

**COPYRIGHT INFRINGEMENT OF INSTAGRAM PICTURES AND THE LEGAL GAPS**  
**IN THEIR COPYRIGHT PROTECTION**

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## 1. Introduction

In the modern digital world, ‘the Internet is teeming with personal websites and social media posts’<sup>1</sup>. Social media, in particular, allowed the connection of millions of Internet users in a means that was not possible before. Nowadays, more and more people around the world are using the Internet and staying connected through social networking<sup>2</sup>. Consequently, a greater number of photos and peoples’ stories are published over social media sites every second<sup>3</sup>. Due to this extraordinary quantity of posting photos on social media websites<sup>4</sup>, a huge number of copyrightable photos are indeed available and accessible for illegal copying by other users<sup>5</sup>. One of the most famous social media platforms of the 21<sup>st</sup> century is Instagram which home more than forty billion photographs<sup>6</sup>. Instagram was generated in October of 2010<sup>7</sup> and since then, Instagram users are able to share photos and videos but they are not able to create a complete online profile with their personal details, such as on Facebook, or writing brief bursts of texts, such as on Twitter<sup>8</sup>. Usually, these photos are accompanied by small comments which describe the images, even though these text commentaries are optional<sup>9</sup>. Before posting a photo, Instagram users can edit the image by choosing a filter to alter its look and by tagging other individuals in order to specify their presence in the picture<sup>10</sup>. Tags enable a user to visit

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<sup>1</sup> Elizabeth J. Tao, ‘A Picture’s Worth: The Future of Copyright Protection of User-Generated Images on Social Media’ (2017) 24 *Ind.J.GlobalLegalStud.* 617

<sup>2</sup> *Ibid*

<sup>3</sup> *Ibid*

<sup>4</sup> ‘Our Story’ (*Instagram Press*, 2018) <<http://instagram.com/press>> accessed 22 March 2018

<sup>5</sup> *Ibid* (n 1) 618

<sup>6</sup> *Ibid* 624

<sup>7</sup> Geoff Desreumaux, ‘The Complete History of Instagram’ (WERSM, 3 January 2014), <<http://wersm.com/the-complete-history-of-instagram> [<https://perma.cc/XFB8-NY4L>]> accessed 23 March 2018

<sup>8</sup> Lauren Myers, ‘A Picture Is Worth a Thousand Material-Connection Disclosures: Endorsers, Instagram, and the Federal Trade Commission’s Endorsement Guides’ (2017) 66 *DukeLJ* 1371, 1376

<sup>9</sup> Stephanie Buck, ‘The Beginner’s Guide to Instagram’ (*MASHABLE*, 29 May 2012) <<http://mashable.com/2012/05/29/instagram-for-beginners/#1NGgV6XL28qJ>> accessed 23 March 2018

<sup>10</sup> *Ibid*

the profile of the tagged person by just clicking on the tag<sup>11</sup>. Moreover, Instagram users can follow other people's profiles and then, by becoming followers, they can like and make comment on other peoples' posts<sup>12</sup>. As of December 2017, the overall number of monthly active Instagram users was calculated about 800 million, with 95 million photos uploaded every day (this constitutes an increase from the 70 million of the previous year)<sup>13</sup>. Namely, Instagram is a ubiquitous platform of sharing photographs and videos with others but undoubtedly, this excessive accessibility creates legal issues in the area of copyright law.

This essay explains the applicable copyright law for posting pictures on Instagram. It starts by giving a brief overview of how copyright law generally operates on a global scale and then it focuses on analysing the copyright law that apply to social media under the jurisdictions of the European Union (EU) and the United States (US). The particular legal systems have been chosen for comparison as they make a good contrast: Instagram is based on US law and the EU law applies over the domestic laws of the European member states. Subsequently, the essay explains the basic of Instagram the relevant to copyrights terms of use. It then explains how Instagram conforms with copyright law and at the end, the essay concludes by analysing some possible factors that may result in copyright infringement on Instagram.

## **2. Copyright law on Instagram Photos (the International Treaties, the US and the UK)**

### **2.1. Copyright on a global scale through international treaties**

Even though there are no international provisions for the copyright protection, there are some global treaties which have formed agreements regarding the protection of international copyright<sup>14</sup>. Over the previous century, the Berne Convention, the Trade-Related Aspects of International Property Rights (TRIPS) Agreement and the Universal Copyright Convention have been established and have been seen as fundamentally important in determining global treatment of copyright issues<sup>15</sup>. The Berne Convention was introduced in 1886 but it was not incorporated into the US until 1989<sup>16</sup>. The

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<sup>11</sup> Ibid (n 9)

<sup>12</sup> Ibid

<sup>13</sup> Salman Aslam, 'Instagram by the Numbers: Stats, Demographics & Fun Facts' (OMNICORE, 1 January 2018) <<https://www.omnicoreagency.com/instagram-statistics/>> accessed 19 March 2018

<sup>14</sup> Ibid (n 8) 570

<sup>15</sup> Neil Weinstock Netanel, 'Asserting Copyright's Democratic Principles in the Global Arena' (1998) 51 VAND.L.Rev. 217, 279-80

<sup>16</sup> 'Summary of the Berne Convention for the Protection of Literary and Artistic Works' (WORLD

Berne Treaty 'has a similar focus on national treatment of copyrighted works from all member nations'<sup>17</sup> and at the moment, after many years of amendments, it has 176 signed members<sup>18</sup>. The TRIPS Agreement was introduced in 1995 and it is nowadays, 'the most comprehensive multilateral agreement on intellectual property'<sup>19</sup>. The TRIPS Agreement specifies the minimum IP protection standards and it includes the 164 member states of the World Trade Organization (WTO)<sup>20</sup>. The Universal Copyright Convention was established in 1955 and demands all member states to provide creators with satisfactory and efficient security over their works by providing foreign creators the same security as local authors<sup>21</sup>. The Universal Copyright Convention was signed by 100 member states<sup>22</sup>.

Any attempts for international harmonization of copyright agreements have caused controversy in defining the proper scope of copyright security which could be provided in each state and at the same time as a global standard<sup>23</sup>. Global organizations, such as the WTO and the World Intellectual Property Organization (WIPO) have introduced international agreements on copyright issues (like the TRIPS Agreement and the Berne Convention respectively) but without managing adequately the international copyright matters<sup>24</sup>. Therefore, a new approach is needed in order to deal with the challenges of global copyright protections<sup>25</sup>.

## 2.2. EU Copyright Law

Whereas the member states of the EU have implemented laws to address the problems regarding

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*INTELL. PROP. ORG.*, 1886) <<http://www.wipo.int/treaties/en/ip/berne/summary-berne.html>> 23 March 2018

<sup>17</sup> Ibid

<sup>18</sup> 'WIPO-Administered Treaties: Contracting Parties' (*WORLD INTELL. PROP. ORG.*, 2018) <[http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15)> accessed 23 March 2018

<sup>19</sup> 'Overview: The TRIPS Agreement' (*WORLD TRADE ORG.*)

<[https://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm)> accessed 23 March 2018

<sup>20</sup> Understanding the WTO: The Organization: Members and Observers (*WORLD TRADE ORG.*, 2016) <[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)> accessed 23 March 2018

<sup>21</sup> Ibid (n 8) 571-72

<sup>22</sup> 'Other IP Treaties: Universal Copyright Convention 1952' (*WORLD INTELL. PROP. ORG.*) <<http://www.wipo.int/wipolex/en/other-treatiesparties.jsptreaty-id=208&group-id22>> accessed 23 March 2018

<sup>23</sup> Neil Weinstock Netanel, 'Asserting Copyright's Democratic Principles in the Global Arena' (1998) 51 *Vand.L.Rev.* 217, 237

<sup>24</sup> Graeme B. Dinwoodie, 'A New Copyright Order: Why National Courts Should Create Global Norms' (2000) 149 *U.Pa.L.Rev.* 469

<sup>25</sup> Ibid (n 8) 579-80

copyright protection, the EU legislation is above these national laws because of the principle of supremacy<sup>26</sup>. The EU law has somehow similar effects in the domestic laws of the EU member states and so it can be seen as a way of harmonisation of the domestic laws of the EU member states<sup>27</sup>. This harmonisation occurs because the laws established in the EU specify the rights that the domestic laws of the member states should provide to all citizens of the EU nations<sup>28</sup>. There have been established many directives in the EU regarding copyright protection but for the purposes of this essay, the most relevant ones are Directive 2001/29/EC and Directive 2006/116/EC because these two concern the issues regarding online copyright protection<sup>29</sup>.

The Directive 2001/29/EC, also known as the InfoSoc Directive 2001, was enacted in an attempt to deal with the challenges that existed in the digital era<sup>30</sup>. At the time of the directive's implementation, many EU nations had already amended their national legislations so as to mitigate the conflicts that have been raised due to the online copyright protection<sup>31</sup>. Thus, in order to retain the purpose of the EU, it was necessary to harmonise matters of online copyright law within the EU and so the InfoSoc Directive was effected<sup>32</sup>.

Under the particular directive, the authors are provided with certain rights for any kind of work they generate and with some rights concerning reproduction of their generated work and the possibility to make it accessible in public. The right for reproducing a work depends on the creator of the alleged work and the EU member states are compelled to exclusively offer the right to the creator to allow or forbid any kind of duplication<sup>33</sup>. The same is also happened with the right of 'communicate [the work] to the public', namely it is up to the author whether the work is to be become available in public<sup>34</sup>. Moreover, under the right of distribution, the author is again the one who decides whether to distribute or not both the original work and copies. This right of distribution can be exhausted under the doctrine of exhaustion. Namely, a further distribution can be implemented to a work that has

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<sup>26</sup> Flaminio Costa v ENEL [1964] ECR 585 (6/64).

<sup>27</sup> Louise Lundell, 'Copyright and Social Media: A legal analysis of terms for use of photo sharing sites Author' (Bachelor's thesis, Jonkoping University 2015) 5

<sup>28</sup> Ibid

<sup>29</sup> Ibid

<sup>30</sup> Ibid

<sup>31</sup> Ibid

<sup>32</sup> Directive 2001/29/EC

<sup>33</sup> Directive 2001/29/EC, Art 2, 3(1)

<sup>34</sup> Directive 2001/29/EC, Art 3(2)

legally acquired by sale or any other kind of ownership transfer made or consented by the holder of the copyrights<sup>35</sup>. Nonetheless, this is not applicable to works which are legally copied by an online user of an online platform like Instagram. In such circumstances, any further distribution is not permitted<sup>36</sup>. Moreover, the rights given by the Directive can be transferred through licence<sup>37</sup>.

It is noteworthy here that Article 5 of the directive indicates the copyright exceptions and restrictions that member states can apply to the rights given by the previous articles<sup>38</sup>. From the list of exceptions of article 5, the only obligatory exception is the first one: ‘transient or incidental [copying] whose sole purpose is to enable (a) a transmission [...], or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2’<sup>39</sup>. The rest of the paragraphs of Article 5 are not compulsory, they are left to the member states to decide whether or not to implement them in national laws<sup>40</sup>.

The adoption of Directive 2006/116/EC is also relevant to online copyright protection. While the Berne Convention establishes ‘minimum requirements for terms of protection’<sup>41</sup>, Directive 2006/116/EC was adopted as a step in making the terms of copyright protection in member states of the EU increasingly unanimous<sup>42</sup>. The directive stipulates that copyrights in artistic works such as photographs and videos subsist during the author’s life and for extra 70 years after the day of the author’s death<sup>43</sup>. In the Berne Convention, the duration of copyright in artistic works is the author’s life plus 50 years after the author’s death<sup>44</sup>. It is therefore observed that artistic works in the EU obtain copyright protection for more years than the works which are only covered under the Berne Convention<sup>45</sup>. Finally, under the Directive 2006/116/EC, photographs need to be ‘the author’s own intellectual creation’ in order to

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<sup>35</sup> Directive 2001/29/EC, Art 4

<sup>36</sup> Directive 2001/29/EC, recital 29

<sup>37</sup> Directive 2001/29/EC, recital 30

<sup>38</sup> Directive 2001/29/EC, Art 5

<sup>39</sup> Directive 2001/29/EC, Art 5 (1)

<sup>40</sup> Directive 2001/29/EC, Art 5

<sup>41</sup> Berne Convention, Art. 19

<sup>42</sup> Ibid (n 27) 7

<sup>43</sup> Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), OJ L 372, 27.12.2006, p. 12– 18, Art. 1(1)

<sup>44</sup> Berne Convention

<sup>45</sup> Ibid (n 27) 7

be protected<sup>46</sup>.

### 2.3. US copyright law

In the US, photographs satisfy the statutory requisites for a 'copyrightable work as original works of authorship that are fixed, either physically or digitally, at the moment of capture'<sup>47</sup>. Therefore, since the end of the nineteenth century, photographs have obtained copyright protection in the US<sup>48</sup>. The leading case here is *Burrow-Giles Lithographic Co. v. Sarony* (1884) where the claimant, a photographer, brought an action against the defendant, a lithographer, for copyright violation of the claimant's photo<sup>49</sup>. It was held that the particular photo is 'an original work of art, the product of plaintiff's intellectual invention, of which plaintiff is the author, and of a class of inventions for which the Constitution intended that Congress should secure to him the exclusive right to use, publish and sell'<sup>50</sup>. This decision became a leading case of copyright law as after this, photography was codified in copyright law<sup>51</sup>. Basically, as soon as the picture is captured by an electronic device, photograph obtains copyright protection because at that time, the picture converts directly fixed in the touchable medium of either digital storage or film<sup>52</sup>. The owner is then endowed with copyright protection along with personal rights over photocopies and any other derivative modifications of the image<sup>53</sup>. Digital systems permit reproduction and distribution of the photos in completely different forms from the original ones and so the digital era has introduced questions about what works gain copyright protection and what behaviours comprise copyright infringement<sup>54</sup>. The US Digital Millennium Copyright Act (DMCA) was established in an attempt to complement the traditional copyright regulations for these modern ways of distribution<sup>55</sup>.

The DMCA is a US copyright law which came into force in 1998 in order to cope with the problems of media sharing in the Internet era and to implement two treaties of the World Intellectual Property

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<sup>46</sup> Directive 2006/116/EC, Art. 6

<sup>47</sup> *Ibid* (n 8) 621

<sup>48</sup> *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884)

<sup>49</sup> *Ibid* at 54

<sup>50</sup> *Ibid* at 60

<sup>51</sup> *Ibid* (n 8) 621

<sup>52</sup> *Ibid*

<sup>53</sup> Marshall A. Leaffer, *Understanding Copyright Law* (5th edn, 2010) 10

<sup>54</sup> *Ibid* 27

<sup>55</sup> *Ibid* (n 8) 622

Organization (WIPO) from 1996<sup>56</sup>. The aforementioned treaties demand member states to ensure that the ‘digitally available works’ are protected from circumvention of technological regulations which have been effected in order ‘to restrict access to copyrighted works and to maintain the integrity of copyright management information’<sup>57</sup>. The DMCA comprises five titles from which the first two are relevant here. The first title of the DMCA, the WIPO Copyright and Performances and Phonograms Treaties Implementation Act, conforms with the terms of the two WIPO treaties<sup>58</sup> and the second title, the Online Copyright Infringement Liability Limitation Act, imposes liability for copyright violation in Internet<sup>59</sup>. Overall, it has been argued that the introduction of the DMCA advanced the US copyright law in the online information age<sup>60</sup>.

Particular attention should be given to the Liability Limitation Act which is mostly applicable to social media<sup>61</sup>. This Act is usually referred to as the ‘safe harbor’ principle because it gives to online service providers a conditional ‘safe harbor’<sup>62</sup> or as ‘DMCA 512’ because it amended Title 17 of the United States Code to implement Section 512<sup>63</sup>. Under section 512 (c), online service providers have to obey to certain imposed guidelines and quickly impede access to supposed infringing materials when a copyright holder send them ‘a notification of an infringement claim’<sup>64</sup>. Moreover, section 512 (c) contains a ‘counter-notification provision’ which also provides a safe harbor to online service providers from liability of their users when those support that the alleged material is indeed not infringing<sup>65</sup>. The above provisions protect online service providers from their own unauthorized actions of copyright infringement and also, from possible minor liability for other’s violating acts<sup>66</sup>. Instagram recognises and implements the two notices and takedown actions that are stated in section 512 (c) of the DMCA<sup>67</sup>. An Instagram picture can be removed under the notification of an infringement

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<sup>56</sup> Ibid (n 53) 404

<sup>57</sup> David Nimmer, ‘Appreciating Legislative History: The Sweet and Sour Spots of the DMCA’s Commentary’ (2002) 23 CARDozoLRev 909, 915

<sup>58</sup> Ibid (n 53) 404

<sup>59</sup> Lateef Mtima, ‘Whom the Gods Would Destroy: Why Congress Prioritized Copyright Protection over Internet Privacy in Passing the Digital Millennium Copyright Act’ (2009) 61 RUTGERS L.REV. 627, 645-46

<sup>60</sup> Ibid (n 8) 623

<sup>61</sup> Ibid

<sup>62</sup> Julie Nichols Matthews et al., ‘Social Media in the Digital Millennium’ (2013) 5 LANDSLIDE 26, 27

<sup>63</sup> U.S.C. §§ 512

<sup>64</sup> U.S.C. §§ 512 (c)

<sup>65</sup> Ibid

<sup>66</sup> Ibid (n 62)

<sup>67</sup> ‘Copyright’ (Instagram, 2018) <<https://help.instagram.com/126382350847838>> accessed 17 March

claim or the counter-notification provision of the DMCA<sup>68</sup>. The person whose picture has been removed from Instagram, he/she will be sent instructions regarding the counter-notification procedure, involving how to place a counter-notification<sup>69</sup>. This counter-notification is forwarded to the reporting party. If that party does not provide any information as to whether or not he/she wants to bring an action to the court within 10-14 working days, the alleged infringed content may be restored or ceased disabling<sup>70</sup>. Notwithstanding the positive arrangements existed in the DMCA, it should not be overlooked that the DMCA was introduced in a time when social media was just starting to appear and therefore, it is reasonable to argue that the drafters did not take into account this kind of online interaction when they were drafting the act<sup>71</sup>. While social networks are increasingly used by online users, the challenges regarding the copyrights in user-generated images still exist<sup>72</sup>.

Adding to the above, although copyright makes the creator of a photo the sole holder of rights over his/her work, the US copyright laws over photographs are not without limitations as there are times when this right is restricted, providing others with the authority to utilise the copyrighted work<sup>73</sup>. A significant exception over copyrights is found in Section 107 of the Copyright Act of 1976 and is called 'the fair use exception'<sup>74</sup>. Section 107 specifies that uses 'for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research' are considered 'fair use of a work' if they satisfy the four criteria mentioned in the section and so, in these circumstances, there is no violation of a copyright<sup>75</sup>. In order to determine whether the use of a work is a fair use, the four factors given below are taken into account:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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.<sup>76</sup>

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<sup>68</sup> Ibid

<sup>69</sup> Ibid

<sup>70</sup> Ibid

<sup>71</sup> Ibid (n 53) 225

<sup>72</sup> Ibid (n 8) 624

<sup>73</sup> Ibid 621

<sup>74</sup> U.S. 1976 Copyright Act §107

<sup>75</sup> Ibid

<sup>76</sup> Ibid

These four criteria are applied by the courts when trying to reach a conclusion as to whether the use of a work is fair use or a copyright violation<sup>77</sup>. Therefore, there is no predetermined condition that will constantly be deemed fair use, it differs from case to case<sup>78</sup>.

It has formerly been demonstrated by the Supreme Court that the first criterion, ‘purpose and character of the use’, plays a vital role in deciding the existence of fair use<sup>79</sup>. The court will attempt to ascertain if the utility of the work has been changed at a level that can be thought as something differentiated from the authentic work<sup>80</sup>. It is more possible for the courts to approve that fair use is present when the use has somehow added to the authentic work and can be regarded to have a different purpose<sup>81</sup>. The second criterion, ‘nature of the work’, examines the kind of work that has been copied<sup>82</sup>. The level of creativity that has been added to the work can affect the court’s decision here<sup>83</sup>. Furthermore, fair use is more probable to be found if the copied work has been published<sup>84</sup>. The fact to be claimed here is that authors have the right to distribute their works<sup>85</sup>. According to the third criterion, ‘the amount and substantiality’, the court will examine whether the part copied is justified in compare with the whole work<sup>86</sup>. Additionally, even though the portion copied may not be such large, when that is significantly linked to and of great importance to the whole work, there is a great chance that the use will not be deemed fair<sup>87</sup>. The final criterion, ‘the effect of the use on a potential market’, examines if the use can harm the copyright holder with respect to the income or capacity to distribute the work<sup>88</sup>.

The fair use exception is better understood through the analysis of the controversial cases of Richard Prince. Throughout the decades of his career, artist Richard Prince has been seen as an appropriation

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<sup>77</sup> Ibid (n 27) 10

<sup>78</sup> Los Angeles News Service v. KCAL-TV Channel 9, 108 F.3d 1119 (9th Cir. 1997)

<sup>79</sup> Ibid (n 27) 10

<sup>80</sup> Ibid

<sup>81</sup> Cariou v. Prince, Docket No. 11-1197-cv (2nd Cir. April 14, 2013)

<sup>82</sup> Ibid (n 27) 10

<sup>83</sup> Ibid

<sup>84</sup> Ibid

<sup>85</sup> Ibid

<sup>86</sup> Ibid

<sup>87</sup> ‘Measuring Fair Use: The Four Factors’ (*Stanford University Libraries*)

<<https://fairuse.stanford.edu/overview/fair-use/four-factors/>> accessed 28 March 2018

<sup>88</sup> WW Fisher III, *Promises to Keep: technology, law, and the future of entertainment* (edn 1, Stanford University Press 2004) 73-74

artist because of creating new reproductions of existing photographs taken by other artists<sup>89</sup>. He was alleging that he was able to do this by grounding his rights of using other people's work on the 'fair use' exception<sup>90</sup>. The cases of Prince clarify that the fair use exception permits the use of a copyrighted piece of work, as long as the original version is being altered and does not have a destructive outcome on the marketing of the original<sup>91</sup>.

In the first case, Photographer Patrick Cariou brought an action against Richard Prince in 2009 for copyright violation of photographs issued in one of Cariou's books<sup>92</sup>. Cariou spend six years of his career in working as a professional photographer in Jamaica and familiarizing himself with a group of Rastafarians<sup>93</sup>. During the six years, he was taking photographs of their lives which he then published in a book<sup>94</sup>. Prince used forty-one of those photographs in different fragments for one of his art shows in 2007<sup>95</sup>. Cariou's book was used by Prince who reassembled some of its photos into a style of collage-artworks, 'enlarged, cropped, tinted, and/or over-painted'<sup>96</sup>. One of the art pieces was sold for almost \$2.5 million<sup>97</sup>. The district court held for Cariou, ruling that the copyrights in Cariou's photos and the Prince's use of the photos were outside of the exception of fair use<sup>98</sup>. Yet, the Second Circuit differed in some points, supporting that all but five uses of Prince satisfy fair use over Cariou's photographs since Prince adequately altered the photos<sup>99</sup>. Subsequently, the Supreme Court did not allow the publication of a certiorari on Cariou's plea,<sup>100</sup> whilst Prince's appropriation was mostly accepted according to the holding of the decision of the Second Circuit<sup>101</sup>. Prince and Cariou managed to come

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<sup>89</sup> Katie Sola, 'Artist Richard Prince Sells Instagram Photos That Aren't His for \$90K' (*HUFFINGTON POST*, 27 May 2015) <[https://www.huffingtonpost.com/2015/05/27/richard-prince-instagram\\_n\\_7452634.html](https://www.huffingtonpost.com/2015/05/27/richard-prince-instagram_n_7452634.html)> accessed 25 March 2018

<sup>90</sup> Lizzie Plaugic, 'The Story of Richard Prince and his \$100,000 Instagram Art' (*VERGE*, 30 May 2015) <<https://www.theverge.com/2015/5/30/8691257/richard-prince-instagram-photos-copyright-law-fair-use>> accessed 28 March 2018

<sup>91</sup> Richard H. Chused, 'The Legal Culture of Appropriation Art: The Future of Copyright in the Remix Age' (2014) 17 *Tul.J.Tech.&Intell.Prop.* 163, 164-65

<sup>92</sup> *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. 2011)

<sup>93</sup> *Ibid* at 343.

<sup>94</sup> *Ibid*

<sup>95</sup> *Ibid* 343-344

<sup>96</sup> *Ibid* 344

<sup>97</sup> Randy Kennedy, *Apropos Appropriation*, *N.Y. TIMES* (Dec. 28, 2011), <http://www.nytimes.com/2012/01/70/arts/design/richard-prince-lawsuit-focuses-on-imits-of-appropriation.htm>

<sup>98</sup> *Cariou*, 784 F. Supp. 2d at 355.

<sup>99</sup> *Cariou v. Prince*, 714 F.3d 694, 712 (2d Cir. 2013), cert. denied, 134 S. Ct. 618 (2013).

<sup>100</sup> *Cariou v. Prince*, 134 S. Ct. 618 (2013) (denying cert.).

<sup>101</sup> *Cariou*, 714 F.3d at 694

up with a settlement outside of court for the violation claims regarding the five photos<sup>102</sup>. This case is a bright example of the vast advantages that commercial operators can gain from copyrighted works of other people, in the lack of suitable protection for the author<sup>103</sup>.

This did not stop Richard Prince from drawing again controversy to his exhibition in May of 2015. In that exhibition he presented appropriating photos from Instagram, making his work been the dominant topic of social media. He went on a hunt on Instagram, wrote comments on various photos posted by several Instagram users and then printed on canvas images with both the Instagram photos and his comments<sup>104</sup>. These prints were afterwards sold by Prince at a New York exhibition for \$90,000<sup>105</sup>. These prints were supposed to be fair use of the Instagram users' pictures since the comments he posted on them were seen as transformative<sup>106</sup>. The Instagram users of whom Prince used photos of, have openly expressed their lack of approval and awareness of Prince's actions<sup>107</sup>.

The exception of fair use is seen as absolutely unfair to the users owning the pictures Prince used for his exhibition<sup>108</sup>. Prince gained an excessive amount of money from his debatably transformative alterations of Instagram pictures, while the owners of the photos were unaware or disapprove Prince's use of their photos<sup>109</sup>. Even though the suitable application of the exception of fair use is a reasonable argument on itself, the cases around Prince operate to underline the personal damage and financial disparity that can occur from copyright violation of personal photos<sup>110</sup>. A review of the existing copyright law to harden and inflate author rights could assist to improve the protection of copyright holders from commercial misuse and exploitation of oversharing<sup>111</sup>. Even though the suggested alterations to legislation may hover contrary to the standards of the technology fields, these reviews will accumulate support from those artists and individuals who seek grander copyright protection<sup>112</sup>.

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<sup>102</sup> David McAfee, Artist Prince, Photographer Cariou Settle Fair Use Feud, LAW360 (Mar. 18, 2014), <http://www.1aw360.com/articles/519819/artist-prince-photographer-cariousettle-fair-use-feud>.

<sup>103</sup> Ibid (n 1) 629

<sup>104</sup> Ibid (n 89)

<sup>105</sup> Ibid (n 90)

<sup>106</sup> Ibid

<sup>107</sup> Ibid (n 89)

<sup>108</sup> Ibid (n 1) 629

<sup>109</sup> Ibid 630

<sup>110</sup> Ibid

<sup>111</sup> Ibid (n 1) 630

<sup>112</sup> Ibid

On that point, it is essential to mention that ‘similar to fair use, exceptions and limitations’ are also found in the international treaties and the legislation of the EU<sup>113</sup>. Exceptions and limitations are contained in the Berne Convention in art. 9(2), 10, 10bis and 11bis(2),<sup>114</sup> in the WCT in art. 10<sup>115</sup>, in TRIPS in art. 13<sup>116</sup> and in Directive 2001/29/EC in art.5 which has been explained above<sup>117</sup>. It is noteworthy that the exceptions and limitations in Berne Convention and WCT are about the author whereas the exceptions and limitations in TRIPS and Directive 2001/29/EC are focused on the holder of the rights<sup>118</sup>. It was claimed that the above exceptions and limitations permit the ‘use of copyrighted work in a way that helps to maintain a functioning internal market within the EU’<sup>119</sup>, but ‘the enactment of such laws can never diminish the authors right to receive recognition for his work’. Again here, the conventions demand the satisfaction of fair use of work as regulated in the Berne Convention<sup>120</sup>. This is a three-step test which is originally found in article 9(2) of the Berne Convention and it is bound by the countries of the Union of the Berne Convention<sup>121</sup>. The three-step test is formed as follow

The first criteria, “special cases”, states that exceptions or limitations cannot be applied to all kinds of use. The second criteria, “normal exploitation” of work does not conflict with the use, means that use cannot result in the copyright owner being deprived from economic income. The third step, “does not unreasonably prejudice the legitimate interests of the author”, gives that there are certain kinds of interests that the author of the work might have which need to be protected from harm.<sup>122</sup>

However, the ‘fair use exception’ of section 107 of the Copyright Act of 1976 is mostly used by the courts nowadays as it constitutes a compulsory and real exception to law.

### 3. Instagram

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<sup>113</sup> Ibid (n 27) 14

<sup>114</sup> Berne Convention, Art. 9(2), 10, 10bis, 11bis(2).

<sup>115</sup> WCT, Art. 10.

<sup>116</sup> TRIPS, Art. 13

<sup>117</sup> Directive 2001/29/EC, Art. 5.

<sup>118</sup> Ibid (n 27) 14

<sup>119</sup> Directive 2001/29/EC, preamble (31).

<sup>120</sup> Berne Convention, Art. 6bis.

<sup>121</sup> Ibid (n 27) 14

<sup>122</sup> A. Christie and R. Wright, ‘A Comparative Analysis of the Three - Step Tests in International Treaties’ (2014) 45 IICInterRevIPCL 9

### 3.1. Instagram basics and terms of use

Instagram is a popular social platform which allows its users to post their pictures within an app. The pictures on Instagram can be posted with location information and hashtags, after being modified using different filters and adjustments<sup>123</sup>. Hashtags make it possible for Instagram users around the world to search and find photos relevant to their interests<sup>124</sup>. People can then interact by following and viewing each other's pages and also by commenting and liking others' uploaded photos<sup>125</sup>. Like any other application, Instagram comes with its own set of terms and conditions which are divided into different segments<sup>126</sup>. As soon as people sign up for becoming Instagram users, they are immediately bound by the Instagram terms and conditions<sup>127</sup>. The very first condition that users should comply with is the age requirement, namely of being older than thirteen years old at the time of registration<sup>128</sup>. Following the general conditions, it is affirmed that the users who decide to delete their account, they will not be allowed to view or interact through their deleted account<sup>129</sup>. However, the content of the deleted account may still be reachable by the service but only if the data has been shared again before the account's termination<sup>130</sup>. By terminating an account has as a result the rights and authorisations given to the user not to be effected any more<sup>131</sup>.

Under the terms and conditions of Instagram, there is a section named 'Rights' which states that Instagram is not entitled to claim ownership of the shared content of its users which has posted within its service<sup>132</sup>. Yet, by using Instagram and approving the terms of use, an Instagram user is bound to Instagram within a license that 'grant[s] to Instagram a non-exclusive, fully paid and royalty-free, transferable, sub-licensable, worldwide license to use the Content that you post on or through the

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<sup>123</sup> Ibid (n 27) 17

<sup>124</sup> Ibid

<sup>125</sup> 'Photo Taking, Editing and Sharing' (*Instagram Help Center*)

<<https://help.instagram.com/365080703569355>> accessed 14 March 2018

<sup>126</sup> 'Terms of Use-Basic Terms' (*Instagram Help Center*)

<<https://help.instagram.com/478745558852511>> accessed 14 March 2018

<sup>127</sup> Ibid

<sup>128</sup> Ibid

<sup>129</sup> Ibid

<sup>130</sup> Ibid (n 126)

<sup>131</sup> 'General Conditions' (*Instagram Help Center*) <<https://help.instagram.com/478745558852511>> accessed 14 March 2018

<sup>132</sup> 'Rights' (*Instagram Help Center*) <<https://help.instagram.com/478745558852511>> accessed 14 March 2018

Service'<sup>133</sup>. Apart from this, the website does not explain adequately the particular licences and does not actually refer to alternative licensing like Creative Commons<sup>134</sup>.

In order to use the service, an active user is obligated to confirm that the posts shared by him are indeed possessed only by him, or alternatively, or that he somehow obtains the rights and licences to share the particular content, that he does not infringe any copyrights by sharing posts and that he is eligible to enter the terms and conditions of Instagram with respect to his authority<sup>135</sup>. Furthermore, users permit Instagram to subtract any post without providing warning and then to keep it in case of any legal requirements Instagram may have to follow<sup>136</sup>. Since Instagram is based and directed in the US, US legal framework is the one which regulates Instagram<sup>137</sup>.

A significant section from the terms and conditions is the one which refers to the violation of Copyright and IP<sup>138</sup>. It simply declares that Instagram users must respect copyright and that continual invading of IP rights can result in deactivating an account<sup>139</sup>. In addition to that, Instagram directs users into a page that explains the basics regarding trademarks and copyrights<sup>140</sup>. Users can also be taken to the 'Help Center' page where users can report a possible copyright violation, and also get answers to any questions may exist in regard with copyrights<sup>141</sup>. For those who want to report a breach that occurred on Instagram, there is a form which can be completed online from either Instagram users or people who do not have an account<sup>142</sup>. The complaint can be brought by the author or by anyone else who is authorised by the author<sup>143</sup>. A complaint which includes 'a complete copyright claim' can also be sent by letter, fax or even email<sup>144</sup>.

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<sup>133</sup> Ibid

<sup>134</sup> Ibid (n 27) 17

<sup>135</sup> Ibid

<sup>136</sup> Ibid (n 132)

<sup>137</sup> Ibid (n 126)

<sup>138</sup> Ibid (n 27) 18

<sup>139</sup> Ibid (n 27) 18

<sup>140</sup> 'Intellectual Property' (*Instagram Help Center*) <<https://help.instagram.com/535503073130320/>> accessed 14 March 2018

<sup>141</sup> 'Welcome to the Instagram Help Center!' (*Instagram Help Center*) <<https://help.instagram.com/>> accessed 14 March 2018

<sup>142</sup> 'About Copyright' (*Instagram Help Center*) <<https://help.instagram.com/126382350847838>> accessed 14 March 2018

<sup>143</sup> Ibid

<sup>144</sup> 'What is the contact information for your Digital Millennium Copyright Act designated agent?' (*Instagram Help Center*) <<https://help.instagram.com/589322221078523>> accessed 14 March 2018

### 3.2. Conformity with copyright law

Primarily, it is noteworthy that there are no limitations on Instagram as it gains the authority to use the posts that have been uploaded. This is allowed because Instagram users confirm to give licences to the service providers at the time they share posts on Instagram<sup>145</sup>. The 1976 Act<sup>146</sup> and the Directive 2001/29/EC<sup>147</sup> state the authority to transfer copyright by specifying that transfer of rights through a license is acceptable<sup>148</sup>. Additionally, there are no restraints on transferring rights under the international legislation that also applies to the US<sup>149</sup>. The reallocation of rights can also be granted by the WCT, which is an inclusion to the Berne Convention which deals with technological progress<sup>150</sup>. Since the international legislation in broad terms permits domestic legislation to offer restrictions and exceptions and thus, it simply delivers minor requirements for security, the EU legislation and the 1976 Act have emergence great importance<sup>151</sup>.

The Berne Convention states that the author of a photo shall have the ability to bring an action against any misuse which may harm his<sup>152</sup>. However, it is doubtful as to whether such a misuse can be considered harmful since Instagram provides itself with the right to use the content of its users without any restrictions other than obeying its own privacy policy<sup>153</sup>. It is impossible though to decide and put down an exhaustive list of activities that would be considered harmful for the author's status and reputation as this is an issue for the courts to address<sup>154</sup>. Nonetheless, it is correct to argue that there are some types of exposure that could actually harm the author's reputation<sup>155</sup>. An example of exposure 'could be if Instagram was to transfer the licence to a company surrounded with a lot of controversy and bad reputation, thus giving the company the right to use the users work'<sup>156</sup>. A work

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<sup>145</sup> Ibid (n 27) 27

<sup>146</sup> U.S. 1976 Copyright Act §201

<sup>147</sup> Directive 2001/29/EC, recital 30

<sup>148</sup> Ibid (n 27) 27

<sup>149</sup> Ibid

<sup>150</sup> Ibid

<sup>151</sup> Ibid (n 27) 27

<sup>152</sup> Berne Convention, Art. 6bis.

<sup>153</sup> Ibid (n 27) 27

<sup>154</sup> C. Masouyé, *Guide To the Berne Convention* (WIPO, Geneva 1978)

<<ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/Guide-Berne-Convention-wipopub615E.pdf>>  
accessed 10 March 2018

<sup>155</sup> Ibid (n 27) 27

<sup>156</sup> Ibid

connected to a company with a bad reputation could probably result in downgrading the author's work and harming his potentials to find a new market<sup>157</sup>.

US courts illustrated that moral rights as found in the US Copyright Act of 1976 are not gained equal protection as in international treaties<sup>158</sup>. Since the Act states that 'fine art' should be produced in a small number of copies, it is doubtful whether or not digital pictures like those shared on Instagram can be considered to belong within this classification<sup>159</sup>. The definition of copies is stated as '[M]aterial objects [...] in which a work is fixed by any method now known or later developed, from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device'<sup>160</sup>. This could indicate that the posts shared on Instagram can be seen as copies under the framework of the 1976 Act<sup>161</sup>. Nonetheless, 'as the photos posted can be reposted or printed from the site with no real means of ascertaining how many copies exists, it would be hard to determine whether the requisite for them being "works of visual art" is met'<sup>162</sup>. This would reasonably support that users do not gain any moral rights for their shared images under the US law<sup>163</sup>. However, the US is a signatory member of the Berne Convention which delivers that the users' moral rights have to be sustained even after the license is in practice<sup>164</sup>. This is because the authors' moral rights are alienable<sup>165</sup>. Therefore, although Instagram does not declare any restriction for this extensive license, there will still exist restrictions on how Instagram can apply this right because the reputation of the author should be taken into account<sup>166</sup>.

### 3.3. Copyright Infringements

Most of the social media platforms, which have as their main operation the sharing of data, usually include some information regarding their copyright protection<sup>167</sup>. Some of social media platforms offer copyrights policies, whereas some others refer to copyright infringement, and there are also

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<sup>157</sup> Ibid (n 27) 28

<sup>158</sup> R. B. Standler, 'Moral Rights of Authors in the USA' (17 April 2012) <<http://www.rbs2.com/moral.pdf>> accessed 18 March 2018

<sup>159</sup> Ibid (n 27) 28

<sup>160</sup> U.S. 1976 Copyright Act §101

<sup>161</sup> Ibid (n 27) 28

<sup>162</sup> Ibid

<sup>163</sup> Ibid

<sup>164</sup> Ibid

<sup>165</sup> Berne Convention, Art. 6bis

<sup>166</sup> Ibid (n 27) 28

<sup>167</sup> Ibid 34

those which present copyrights as something that is not permitted<sup>168</sup>. Instagram briefly mentions (in a section of the terms of use) information regarding infringement of the rights of intellectual property and then it gives guidelines as to how to reach websites which inform how to address copyright issues<sup>169</sup>. It can be claimed that there is very little information regarding copyright violation and very careful advices are formulated and given<sup>170</sup>. As part of the FAQ section, Instagram declares that it is not under their responsibilities and capacities to provide legal advice<sup>171</sup>. Yet, Instagram directs the users to visit the WIPO website, even though the link in practice directs them to the website of the US copyright organisation<sup>172</sup>. Even though Instagram does not offer to the user correct legal advices, which is justifiable since it is a social media platform and not a service for guidelines in terms of copyright protection, it can be argued that a violation is more likely to happen on a service that has been completely avoided to include some clear and useful information regarding copyright infringement<sup>173</sup>.

A good argument here is that misunderstandings still occur even in cases where social media platforms provide adequate information<sup>174</sup>. This was illustrated in the Drauglis v. Kappa Map Grp case, where the copyright owner misinterpreted a licence for which there was information in the website<sup>175</sup>. Consequently, it is reasonably observed that notwithstanding the protective steps taken by social media to mitigate the problems, violations still happen since it is a matter of the users who do not pay attention in the information provided in the websites<sup>176</sup>.

It is well known that social media contains tools that permit photographs to be shared reposted<sup>177</sup>. Such activities may cause copyright infringement and so it is essential for users to estimate the results of their actions before acting<sup>178</sup>. A user may want to share again or repost a photo for many reason.

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<sup>168</sup> Ibid

<sup>169</sup> Ibid

<sup>170</sup> Ibid

<sup>171</sup> 'I want to post something on Instagram, but I'm not sure if it would infringe someone's copyright. What should I do?' (*Instagram Help Center*) <<https://help.instagram.com/354736791367645>> accessed 14 March 2018

<sup>172</sup> Ibid (n 27) 34

<sup>173</sup> Ibid

<sup>174</sup> Ibid 35

<sup>175</sup> *Drauglis v. Kappa Map Grp., LLC*, No. 14-1043 (ABJ) (D.D.C., 2015)

<sup>176</sup> Ibid (n 27) 35

<sup>177</sup> Ibid

<sup>178</sup> Ibid

For example, a user may share someone else's work because he finds the photo interesting and attractive, or he wants to show his appreciation to the other person's work, or he just wants to steal a photograph wishing that no one will notice that<sup>179</sup>.

A relevant legal concept here is the one that based on the restriction of the exclusive rights owned by the copyright owner<sup>180</sup>. In other words, the applicable law that may be relevant here is the fair use in the US legislation, and restrictions and exceptions in the EU and international legislation<sup>181</sup>. As it was explained above, there are four criteria which make fair use applicable in the US<sup>182</sup>. Interestingly, fair use is seen as a controversial and complex sector in copyright law and so, it is worth debatable if it should be taken into account by users as method of lawfully using other's photos<sup>183</sup>. A good point here is that 'the situations when use can be considered fair is limited and restricted under the first criterion which requires 'special cases'<sup>184</sup>. Namely, the 'calls for the use to be something other than everyday use, which would mean that reposting of photos does not qualify as use that is fair within the meaning of any of the articles regulating exceptions and limitations'<sup>185</sup>.

#### 4. Conclusion

By taking everything into account, there is no doubt that nowadays, social media constitute a crucial part of our everyday lives and in the way that we communicate with people around the world<sup>186</sup>. Massive amounts of data, involving numerous user-generated photos and images are interacted on social media<sup>187</sup>. Interestingly, even though a huge number of photos are posted online every day, copyright provides protection to these images in a similar way that traditional images are secured<sup>188</sup>. Social media platforms have been established to permit online users to share pictures with others but unfortunately these open designed platforms result in infringement, appropriation and use of personal photos for commercial purposes. Social media providers, particularly the giant ones like

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<sup>179</sup> Ibid

<sup>180</sup> Ibid (n 27) 36

<sup>181</sup> Ibid

<sup>182</sup> Ibid

<sup>183</sup> A. May Wyatt and S. E. Hahn, 'Copyright Concerns Triggered by Web 2.0 Uses' (2011) 39 Reference Services Review 306

<sup>184</sup> Ibid (n 27) 37

<sup>185</sup> Ibid

<sup>186</sup> Ibid (n 1) 634

<sup>187</sup> Ibid

<sup>188</sup> Ibid

Instagram, enforce too much control over the landscape of social media and sometimes they use their strength to demand media users to transfer away their rights in photos shared by them. When users access or share a photo on Instagram, they approve, at the same time, the terms and so transfer of rights has completed<sup>189</sup>. Namely, by that time 'Instagram can use the content as it chooses and can also licence the content to third parties'<sup>190</sup>. Such misuses of photographs cause financial and emotional harm to the authors and create problems to the protection of moral rights as against the Berne Convention<sup>191</sup>. Instagram users can seek to bring an action against an infringement on Instagram but they should be aware of the fair use exception<sup>192</sup>. Simple recommendations that can be followed by Instagram users are to 'upload images or videos [that they] take or create, or share those [they are] given permission to share' and of course, to read carefully the Instagram Terms of Use and Community Guidelines<sup>193</sup>. Finally, it is useful to note the well-arguing statement made by Elizabeth J. Tao:

On a national scale, copyright protection [of social media and particularly of Instagram] has been a fundamental part of U.S. law since the writing of the Constitution. [US legislation] should take steps to continue protecting copyright as the age of social media transforms how works like photographs are used and shared. On a global scale, user-generated images are being created and shared in massive quantities. A global solution is required to protect personal interests in images existing in the global world of social media. Achieving a balance between the desire for accessibility and the protection of creativity and authorship can benefit our global society, and an international treaty can best set a global legal standard for this allocation of rights.<sup>194</sup>

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<sup>190</sup> Ibid

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