

Class Action Against Instagram Following Modifications to Terms of Use Dismissed

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After Instagram updated its terms of use in December 2012, a class-action lawsuit was filed alleging breach of contract as well as a claim under California's unfair competition law. The changes to the terms gave Instagram the right to sublicense content posted to the site, included a liability waiver, and removed certain limitations on the scope of the license users grant to Instagram when posting content. Notably, while the original terms gave Instagram the right to unilaterally amend the terms, the new terms were posted publicly for a month before they went into effect.

The new terms expressly provided that use of Instagram after the effective date constitutes acceptance to those terms and explains, "If you do not agree to be bound by all of these Terms of Use, do not access or use the Service." In sustaining Instagram's demurrer without leave to amend, the California Superior Court reasoned that Instagram required the plaintiff to consent to the changes to the terms if she wished to continue using the service. The court specifically noted that the plaintiff did not have to agree to the new terms and could have stopped using the service, but she chose to continue on the site.

TIP: Proceed with caution when modifying your terms of use and privacy policies, even when your existing policies contain language suggesting that you have the right to make unilateral modifications. Depending on the circumstances, taking the extra step of posting the changes to your site well before they become effective – as Instagram did in this case – or even requiring users to affirmatively click acceptance of the modified terms can help improve the enforceability of your revisions.

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