of a narrower copyright license granted through a terms of service. Therefore, this comment urges social media platforms to voluntarily rewrite their terms of service, thereby resolving the issues raised in this comment by limiting their license by making it non-transferable and not sub-licensable. Moreover, to incentivize social media platforms to limit the current broad licenses, this comment urges users to lobby for change by voicing their concern on social media and take action to protect their copyright rights by following the suggestions raised in this comment.

2. Rewrite their Terms of Services So That the Average Person Can Understand Them

Social media platforms should strive to improve their terms of service by writing them in a way that the average user understands the language. Improved language in the terms of service may make users more likely to actually read the terms and may also help them realize that by posting content on social media they are granting the platform a broad license to their work. Clear and well-written terms can also benefit the social media platform by building trust in the platform's brand, avoiding consumer backlash, and preventing lawsuits.¹¹¹

Specifically, platforms can improve their terms of service by including non-legal language so that a user can understand the contract without having to consult an attorney.¹¹² Casual and clear language may also help users to actually read a terms of service, rather than clicking "accept" without even skimming through what rights they are agreeing to give up.

111. Erik Episcopo, *How User Friendly is Your Terms & Conditions Page?*, MEDIUM (Nov. 1, 2017), https://medium.com/@clutch_co/how-user-friendly-is-your-terms-conditions-page-9943b29e26a9 [<https://perma.cc/7CYQ-VF5F>].

112. Schlackman, *supra* note 39.

Of the five social media platforms discussed, Pinterest is perhaps the most effective at writing terms so that it can be understood by an average user. Pinterest does an excellent job of clarifying its terms to their users by explaining each clause two-fold. First, the legal writing includes a longer and more descriptive paragraph in black text, and then blue text that states “[m]ore simply put” which summarizes the proceeding text into a few sentences in more causal language.¹¹³ For example, in Pinterest’s terms of service under the section *Limitation of liability*, the black text reads “TO THE MAXIMUM EXTENT PERMITTED BY LAW, PINTEREST SHALL NOT BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL OR PUNITIVE DAMAGES, OR ANY LOSS OF PROFITS OR REVENUES, WHETHER INCURRED DIRECTLY OR INDIRECTLY, OR ANY LOSS OF DATA, USE, GOODWILL, OR OTHER INTANGIBLE LOSSES” However, the blue text that follows explains, “[m]ore simply put [w]e are building the best service we can for you but we can’t promise it will be perfect. We’re not liable for various things. If you think we are, let’s try to work it out like adults.” When comparing the different texts, it’s clear that Pinterest is choosing to include all of the necessary legal information, while attempting to explain the legalese to the average user. However, this simplified version should be read with caution, as it is not a perfect translation of the legalese. Regardless of its shortcomings, Pinterest’s efforts are nevertheless a step in the right direction where platforms apply a more user-friendly language in the terms of service agreements.

Notably, Pinterest’s terms still fall short in one key way. Of the terms’ thirteen sections, section 11, “Arbitration”, is the only section without the blue “more simply put” text explanation.¹¹⁴ As discussed above, requiring binding arbitration is an important right that users are agreeing to give up. This section does actually start with casual language, explaining to the user that “[f]or any dispute you have with Pinterest, you agree to first contact us and try to resolve the dispute with us informally.”¹¹⁵ However, users would still greatly benefit from a “more simply put” brief summary of this requirement and relinquishment of this right.

113. PINTEREST, *TOS*, *supra* note 23.

114. *Id.*

115. *Id.*

3. Send Emails About Updated Terms of Service and Explain What the Changes Are and Why

Twitter,¹¹⁶ Instagram,¹¹⁷ Facebook,¹¹⁸ YouTube,¹¹⁹ and Pinterest¹²⁰ all specify in their terms that they will notify users when they make changes to their terms. When social media platforms send these emails, they should be effectively communicating changes to the contract between the platform and user. They can accomplish this in a number of ways. From the onset, the email should have a clear title in the subject line that indicates exactly what the email contains.¹²¹ Emails including a personalized touch, for example addressing the email to the person's first name, are likely to get more attention.¹²² The email itself should summarize or discuss the changes to the terms of service, rather than just include a link to the updated terms and assume the user will read or re-read the terms.¹²³ Finally, platforms can also use color and various formatting to improve the legibility of a text-heavy email.¹²⁴

B. Steps Users Can Take to Protect Their Copyrights and Still Post on Social Media

1. Read Terms of Service and Understand Your Copyright Rights

The first step users should take is make an effort to read and understand the terms of service of the social media platforms they post content on. Users should be aware that photos, videos, and even writings they post on social media platforms are likely protected by copyright law, even without filing a copyright registration. As mentioned above, users should know that by using Twitter, Instagram, Facebook, YouTube, and/or Pinterest, they are granting the platform a broad royalty-free license with a right to sub-license and transfer user content. Additionally, users should know that the terms also pro-

116. TWITTER, *TOS*, *supra* note 19.

117. INSTAGRAM, *TOS*, *supra* note 20.

118. FACEBOOK, *TOS*, *supra* note 21.

119. YOUTUBE, *TOS*, *supra* note 22.

120. PINTEREST, *TOS* *supra* note 23.

121. Kelly Shetron, *Terms Of Service And Privacy Policy Emails: 6 Lessons To Make Them Exciting*, EMAIL DESIGN (June 12, 2017), <https://emaildesign.beefree.io/2017/06/terms-of-service-privacy-policy-email-best-practices/> [<https://perma.cc/2NBW-A3LY>].

122. *Id.*

123. *Id.*

124. *Id.*

vide that this license may be terminated if the user deletes the content or their account.¹²⁵

2. Preemptively Safeguard Your Work Before Posting it on Social Media

In addition to filing DMCA take down forms against online third-party infringers, users can take additional steps to protect their copyright rights and still post their content on social media. If users are concerned about infringement of their work, they should file a copyright registration before they share their work online. Although copyright registration is not required to receive copyright protection, as the right to a copyright is vested at the time the work is created, registration does provide the user greater legal power, including the ability to receive statutory damages that can range from \$750 to \$30,000 per infringement and for the infringer to pay the copyright owner's legal fees.¹²⁶ Additionally, the fee to register a copyright with the United States Copyright Office ranges from \$35 to \$55¹²⁷ making it an effective and relatively low cost protective measure for professionals and certain individuals who want additional protection of their work.

After receiving a copyright registration, creators can further protect their works by including a copyright notice on the content itself. Notice is a statement placed on a copy of a work that informs the public that the copyright owner is claiming ownership of it.¹²⁸ Notice was previously required for all works published before March 1, 1989 but is now an optional requirement.¹²⁹ Notice should include the copyright symbol ©, the word "copyright," or the abbreviation "copr.," the year the work was first published, and the name of the copyright owner (e.g. © 2018 John Doe).¹³⁰ Including a notice provides the copyright owner many legal benefits including: identifying the copyright owner, making potential users aware that the work is claimed and legally protected, specifying the term of the copyright, and preventing

125. Copper & Blakers, *supra* note 35.

126. Nicole Martinez, *DMCA Safe Harbor: Why Artists Can't Sue Instagram*, ART L.J. ARTEPRENEUR (Feb. 7, 2016), <https://alj.artpreneur.com/dmca-safe-harbor-sue-instagram/> [<https://perma.cc/TYN4-48ML>].

127. *Copyright Office Fees*, U.S. COPYRIGHT OFF. 2, (Apr. 2018), <https://www.copyright.gov/circs/circ04.pdf> [<https://perma.cc/UUK2-YZNS>].

128. *Copyright Notice*, U.S. COPYRIGHT OFF. 1, (Sept. 2017), <https://www.copyright.gov/circs/circ03.pdf> [<https://perma.cc/FAY6-7F9Z>].

129. *Id.*

130. *Id.*

infringers from limiting their liability for damages or injunctive relief based on an innocent infringement defense.¹³¹

For users who want their work to be used and shared online but still want to maintain their copyright ownership, an alternative to a traditional copyright registration is a “creative commons license.” A creative commons license allows creators to “retain their copyright while allowing others to copy, distribute” and use their work either for commercial or non-commercial purposes.¹³² Another benefit of a creative commons license is that there are some restrictions built in to continue to protect the copyright owner, including that “licensees must credit the licensor, keep copyright notices intact on all copies of the work, and link to the license from copies of the work.”

For photographs and images specifically, another protective measure content creators can take is to digitally watermark their work. Digital watermarks are an invisible layer added to the top of an image that contain various metadata.¹³³ The data layer can't be removed from the image and can be read by software regardless of where the image is placed (i.e. online or on a physical object).¹³⁴ Watermarks can also be used to track down people using an image without consent.¹³⁵ Additionally, Google's reverse image search is another helpful tool to track down infringers.¹³⁶ Other basic protections include having visible watermarks on works and only posting lower resolution images online.¹³⁷

3. Continue to be Proactive About Protecting Your Copyright Rights

Overzealous terms of service continue to be kept in check by backlash from the users and public. In 2009 Facebook changed their terms and deleted the sentence which stated that Facebook's license to the user's content would be terminated when the account was deleted, implying that Facebook would continue to have a license to the

131. *Id.* at 3–4.

132. *About The Licenses*, CREATIVE COMMONS, <https://creativecommons.org/licenses/> [<https://perma.cc/YHA3-6RWC>] (indicating that a creator may choose a license that either allows their work to be used commercially or does not allow the work to be used commercially).

133. Martinez, *supra* note 126.

134. *Id.*

135. *Id.*

136. Candide McDonald, *To catch a thief: dealing with copyright theft*, CAPTURE (Jan. 15, 2019), <http://www.capturemag.com.au/advice/to-catch-a-thief-dealing-with-copyright-theft> [<https://perma.cc/R5TP-8ZX9>].

137. *Id.*

user's content even after the user deletes it.¹³⁸ After public outcry, including prominent Twitterers and bloggers announcing that they deleted their Facebook accounts, Facebook attempted to publicly clarify it did not intend to imply this change, and as of 2018 Facebook's terms explicitly state that users "can end this license at any time by deleting [their] content or account."¹³⁹

In 2012, Instagram changed their terms of service to allow it to sell its user's uploaded images.¹⁴⁰ The new clause stated "[t]o help us deliver interesting paid or sponsored content or promotions, you agree that a business or other entity may pay us to display your username, likeness, photos (along with any associated metadata), and/or actions you take without any compensation to you."¹⁴¹ After criticism from privacy advocates, consumers and the National Geographic Society, Instagram dropped the controversial change.¹⁴² Instagram's terms have become less transparent since the terms no longer expressly state that Instagram has the right to sell its user's photos. However, Instagram's current terms may still effectively grant it the ability to sell user's images through their license, as the terms provide that users grant Instagram a "royalty-free, transferable, sub-licensable, worldwide license to host, use, distribute, modify, run, copy . . . and create derivative works of your content."¹⁴³ Therefore, while Instagram's terms no longer expressly grant it the right to sell user's work, it could be implied from their transferable and sub-licensable license that gives Instagram the right to use and copy the user's content.

C. How Changing Laws and Legal Standards Can Protect User's Copyright Rights

With the 2018 implementation of the GDPR, which regulates on-line data protection and privacy, the European Union appears to be making a particularly forceful effort to protect its consumers online. Additionally, in September 2018, the European Parliament voted in

138. See Caroline McCarthy, *Facebook faces furor over content rights*, CNET, <http://www.cnn.com/2009/TECH/02/17/facebook.terms.service/index.html> [<https://perma.cc/5GQ7-97QG>] (last updated Feb. 18, 2009, 2:29 PM).

139. FACEBOOK, *TOS*, *supra* note 21.

140. See Schlackman, *supra* note 39.

141. Mario Aguilar, *Instagram: 'We Don't Want To Sell Your Photos' (Updating)*, GIZMODO (Dec. 18, 2012, 5:05 PM), <https://gizmodo.com/5969572/instagram-we-dont-want-to-sell-your-photos> [<https://perma.cc/J6A8-K8P7>].

142. Schlackman, *supra* note 39.

143. INSTAGRAM, *TOS*, *supra* note 20.

favor of the Copyright Directive, a new “legislation intended to update online copyright law for the internet age.”¹⁴⁴ The legislation is controversial because it will require an “upload filter” where platforms like YouTube and Facebook will have to scan the data uploaded to its sites and prevent users from uploading copyrighted content.¹⁴⁵ This legislation is a stark change from the existing copyright laws, including the DMCA, which do not require the platforms to proactively prevent copyright infringement.

In March of 2019, the European Parliament voted in favor of the Copyright in the Digital Single Market Directive (“the “Directive”).¹⁴⁶ To become law, it had to be approved by a majority of European Union Member States at the European Union Council of Ministers.¹⁴⁷ The final vote occurred on April 15, 2019, and the Directive was approved.¹⁴⁸ Its passage was backed by nineteen countries at the EU Council, with six member states voting against it, and three countries abstaining.¹⁴⁹

The Directive will hold platforms to a higher standard of protecting copyright rights which could lead to a more balanced terms of service agreement between the platform and the user. Specifically, Article 17 (formerly Article 13) of the Directive, requires the platforms to take a more proactive role in preventing infringing content from being freely shared.¹⁵⁰ For example, under the Directive, platforms

144. James Vincent, *EU approves controversial Copyright Directive, including internet ‘link tax’ and ‘upload filter’*, VERGE (Sept. 12, 2018, 7:12 AM), <https://www.theverge.com/2018/9/12/17849868/eu-internet-copyright-reform-article-11-13-approved> [<https://perma.cc/QPM8-5XYX>].

145. *Id.*

146. Michelle Kaminsky, *EU’s Copyright Directive Passes Despite Widespread Protests—But It’s Not Law Yet*, FORBES, (Mar. 26, 2019, 1:15 PM), <https://www.forbes.com/sites/michellekaminsky/2019/03/26/eus-copyright-directive-passes-despite-widespread-protestsbut-its-not-law-yet/#391e1db32493> [<https://perma.cc/ACW3-W55S>].

147. *Id.*; see also, Carlton Daniel, *European Parliament Adopts the Copyright Directive*, NAT’L L. REV., (Apr. 10, 2019), <https://www.natlawreview.com/article/european-parliament-adopts-copyright-directive> [<https://perma.cc/M24S-DJD7>].

148. Foo Yun Chee, *EU Approves Tougher EU Copyright Rules in Blow to Google, Facebook*, REUTERS (Apr. 15, 2019), <https://www.nytimes.com/reuters/2019/04/15/technology/15reuters-eu-copyright.html?searchResultPosition=2> [<https://perma.cc/DDS4-JYC4>].

149. Ryan Browne, *Europe backs copyright overhaul that threatens to hit YouTube and Facebook hard*, (Apr. 15, 2019, 7:50 AM), <https://www.cnn.com/2019/04/15/article-13-eu-council-backs-copyright-law-that-could-hit-youtube-fb.html> [<https://perma.cc/3D8B-RNH5>].

150. Fionnuala P. Richardson and Margaret A. Esquenet, *EU Council Officially Approves European Copyright Law Reforms: A New Digital Age Is Born*, LEXOLOGY: FED. CIR. IP BLOG (Apr. 16, 2019), <https://www.lexology.com/library/detail.aspx?g=44a4293a-f432-4c89-a65e-44f4ebed715d> [<https://perma.cc/426G-G4NE>].

will be required to sign licensing agreements with users such as musicians, performers, authors, news publishers, and journalists to use their work.¹⁵¹ Additionally, platforms will have to install filters that prevent users from uploading copyrighted materials.¹⁵²

Unsurprising, there has been immense backlash against the Copyright Directive. A change.org online petition has received over five million signatures against the “censorship-machinery” of the Directive in order to “save the internet”.¹⁵³ Google (which owns YouTube) has lobbied against the Directive and has even suggested that it might retract Google News from Europe.¹⁵⁴ However, other associations have embraced the Directive, including the European Magazine Media Association, the European Newspaper Publishers’ Association, the European Publishers Council, News Media Europe and independent music labels lobbying group Impala.¹⁵⁵ While it is too soon to know what form the response to the Directive will ultimately take, it is clear that such legislation has support and could be an important counter-balance to one-sided social media platform terms.

V. Conclusion

After reviewing Twitter’s, Instagram’s, Facebook’s, YouTube’s, and Pinterest’s terms of service, it’s clear that all five of the prominent social media platforms use their terms to grant themselves an extremely broad license to their users’ copyright protected content. This license is overly and unnecessarily broad because it allows the platforms to transfer and sub-license the user’s work without requiring the user’s consent or payment to the user. This issue is compounded by the fact that most users either do not read or understand the terms of service and may also be limited in when and how to bring a lawsuit by arbitration and forum selection clauses. Therefore, the platforms’ existing terms of service are designed to unfairly benefit the platform and disadvantage the user.

151. Chee, *supra* note 148.

152. *Id.*

153. *Stop the censorship-machinery! Save the Internet!*, CHANGE.ORG <https://www.change.org/p/european-parliament-stop-the-censorship-machinery-save-the-internet> [https://perma.cc/C43V-7VYD].

154. Foo Yun Chee, *EU countries back copyright reforms aimed at Google, Facebook*, REUTERS, (Feb. 20, 2019, 6:54 AM), <https://www.reuters.com/article/us-eu-copyright/eu-countries-back-copyright-reforms-aimed-at-google-facebook-idUSKCN1Q91WO> [https://perma.cc/X4LU-68B3].

155. Chee, *supra* note 148.

The best way to solve this problem would be for the social media platforms to change their terms of service and limit their license, specifically by making the license non-transferable and not sub-licensable. The platforms can also correct this problem by rewriting their terms so that users are more likely to read and understand them and by sending clear emails to the users when the platforms change their terms. Users can also take steps to solve these problems including making an effort to read the terms, understand their copyright rights and proactively protect their copyrighted work before they post it online. Finally, a new law in the European Union will further help protect users' copyright rights by requiring platforms to scan for infringing work. All of these suggestions may help solve the problem of users "agreeing" to sign away some of their copyright rights through the platforms' terms of service, without ever realizing it.