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I Introduction

I.1 Background

In the era of smart phones, online sharing has become an important part of our lives.¹ Both individuals and organisations (such as companies and governmental institutions) use different online services in order to share content, market themselves and reach out to a wide audience. The number of social media users globally has reached more than 2 billion². Given that we are a generation that enjoys sharing our experiences with others, a large amount of social media users naturally generate a large number of social apps and web services that allow content sharing.³

Flickr, Instagram and DeviantArt are examples of online services that allow artistic work to be shared in the public eye. Flickr is a media that enables users to share photos and videos from different devices and software, either globally or only to friends and family, and has 112 million users.⁴ Similar to Flickr, Instagram allows for visual storytelling and currently has the largest number of users with 400 million active users.⁵ DeviantArt, with 35 million registered members, is marketed as an online social network where users are able to share art, such as paintings and pixel art, to other enthusiasts.⁶

The type of content that is shared on these sites is by definition considered to be artistic work, to which intellectual property rights apply. Copyright is the right the author of a work, literary or artistic, has over it and, typically, there is no need for any type of formality in order for the author to obtain this right.⁷ This right can then be transferred, for example, by the grant of a licence.⁸ Artistic work can be said to date back half a million years⁹ while

¹ A. Perrin, 'Social Media Usage: 2005-2015', *Pew Research Center* [website], (2015-10-08), <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/>, [downloaded 2015-11-29].

² S. Kemp, 'Global Social Media Users Pass 2 Billion', *We Are Social*, (2014-08-08), <http://wearesocial.net/blog/2014/08/global-social-media-users-pass-2-billion/>, [downloaded 2015-09-14].

³ O. Nov et al. 'Analysis of Participation in an Online Photo-Sharing Community: A Multidimensional Perspective', *Journal of The American Society For Information Science and Technology*, Vol. 61, no. 3 (2010) p.555.

⁴ J. Bonforte, 'Thank You, Flickr Community!' *Flickr Blog* (2015-06-10), <http://blog.flickr.net/en/2015/06/10/thank-you-flickr-community/>, [downloaded 2015-09-13].

⁵ 'Celebrating a Community of 400 Million' *Instagram Blog* (2015-09-22) <http://blog.instagram.com/post/129662501137/150922-400million>, [downloaded 2015-09-13].

⁶ 'About DeviantArt', *DeviantArt*, <http://about.deviantart.com/>, [downloaded 2015-09-13].

⁷ WIPO, 'What is copyright?', *World Intellectual Property Organization*, <http://www.wipo.int/copyright/en/>, [downloaded 2015-09-13].

⁸ T. K. Armstrong, 'Shrinking the Commons: Termination of Copyright Licenses and Transfers for the Benefit of the Public', *Harvard Journal on Legislation*, vol. 47, no. 09-16, (2009), p. 360.

copyright law dates back to 1710, with the Statute of Anne being one of the first legal acts to provide protection for copyright in which the authors' rights were addressed.¹⁰ Since then, a lot of changes have been made regarding copyright protection and nowadays the most prominent convention on protection of copyright is the Berne Convention, which was agreed in 1971.¹¹ However, it was not until the Internet became accessible for the public that the Contracting Parties of World Intellectual Property Organization (WIPO)¹² recognised that in order for copyright protection to apply to digital content, some additions to copyright law were necessary.¹³ The WIPO Copyright Treaty (WCT)¹⁴ that was established in 1996 was the first treaty on intellectual property to address copyright in the digital environment.^{15, 16}

However, when sharing work online on social media it can prove difficult to protect said work from being subject to unauthorised copying or theft. Social media sites have terms of services and use that the user needs to comply with in order to use the service. But despite the site asking the user to agree to the terms, it is quite common for the user to simply agree without reading the terms or reading them without understanding, therefore having no idea what they have signed up for.^{17, 18} This is problematic, as the user is bound by the terms, regardless if he reads them or not.¹⁹

1.2 Purpose and Delimitation

The purpose of this B.Sc. thesis is to investigate the terms of use for specific online services available on the Internet for distribution of digital content and analyse the legal conditions in order to establish congruence with European and US copyright law.

⁹ C. Brahic, 'Shell 'art' made 300,000 years before humans evolved', *New Scientist*, (2014-12-06), <https://www.newscientist.com/article/mg22429983.200-shell-art-made-300000-years-before-humans-evolved#.VISuEibfWnM>, [downloaded 2015-09-14].

¹⁰ S. Van Gompel, *Formalities in Copyright Law – An Analysis of their History, Rationales and Possible Future*, Kluwer Law International, Amsterdam, 2011, p. 67.

¹¹ Berne Convention for the Protection of Literary and Artistic Works, 1971 Paris Text.

¹² WIPO, 'What is WIPO?', *WIPO* [website], <http://www.wipo.int/about-wipo/en/>, [downloaded 2015-12-02].

¹³ WIPO Copyright Treaty, Geneva, 1996, preamble.

¹⁴ WIPO Copyright Treaty, Geneva, 1996.

¹⁵ R. Towse, 'Economics and copyright reform: aspects of the EC Directive', *Telematics and Informatics*, vol. 22, no. 1-2, (2005), p. 11-24.

¹⁶ H. Olsson, *Copyright – Svensk och internationell upphovsrätt*, 9th ed., Norstedts Juridik, 2015, s. 363.

¹⁷ 'Nobody reads terms and conditions: it's official', *Out Law* [website], (2010-04-19), <http://www.out-law.com/page-10929>, [downloaded 2015-11-20].

¹⁸ Consumer Affairs Victoria, 'Unfair Contract terms in Victoria: Research into their extent, Nature, Cost and Implications', no. 12, (2007), p. 15.

¹⁹ *Burcham v. Expedia*, 2009 WL 586513 at *4 (E.D. Mo. Mar. 6, 2009).

The analysis considers both individuals and companies as users of the services, and if any distinction can be seen between these, this will be taken into account. While conducting the analysis and drawing conclusions based on law, the focus will be on ownership of the work posted on the sites. Specifically, services²⁰ available both via web browsers, and mobile apps, will be considered in the analysis. The number of services analysed has been narrowed down to three: Flickr, Instagram and DeviantArt. In order for the analysis of the terms of the services to be more in-depth, the analysis will consider services that are specifically or mainly used to post and share images. The sites allows for posting of other kinds of work than photos, such as motion pictures and audio. However, the analysis will be undertaken with photographs as a reference point. While Flickr and DeviantArt provide for memberships that are subject to a fee^{21, 22}, Instagram however does not, so only the free versions of the services will be considered. In cases where the sites have additional rules that are relevant to the purpose and analysis, such as policies that apply to the user or the content, these will be included.

With the services chosen as a basis, the legal system of the US and the European Union has been chosen as a comparison for the legal terms. This is based on the fact that the services are based in the US, and since the EU law covers the national laws of the European countries this would make a good contrast. Additionally, there are a few differences between these legal systems which leads to some interesting differences in how well the terms match the laws.

Services that are aimed at exclusively sharing film, literary works or other types of artistic work will not be considered in the analysis in order to keep the scope of the thesis more focused. The analysis will not cover every possible aspect of the terms and will neither be exhaustive in the aspects of applicable law, as this is beyond the scope of the thesis. Aspects, such as, issues regarding the death of the user and sanctions due to copyright infringement will not be covered in this study. Also, laws that are aimed at protecting other rights than artistic will not be covered in this analysis, since they are not applicable to the work that is published on these sites.

²⁰ A. May Wyatt, S. E. Hahn, 'Copyright Concerns Triggered by Web 2.0 Uses', *Reference Services Review*, vol. 39, iss. 2, (2011), p. 304-305.

²¹ 'Enhance your experience with Flickr Pro', *Flickr*, <https://www.flickr.com/account/upgrade/pro>, [downloaded 2015-11-24].

²² 'Core members build a strong future for DeviantArt and, in return, gain special privileges', *DeviantArt*, <https://www.deviantart.com/checkout/?mx=premium>, [downloaded 2015-11-24].

1.3 Method

The legal conditions of the sites will be analysed by a comparative analysis,²³ identifying who they apply to and how. Some specific questions that will be taken into consideration while analysing the terms are: Does the licence under which a photo is uploaded matter in regard to the terms? Do the conditions differ between individuals and companies? What rights does the user give to the site? Does the site take measures in order to prevent copyright infringement of users, and if so, what kind of measures?

Legal material will be one of the main materials used in this B.Sc. thesis, such as relevant EU directives, US copyright law, international legislation and case law. Literature, dissertations and various journal articles will be used to back up the analysis and provide more grounding. The analysis will initially be undertaken as a comparative analysis,²³ followed by an analysis that from a users perspective brings up selected aspects of the terms that hold importance to copyright protection. Specifically, the analysis focuses on conditions for use by different types of stakeholders, including individuals, companies and governmental agencies.

1.4 Outline

Chapter 2 of the thesis begins with explaining the copyright law of the European Union and the US by giving an overview and pointing out some important aspects that apply to online media sharing. It will also explain the aspects of Creative Commons, fair use and exceptions and limitations and their relation to copyright protection. Chapter 3 moves on to scrutinise the terms of each site, giving an understanding of the meaning of the legal conditions of the sites. In chapter 4 a comparative analysis between the copyright law and the terms of the sites will be undertaken, with a focus on a number of aspects. Chapter 5 then follows with an analysis based on aspects that might be interesting from the perspective of a user on the sites. Chapter 6 contains the conclusions.

²³ C. Pickvance, 'The four varieties of comparative analysis: the case of environmental regulation', available at: <http://eprints.ncrm.ac.uk/57/1/chrispickvance.pdf>, (2005), p. 1-2, [downloaded 2015-12-06].

2 Copyright law

While copyright might seem like a well defined area of law where someone by creating something artistic, such as a painting or a photograph, or literary, such as a book or a poem, holds protection for said work without having to take any action, there are many complex questions regarding copyright. One being who can hold copyright. There have been arguments regarding a situation where a monkey took a photo of itself using a photographer's camera, which later was uploaded to a website saying that the monkey owned the copyright.²⁴ The US Copyright Office in a compendium explicitly stated that they cannot register copyright for "a photograph taken by a monkey" as it is not created by a human.²⁵ However, as copyright belongs to the author of a work, it would depend on the definition of "author" who can be said to own copyright.

2.1 EU

While the nations of the EU have legislation that address copyright protection, the EU have implemented legislation that according to the principle of supremacy take precedence over national law.²⁶ The EU law is a means to harmonise the legislation of the member states and results in the national laws of the member states of the EU being somewhat similar. This because legislation enacted within the EU states the rights that the member states' national laws are obliged to give the residents of other nations within the EU.

There are a significant number of directives established within the EU concerning copyright and its protection. However, the most relevant to copyright protection online is Directive 2001/29/EC.

2.1.1 Directive 2001/29/EC (InfoSoc Directive 2001)

The InfoSoc Directive was established as a response to developments that occurred within the technological area. At the time of its adoption, several member states had already implemented changes to their legislation on a national level to meet and solve the clashes that

²⁴ 'Photographer 'lost £10,000' in Wikipedia monkey 'selfie' row', *BBC News* [website], (2014-08-01), <http://www.bbc.com/news/uk-england-gloucestershire-28674167>, [downloaded 2015-12-02].

²⁵ U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices*, 3d ed., ch. 300, 2014, p. 22.

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

occurred with online copyright protection. In order to maintain the scope of the EU, harmonisation on an EU level was necessary, and thus this directive was implemented.²⁷

The directive bestows certain rights upon the author for any type of work they produce, as well as giving performers, phonogram producers, film producers and broadcasting organisations some rights regarding reproduction of their work and making it available to the public. The right to reproduce a work rests with the author of said work, and member states are obliged to exclusively give the right to the author to authorise or prohibit any type of reproduction of their works.²⁸ The same is true of the right to communicate the work to the public; whether it is making the work publicly available, by wire or wireless means, the right lies with the author.²⁹ Also the right of distribution, both of the original work and of copies, is held by the author. The right of distribution that is given by this directive can be subject to exhaustion according to the principle of exhaustion. This means that a work that is lawfully obtained through sale or any other type of transfer of ownership that is made by the rightsholder, or with the rightsholder's consent, can be distributed further.³⁰ However, this is not to be applied to work that is lawfully copied by a user of an online service with consent of the rightsholder. In such a case, the right of distribution shall not be exhausted.³¹ It is also possible to transfer the rights granted by the Directive by licence.³²

Article 5 of the directive states exceptions and limitations to the rights bestowed by the previous articles. While the article lists a number of exceptions, only the first paragraph of the article is binding for the member states. The remaining paragraphs of the article leave to the member states implementation of exceptions and limitations on a national level.³³

2.1.2 Directive 2006/116/EC

As the Berne Convention lays down minimum requirements for terms of protection³⁴, Directive 2006/116/EC was adopted as a step in making the terms of copyright protection in

²⁷ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10–19, preamble.

²⁸ Directive 2001/29/EC, Art 2, 3(1).

²⁹ Directive 2001/29/EC, Art 3(2).

³⁰ Directive 2001/29/EC, Art 4.

³¹ Directive 2001/29/EC, recital 29.

³² Directive 2001/29/EC, recital 30.

³³ Directive 2001/29/EC, Art 5.

³⁴ Berne Convention, Art. 19.

member states of the EU increasingly unanimous. The directive provides that work such as photographs and videos, as defined in the Berne Convention, shall be subject to copyright for the author's life and an additional 70 years from the day the author passes.³⁵ This means that work within the EU holds copyright for a longer period of time than those only protected under the Berne Convention. Regarding photographs, the work needs to be "the author's own intellectual creation" in order to be protected under the directive.³⁶

2.2 US Copyright Act of 1976

In 1998, the 1976 Act³⁷ was amended by enactment of the Digital Millennium Copyright Act (DMCA). This amendment was made in order to implement the WCT and the WIPO Performances and Phonograms Treaty (WPPT) into the 1976 Act.³⁸ To make the 1976 Act compatible with the WCT, section 512 and 1201-1205 were created.

In US legislation, the general rule is that an original work that is of authorship and "fixed in any tangible medium of expression, now known or later developed" from which it can be communicated in any form is under the protection of copyright.³⁹ From the definitions in §101 it is given that the term 'fixed' means that the work is stored in a way that enables it to be communicated for a longer period of time.⁴⁰ However, it is only unpublished work that is protected regardless of the author's nationality.⁴¹ If the work is published, the author either needs to hold residence or be a national in the US or a treaty party, meaning "a country or intergovernmental organization other than the United States that is a party to an international agreement".^{42, 43} The author will also enjoy copyright protection if their work is initially publicised in the US or other country, if it is a treaty party.⁴⁴ The rights which fall upon the copyright owner are to solely be able to authorise reproduction by copy, preparation of derivative works, commercial or non-commercial distribution of copies or other

³⁵ 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).

³⁶ Directive 2006/116/EC, Art. 6.

³⁷ 17 U.S.C. §§101 *et seq.* (2006), Pub. L. No. 94-553, 90 Stat. 2541, as amended.

³⁸ The Digital Millennium Copyright Act of 1998. Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

³⁹ U.S. 1976 Copyright Act §102(a).

⁴⁰ U.S. 1976 Copyright Act §101.

⁴¹ U.S. 1976 Copyright Act §104(a).

⁴² U.S. 1976 Copyright Act §104(b)(1).

⁴³ U.S. 1976 Copyright Act §101.

⁴⁴ U.S. 1976 Copyright Act §104(b)(2).



types of distribution and the public display of the work.⁴⁵ Within the 1976 Act, authors also hold moral rights to their work. This right is fairly limited as it only applies to authors of “a work of visual art”⁴⁶ which, according to §101, in terms of photographs, means “a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author”. The right does not apply to motion pictures or any similar productions.⁴⁷ For a work that holds protection according to the 1976 Act, the initial copyright owner of the work is the author or the authors. The ownership can then be transferred by “any means of conveyance or by operation of law” either in its entirety or in part.⁴⁸ Such transfer can be made in a few different ways, such as by licensing the rights with an exclusive or non-exclusive licence. An exclusive licence grants the licensee the copyright or part of the copyright to the work, while a non-exclusive licence gives the licensee the right to use the copyrighted work but does not grant ownership.⁴⁹ It needs to be noted that “transfer of copyright ownership” by an exclusive licence needs to be provided by a written and signed instrument, as defined in §101, while a non-exclusive licence can be an oral agreement as it is explicitly excluded in the definition.⁵⁰

As mentioned earlier, copyright arises automatically for the author of a work, without any need of formality. However, within US law, both the copyright notice applied to the work and registration of copyright may play a role in the case of a copyright infringement situation. According to the 1976 Act, a lawfully made copyright notice may put the defendant in bad faith, where the case otherwise might have resulted in mitigation for actual or statutory damages.⁵¹ Registration of copyright may also prove important in a copyright infringement case. In order to actually make a copyright claim for a US work, the copyright owner needs to have the copyright registered.⁵² However, since the 1976 Act has been amended in order to comply with the Berne Convention, where registration is not requested⁵³, any foreign work shall not be subject to this provision, although it might prove useful for authors or

⁴⁵ U.S. 1976 Copyright Act §106.

⁴⁶ U.S. 1976 Copyright Act §106A.

⁴⁷ U.S. 1976 Copyright Act §101.

⁴⁸ U.S. 1976 Copyright Act §201.

⁴⁹ M. LaFrance, *Copyright Law In a Nutshell*, 2nd ed., West, 2011, p.137-142.

⁵⁰ U.S. 1976 Copyright Act §101.

⁵¹ U.S. 1976 Copyright Act §401(d).

⁵² U.S. 1976 Copyright Act §411(a).

⁵³ Berne Convention, Art. 5(2).

owners of foreign works that enjoy copyright in the US to register as it might prove beneficial in an infringement procedure.^{54, 55}

The amendment to the 1976 Act brought a section that serves as protection for service providers online. Service providers such as social media sites fall under paragraph (c), as they are considered services for online storing and communication.⁵⁶ The paragraph states that in cases where the service provider does not have the knowledge to determine that infringing activity is ongoing, is not aware of facts or the circumstances regarding infringing activity or, when receiving knowledge or awareness, urgently acts accordingly, the service provider cannot be held liable.⁵⁷ Further, the service provider will not hold liability despite the service provider having ability to control infringement, if it does not benefit from such activity in a financial fashion.⁵⁸ Also, in cases where the service provider is notified about infringing activity acts accordingly, the service provider cannot be held liable for infringement arising from user activity on the service provided.⁵⁹ All service providers are however obligated to have a designated agent that deals with the notifications regarding infringement claims. This agent, and its contact information, must be accessible for the public on the site.⁶⁰ Also the form of the notifications is regulated by the section and need to live up to certain requirements in order to be acceptable as infringement claims. The necessary elements are an authorised signature, identification of the infringed work or works, identification of the claimed infringing material, information about the filer of the complaint enabling the service provider to contact him or her, a statement that the filer has a good faith belief that the use is not authorised, that the person complaining is able to act on behalf of the owner of the infringed right and that the information given is accurate.⁶¹

Even though copyright gives the author the sole right to his or her work, there are a number of cases where this right is limited, giving others the right to use the copyrighted work. In the 1976 Act, section 107 lists uses that may not be considered copyright infringement if the criteria in the section are met. The four criteria consist of the purpose and character of

⁵⁴ U.S. 1976 Copyright Act §411(a).

⁵⁵ P. Goldstein, B. Hugenholtz, *International Copyright – Principles, Law, and Practice*, 3rd ed., Oxford University Press, New York, 2013, p. 227.

⁵⁶ U.S. 1976 Copyright Act §512(c), (k).

⁵⁷ U.S. 1976 Copyright Act §512(c)(1)(A).

⁵⁸ U.S. 1976 Copyright Act §512(c)(1)(B).

⁵⁹ U.S. 1976 Copyright Act §512(c)(1)(C).

⁶⁰ U.S. 1976 Copyright Act §512(c)(2).

⁶¹ U.S. 1976 Copyright Act §512(c)(3).

the use, the nature of the work, how substantial the section used is in comparison with the copyrighted work in its entirety and the effect the use will have for the copyrighted work on its potential market.⁶² When trying to determine whether the use of copyrighted work is fair use or an infringement, courts will apply the four criteria to the situation before coming to a conclusion. This means that there is no pre-set situation that will always be considered fair use, it varies from case to case.^{63, 64}

It has previously been established by the Supreme Court that the first factor, purpose and character of the use, weighs heavily in determining whether fair use is present. The court will try to establish if the use has been altered so that it can be seen as something distinguished from the original work. Courts will be more likely to agree that fair use is at hand if the use in some way has added to the original work and can be considered to have a distinguishable purpose.⁶⁵ The second factor, nature of the work, concerns what type of work is being copied. The amount of creativity that can be considered to have gone into the work will affect how the court judges the use. Also, fair use is more likely to be at hand if the work copied is already published. This comes from the fact that authors have the right of distribution of their work. In regard to the third factor, the amount and substantiality, the court will evaluate if the portion copied is justifiable in comparison with the work in its whole. Moreover, although the portion might not be that large, if the portion is strongly connected to and of great importance to the work as a whole, the use will probably not be considered fair. The last factor, the effect of the use on a potential market, concerns whether the use will damage the copyright owner in any way in regard to income or ability to distribute the work.^{66, 67}

2.3 International legislation

In 1967, 50 contracting parties signed an agreement that established an organisation whose aim was to stimulate the protection of intellectual property by improving the understanding and cooperation between states in order to modernise the protection. This organisation

⁶² U.S. 1976 Copyright Act §107.

⁶³ M. F. Makeen, *Copyright in a Global Information Society – The Scope of Copyright Protection Under International, US, UK and French Law*, vol. 5, ed. M. Andenas, Kluwer Law International, The Hague, 2000, p.122.

⁶⁴ *Los Angeles News Service v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997).

⁶⁵ *Carion v. Prince*, Docket No. 11-1197-cv (2nd Cir. April 14, 2013).

⁶⁶ W. W. Fisher III, *Promises to Keep: technology, law, and the future of entertainment*, Stanford University Press, 2004, p. 73-74.

⁶⁷ 'Measuring Fair Use: The Four Factors', *Stanford University Libraries* [website], http://fairuse.stanford.edu/overview/fair-use/four-factors/#the_transformative_factor_the_purpose_and_character_of_your_use, [downloaded 2015-11-10].

was the World Intellectual Property Organization (WIPO).⁶⁸ WIPO has since then established several international treaties regarding copyright protection, with some of the most prominent being the Berne Convention and the WIPO Copyright Treaty (WCT). Later, in 1995, another international organisation was created which manages rules regarding trade between nations, the World Trade Organization (WTO).⁶⁹ In terms of copyright, the WTO only contributes with the TRIPs agreement. This agreement is of significance since it regulates copyright protection in the aspect of trade between nations.⁷⁰

2.3.1 Berne Convention

When the Berne Convention⁷¹ was created, the intention was for it to be an international convention that effectively protects authors' and artists' rights to their works, literary or artistic.⁷² This protection was not only meant as a minimum for the residents in each nation, but as a uniform protection that would protect an author's work anywhere within the Union.^{73, 74} Whether an author can enjoy protection of their work under this Convention or not depends on their nationality. An author that is considered a national in the Union holds protection both for published and unpublished work.⁷⁵ This right applies to authors that are not nationals, but hold their habitual residence in any of the countries within the Union.⁷⁶ Whether it is by nationality or habitual residence, an author within the Union holds the same protection in any country within the Union as a national in that country, without the need of any formalities.^{77, 78} If the author does not hold nationality in any of the countries in the Union, but has published work therein, the author holds protection for that work in its country of origin with the same rights as any national author.^{79, 80}

⁶⁸ Convention Establishing the World Intellectual Property Organisation, signed at Stockholm on July 14, 1967, as amended on September 28, 1979 (WIPO Convention), 848 U.N.T.S. 3 (July 14, 1967).

⁶⁹ 'What is the WTO?', *World Trade Organisation* [website] https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm [downloaded 2015-11-10].

⁷⁰ P. Goldstein, B. Hugenholtz, *International Copyright – Principles, Law, and Practice*, p. 90-91.

⁷¹ Currently with a total of 168 contracting parties, forming the Union of the Berne Convention, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15, [downloaded 2015-12-01].

⁷² Berne Convention, preamble.

⁷³ M. F. Makeen, *Copyright in a Global Information Society – The Scope of Copyright Protection Under International, US, UK and French Law*, p.23.

⁷⁴ Berne Convention, Art. 2(6).

⁷⁵ Berne Convention, Art. 3(1)(a).

⁷⁶ Berne Convention, Art. 3(2).

⁷⁷ Berne Convention, Art. 5(1).

⁷⁸ Berne Convention, Art. 5(2).

⁷⁹ Berne Convention, Art. 3(1)(b).

⁸⁰ Berne Convention, Art. 5(3).

In the scope of the Berne Convention, literary and artistic work means any type of work that is produced, whether it be a type of writing, an address, a choreographic routine, a drawing, photographs or illustrations of any sort.⁸¹ However, the Berne Convention leaves to the national legislation of the countries within the Union to determine if any type of work shall fall outside of this protection.⁸² Regardless what protection an original work holds according to legislation, an alteration of such a literary or artistic work shall hold the same extent of protection originally given to an original work.⁸³ Authors of work that holds protection under the Berne Convention exclusively holds the right to claim authorship of said work, but also to make the effort of preserving his reputation by objecting to modifications of the work that may come to harm it.⁸⁴ The rights of the author regulated in the Berne Convention include that of reproduction, leaving fully to the author the right to authorise any form of reproduction of their work.⁸⁵ Also, the right of receiving proper mention in a case where the authors work has been fairly used according to law cannot be waived.⁸⁶ Further, authors hold the exclusive right to authorise any type of alteration to their work.⁸⁷ While further protection is given in the Berne Convention, much of the use exceeding this is left to legislation by the countries of the Union, and to be included as exceptions and limitations, as seen in section 2.3.5. An important provision is that any type of work that is to be considered as infringing within the countries of the Union is liable to seizure.⁸⁸

Subject to the Berne Convention, authors are granted protection of their work for their life and fifty years after their death as a general rule.⁸⁹ For cinematographic work, the protection can be decided by the countries of the Union to continue fifty years after the work is made publicly available.⁹⁰ Regarding photographs, the countries of the Union may legislate on a shorter term of protection than the general rule, as long as it lasts for twenty-five years from its creation.⁹¹ As the Berne Convention sets out the minimum protection that shall be

⁸¹ Berne Convention, Art. 2(1).

⁸² Berne Convention, Art. 2(2), (4), (7).

⁸³ Berne Convention, Art. 2(3).

⁸⁴ Berne Convention, Art. 6bis.

⁸⁵ Berne Convention, Art. 9(1).

⁸⁶ Berne Convention, Art. 9(3).

⁸⁷ Berne Convention, Art. 12.

⁸⁸ Berne Convention, Art. 16.

⁸⁹ Berne Convention, Art. 7(1).

⁹⁰ Berne Convention, Art. 7(2).

⁹¹ Berne Convention, Art. 7(4).

granted, the countries of the Union are free to legislate terms of protection that exceed those of the Berne Convention.⁹²

2.3.2 TRIPS agreement

In 1994, the members of the World Trade Organization (WTO) signed an agreement that addressed intellectual property protection and international trade. This agreement is known as the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs)⁹³. The TRIPs protection goes beyond that of the Berne Convention in that it covers all types of intellectual property, not only copyright.⁹⁴ The members of the TRIPS agreement are to comply with the Berne Convention in its entirety when applying the agreement. Regarding moral rights the agreement excludes both the protection of such rights and obligations relating to such rights.⁹⁵ This means that if a nation has only signed the TRIPS agreement among the international treaties, authors within that nation will only receive moral rights for their work if the national legislation protects it. Regarding copyright, the addition the agreement makes to the Berne Convention is the protection of databases and computer programs.

2.3.3 WCT

WCT⁹⁶ is the result of the contracting parties of WIPO seeing a need to adapt the existing legislation to the societal change that happened in the mid 1990s. The Berne Convention was no longer sufficient to cover the copyright protection of work of a more digital nature.⁹⁷ The WCT is to be considered an addition to the Berne Convention, and holds agreements that goes beyond those of the Berne Convention.⁹⁸ Rights bestowed upon the author by the WCT cannot override those of the Berne Convention.⁹⁹ As the WCT can be considered as additional, modernising rules on top of the Berne Convention, articles 2 to 6 of the Berne Convention shall be applied and formulated in a way that is appropriate in re-

⁹² Berne Convention, Art. 7(6).

⁹³ Currently with a total of 161 contracting parties, http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22, [downloaded 2015-12-01].

⁹⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Marrakesh, April 15, 1994, 33 I.L.M. 1, 83-111, Art. 1(2).

⁹⁵ TRIPS, Art. 9(1).

⁹⁶ Currently with a total of 93 contracting parties, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16, [downloaded 2015-12-01].

⁹⁷ WCT, preamble.

⁹⁸ Berne Convention, Art. 20.

⁹⁹ WCT, Art. 1.

gard to the WCT and its aim.¹⁰⁰ The WCT gives the author the right to authorise distribution of their work, both for copies and the original work, through any transfer of ownership. It also gives the contracting parties the right to set down rules regarding exhaustion of this right.¹⁰¹ Further, the treaty grants authors the exclusive right to authorise any form of communication to the public of their work. This right includes doing this in a way which enables the public to access the work at any given time.¹⁰² This is considered an important part of the treaty, as it provides protection in an online environment of interaction.¹⁰³ The term of protection set out in the WCT allows for the work to be protected for the life of the author and fifty years after his death. By expressing that the contracting parties shall not apply Article 7(4) of the Berne Convention, the WCT prevents the contracting parties legislating on lesser terms.¹⁰⁴

2.4 Exceptions and limitations

Similar to fair use, exceptions and limitations are restrictions on the rights authors have over their work. In the international treaties as well as within the legislation of the EU, exceptions and limitations are expressed as an enumeration of exceptions that apply to the artistic and literary works created falling within the scope of WIPO legislation.

The Berne Convention contains rules regarding exceptions and limitations in art. 9(2), 10, 10bis and 11bis(2).¹⁰⁵ Also the WCT provides for an article on exceptions and limitations in art. 10¹⁰⁶, TRIPS in art. 13¹⁰⁷ and Directive 2001/29/EC in art. 5¹⁰⁸. It is worth noting that the articles in the Berne Convention and WCT focus on the author of the work, while the articles in TRIPS and Directive 2001/29/EC are directed towards the rightsholder. With the exception of art. 10(1) of the Berne Convention, allowing for quotations to be made of a work that has lawfully been made available to the public¹⁰⁹, the articles regarding exceptions and limitations leave the right to establish legislation concerning this matter to the member states. The article on exceptions and limitations in Directive 2001/29/EC pro-

¹⁰⁰ WCT, Art 3.

¹⁰¹ WCT, Art 6.

¹⁰² WCT, Art 8.

¹⁰³ P. Goldstein, B. Hugenholtz, *International Copyright – Principles, Law, and Practice*, p. 335.

¹⁰⁴ WCT, Art 9.

¹⁰⁵ Berne Convention, Art. 9(2), 10, 10bis, 11bis(2).

¹⁰⁶ WCT, Art. 10.

¹⁰⁷ TRIPS, Art. 13.

¹⁰⁸ Directive 2001/29/EC, Art. 5.

¹⁰⁹ Berne Convention, Art. 10(1).

vides a fairly in-depth list of situations where member states can legislate exceptions to the protection of copyright. The only binding part of the article allows for temporary reproduction important to a technological process with sole purpose to enable “transmission in a network between third parties by an intermediary, or a lawful use” without economic significance, that are either transient or incidental.¹¹⁰

While exceptions and limitations allows for use of copyrighted work in a way that helps to maintain a functioning internal market within the EU,¹¹¹ the enactment of such laws can never diminish the authors right to receive recognition for his work. Even where it is bestowed upon the member states to legislate regarding this matter, the conventions require fair use of work to give mention to the author, as regulated in the Berne Convention.¹¹²

In order to decide whether use can be considered fair in the terms of exceptions and limitations, the three-step test is applied. Originally found in article 9(2) of the Berne Convention, the test states three criteria which are to be considered by the countries of the Union¹¹³ when deciding on exceptions and limitations in their national legislation. The test has later on been included in other treaties with some alterations, but is mainly the same. The first criteria, “special cases”, states that exceptions or limitations cannot be applied to all kinds of use.¹¹⁴ 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.¹¹⁵ 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.^{116, 117}

2.5 Creative Commons

While copyright means that the rights to a work belongs to the author, there are alternatives for authors who, for some reason, do not want to hold all of the rights that a standardised copyright licence provide. Creative Commons is an organisation that provides addi-

¹¹⁰ Directive 2001/29/EC, Art 5.

¹¹¹ Directive 2001/29/EC, preamble (31).

¹¹² Berne Convention, Art. 6bis.

¹¹³ The Union of the Berne Convention.

¹¹⁴ A. Christie, R. Wright, ‘A Comparative Analysis of the Three - Step Tests in International Treaties’, *IIC-International Review of Intellectual Property and Competition Law*, vol. 45, no. 4, 2014, p. 9.

¹¹⁵ A. Christie, R. Wright, ‘A Comparative Analysis of the Three - Step Tests in International Treaties’, 2014, p. 20.

¹¹⁶ A. Christie, R. Wright, ‘A Comparative Analysis of the Three - Step Tests in International Treaties’, 2014, p. 27.

¹¹⁷ A. Christie, R. Wright, ‘A Comparative Analysis of the Three - Step Tests in International Treaties’, 2014.

tional copyright licenses that allow for the author to bestow some rights onto the public.¹¹⁸ If an author chooses to utilise a Creative Commons licence, the author can use one of the six different licences available where each one gives certain rights, such as remixing, commercial distribution and other rights.^{119, 120} Moreover, Creative Commons provide tools that enable work to be published without any rights reserved, or to be identified as work within the public domain.¹²¹ It should, however, be noted that a Creative Commons licence cannot withdraw a right of use that is already given by law or bestow copyright protection upon work that is not already protected.¹²²

A photo uploaded on a site allowing content sharing with a Creative Commons licence would enable other users to share or use the work without having to ask the author for permission, as it already has been given by applying the licence. On the Creative Commons website, Flickr is highlighted as allowing the licences and standing out as the largest source containing work licensed under Creative Commons.^{123, 124}

¹¹⁸ For a comprehensive background and motivation for Creative Commons licences, see L. Lessig, *CODE*, 2nd ed., Basic Books, New York, 2006, ISBN-10: 0-465-03914-6, ISBN-13: 978-0-465-03914-2.

¹¹⁹ 'About', *Creative Commons* [website], <http://creativecommons.org/about> [downloaded 2015-10-27].

¹²⁰ 'About The Licenses', *Creative Commons* [website], <http://creativecommons.org/licenses/> [downloaded 2015-10-27].

¹²¹ 'Our Public Domain Tools', *Creative Commons* [website], <https://creativecommons.org/publicdomain/>, [downloaded 2015-12-01].

¹²² 'Considerations for licensors and licensees', *Creative Commons wiki* [website], https://wiki.creativecommons.org/wiki/Considerations_for_licensors_and_licensees#Considerations_for_licensors, [downloaded 2015-10-27].

¹²³ 'Who Uses CC?', *Creative Commons* [website], <http://creativecommons.org/who-uses-cc> [downloaded 2015-11-27].

¹²⁴ For a comprehensive analysis of the licence system created by Creative Commons, see for example: H. Hietanen, 'The Pursuit of Efficient Copyright Licensing – How Some Rights Reserved Attempts to Solve the Problems of All Rights Reserved', PhD thesis, Diss. Lappeenranta University of Technology, Lappeenranta, (2008), ISBN 978-952-214-655-7, ISSN 1456-4491.

3 Terms of Use/Service

3.1 Instagram

Instagram is a social media platform allowing users to share photographs through an app, adding filters and making adjustments to the photo and uploading it with hashtags in order for people around the globe to be able to search for it.¹²⁵ Uploaded photos can be interacted with by liking and commenting, and it is possible for the user to follow other users in order to see their photos on the user's home page.¹²⁶ It is also possible to interact with the site through their website, however, users are not able to upload photographs through the website.¹²⁷ The Instagram terms of use are divided under different sections. Simply by using or accessing the service that Instagram provides, a user or visitor is bound by the terms. Users of the site need to meet the age requirement of being at least 13 years old.¹²⁸ Under the general conditions it is stated that if a user decides to terminate their account, they will no longer be able to access any data through the terminated account. However, the data may still be accessible from the service if the content has been re-shared before the termination. The act of termination will result in any licences or other rights that are granted to the user ceasing to have effect.¹²⁹

Under the "Rights" section, it is stated that Instagram does not claim ownership of the content that their users share through the use of their service. But, by using the service and thereby agreeing to the terms, the user binds themselves to Instagram by a licence 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 Service".¹³⁰ Other than this, there is little mention of licences on the site, and no actual mention of alternative licensing, such as Creative Commons.

In using the service, the user is required to confirm that the content they post is owned by them or that they in some other way have the rights and licences to use the content, that

¹²⁵ For an example of a public profile page on Instagram, see appendix.

¹²⁶ 'Photo Taking, Editing and Sharing', *Instagram Help Center* [website], <https://help.instagram.com/365080703569355/>, [downloaded 2015-11-20].

¹²⁷ 'How do I take or upload a photo?', *Instagram Help Center* [website], <https://help.instagram.com/365080703569355/>, [downloaded 2015-11-20].

¹²⁸ 'Basic Terms', section 1, <https://help.instagram.com/478745558852511>, [downloaded 2015-12-02].

¹²⁹ 'General Conditions, section 1 & 2', *Instagram Help Center* [website], <https://help.instagram.com/478745558852511>, [downloaded 2015-11-07].

¹³⁰ 'Rights, section 1', *Instagram Help Center* [website], <https://help.instagram.com/478745558852511>, [downloaded 2015-11-07].



they do not violate copyright by posting or use of content and that they are able to enter into Instagram’s terms of use with respect to their jurisdiction. Moreover, the user allows Instagram to remove any content without giving notice, and thereafter store it for any legal obligations Instagram may have to comply with.¹³¹ As the service is based in the US, US legislation governs the site.¹³²

A short section within the terms addresses violation of Copyright and IP rights. It is merely stated that users should respect copyright and that repeated infringing of IP right will result in an account being disabled. Other than that, users are directed onto a page within Instagram which gives a basic explanation of copyright and trademarks.¹³³ The user is then directed further towards a page on Instagram’s “Help Center”¹³⁴. Here, users, or people without an account, can find help to report any copyright infringement that may occur within the service, and also find answers to questions they may have regarding copyright. In order for users to report infringement, Instagram provides a form which can be filled in on the site. There is no requirement to have an account in order to fill in the form, and the complaint can be made by the author or an authorised person on behalf of the author.^{135, 136} It is also possible to file a complaint containing “a complete copyright claim” by mail, fax or email.¹³⁷

3.2 DeviantArt

DeviantArt is an online community, directed towards artists and people that enjoy art.¹³⁸ Users are able to upload and share their work and communicate with other users through the service¹³⁹, the works being such things as digital art, pixel art, film etc..¹⁴⁰ Interacting with other users can be done in several ways, such as commenting¹⁴¹ and favouriting each others content¹⁴². DeviantArt separates users of and visitors to the site, as only the first sec-

¹³¹ ‘Rights’, section 7, <https://help.instagram.com/478745558852511>, [downloaded 2015-11-07].

¹³² ‘Governing Law & Venue’, <https://help.instagram.com/478745558852511>, [downloaded 2015-12-01].

¹³³ ‘Intellectual Property’, <https://help.instagram.com/535503073130320/>, [downloaded 2015-11-07].

¹³⁴ ‘Welcome to the Instagram Help Center!’, <https://help.instagram.com/>, [downloaded 2015-11-29].

¹³⁵ ‘About Copyright’, <https://help.instagram.com/126382350847838>, [downloaded 2015-11-07].

¹³⁶ ‘Copyright Report Form’, <https://help.instagram.com/contact/539946876093520>, [downloaded 2015-11-08].

¹³⁷ ‘What is the contact information for your Digital Millennium Copyright Act designated agent?’, <https://help.instagram.com/589322221078523>, [downloaded 2015-11-08].

¹³⁸ ‘What Is DeviantArt?’, *DeviantArt* [website], <http://welcome.deviantart.com/>, [downloaded 2015-11-17].

¹³⁹ For an example of a user account on DeviantArt, see appendix.

¹⁴⁰ ‘At DeviantArt, we bleed and breed art’, <http://about.deviantart.com/>, [downloaded 2015-11-23].

¹⁴¹ <http://help.deviantart.com/661/>, [downloaded 2015-12-03].

¹⁴² <http://help.deviantart.com/11/>, [downloaded 2015-12-03].

tion of the terms are binding on the latter.¹⁴³ It is also worth noting that there is no age restriction to access the site, but for the sake of registration that users have to meet the criteria of 13 years.¹⁴⁴ DeviantArt's terms of service state that any individual that uses the site should in some way be the copyright owner of the content they post, either by directly owning the copyright or having permission to post it either by a licence or law. Apart from where this applies, and if nothing else is stated, the content on the site is owned by DeviantArt.¹⁴⁵ Users grant DeviantArt "a non-exclusive, royalty-free license to reproduce, distribute, re-format, store, prepare derivative works based on, and publicly display and perform Your Content", however only in order for DeviantArt to make content available on their site.¹⁴⁶ But when uploading "Artist Material" to the site, which could be any kind of content that the user uploads on the site¹⁴⁷, users are also bound by the submission policy which "is incorporated into, and forms a part of, the Terms."¹⁴⁸ This submission policy gives DeviantArt more extensive rights to use the content, such as "display, copy, reproduce, exhibit, publicly perform, broadcast, rebroadcast, transmit, retransmit, distribute through any electronic means (including analogue and digital) or other means, and electronically or otherwise publish any or all of the Artist Materials, including any part of them, and to include them in compilations for publication, by any and all means and media now known or not yet known or invented" and also to sublicense the rights granted to them, by "a worldwide, royalty-free, non-exclusive license".¹⁴⁹ DeviantArt grants itself the right to terminate any user account or delete content if the user fails to comply with the terms or any applicable law.¹⁵⁰ Since the year of 2006, it is possible for users to upload content to DeviantArt under a CC licence. The user is asked if they would prefer to CC licence their work, and is then asked questions in order to apply the correct licence. The work uploaded with the licence will then have the licence logo visible by the work, clearly stating what type

¹⁴³ 'About Us: Terms of Service', introduction, <http://about.deviantart.com/policy/service/>, [downloaded 2015-11-28].

¹⁴⁴ 'About Us: Terms of Service' Art. 13, <http://about.deviantart.com/policy/service/>, [downloaded 2015-12-02].

¹⁴⁵ 'About Us: Terms of Service' Art. 4, <http://about.deviantart.com/policy/service/>, [downloaded 2015-11-08].

¹⁴⁶ Art. 16, <http://about.deviantart.com/policy/service/>, [downloaded 2015-11-08].

¹⁴⁷ 'Submission Policy', Art. 3g), <http://about.deviantart.com/policy/submission/>, [downloaded 2015-11-25].

¹⁴⁸ Art. 15, <http://about.deviantart.com/policy/service/> [downloaded 2015-11-25].

¹⁴⁹ Art. 3, <http://about.deviantart.com/policy/submission/>, [downloaded 2015-11-25].

¹⁵⁰ Art. 20, <http://about.deviantart.com/policy/service/>, [downloaded 2015-11-25].

of licence the work is subject to.¹⁵¹ However, there is no in-site option that enables users to search for work uploaded with a specific licence.¹⁵²

Other than through the terms of service, DeviantArt addresses copyright protection through its copyright policy. With the copyright policy, DeviantArt aims at clarifying the phenomenon that is copyright protection, while stating that the policy holds no legal status and is only to be considered a guide. It is acknowledged that copyright does not need any type of formality in order to arise, but that formality may be needed in order to be granted full protection.¹⁵³

As for copyright infringement issues, DeviantArt has a system where copyright owners may file a notification, which contains the formal requirements of the 1976 Act. It is possible to file a copyright complaint both as a registered member and without having an actual account. For registered members, DeviantArt provides a form which is only available while logged in. As a non-registered user it is possible to send a written notice by mail or email. Infringements on the DeviantArt site is deleted by DeviantArt without warning to the infringer after a proper notification has been received regarding the matter. It is only the copyright owner, or an authorised person acting on the owners behalf that is able to file a copyright notice.¹⁵⁴ For disputes regarding the terms, these are resolved under US law. More specifically by the courts of the State of California.¹⁵⁵

3.3 Flickr

Flickr is an application for photo sharing and management online.^{156, 157} The site allows for sharing photos and videos, either to a private group of people chosen by the user, or to the public.¹⁵⁸ Users are able to upload content through the Flickr website and their mobile app, and also through other programs.¹⁵⁹ Sharing photos is not the only use for the site, it can

¹⁵¹ @IconImagery, 'Submission Process – The Creative Commons License', (2006-11-23), <http://www.deviantart.com/journal/Submissions-Process-The-Creative-Commons-License-214148193>, [downloaded 2015-11-18].

¹⁵² @fbgbdk4, 'A way to search for Creative Commons art in DA', (2012-07-15), <http://creativecommons.deviantart.com/journal/A-way-to-search-for-Creative-Commons-art-in-DA-314892577>, [downloaded 2015-12-03].

¹⁵³ 'Copyright Policy', <http://about.deviantart.com/policy/copyright/>, [downloaded 2015-11-08].

¹⁵⁴ Ibid., [downloaded 2015-11-08].

¹⁵⁵ Art. 11, <http://about.deviantart.com/policy/service/>, [downloaded 2015-12-01].

¹⁵⁶ 'About Flickr', *Flickr* [website], <https://www.flickr.com/about/>, [downloaded 2015-11-17].

¹⁵⁷ For an example of a search page on Flickr viewed as a nonregistered user, see appendix.

¹⁵⁸ 'What if I don't want everyone to see my photos?', <https://www.flickr.com/help/privacy/>, [downloaded 2015-11-23].

¹⁵⁹ 'How can I upload?', <https://www.flickr.com/help/tools/>, [downloaded 2015-11-23].

solely be used as a means to connect with other users by engaging in group chats or commenting on photos. It has been shown in previous studies of the site that there is variety in the use of the site, which gives that many types of intentions occur on the site.¹⁶⁰ Users are able to add “tags” to their photos to enable others to find them easier.¹⁶¹ It is owned by Yahoo, and thus users of Flickr are bound by the Yahoo terms of service. These are in turn provided by Yahoo! EMEA Limited (Yahoo), which is a daughter company to Yahoo! Inc, with corporate office based in Ireland. It could be worth noting that on some occasions when clicking the link to the terms of service on Flickr, it directs towards the terms of Yahoo! Inc instead. Yahoo provides for additional terms of service for a number of their services. However this does not apply to Flickr, meaning that there are no specified terms for the service. Apart from the terms, Flickr has community guidelines that may apply if nothing else is stated in the terms. It is stated that the terms are binding for an individual that uses the site.¹⁶² However, the terms will not affect rights that are bestowed upon the user acting as a consumer.¹⁶³ In order to use Yahoo’s services, users must be at least 13 years old.¹⁶⁴

Users hold responsibility for any type of content that is posted onto the Yahoo services, and are bound not to use the service for any activity that may infringe on any law or regulation, copyright included, or encourage such behaviour. Yahoo declines any obligation to supervise the content uploaded by their users. However, they may deal with content that violates the terms. Users are made aware of the fact that the content posted on the site might end up being exported or imported, and thereby subject to laws regarding this matter.¹⁶⁵ As far as licences go, the terms of service have a section dedicated to explaining the licence matters to the user. When using Flickr to post photos, graphics, audio and videos, Yahoo is provided with a licence from the user that is valid as long as the user has content on the service. This licence gives “Yahoo the worldwide, royalty-free and non-exclusive licence to use, distribute, reproduce, adapt, publish, translate, create derivative works from, publicly perform and publicly display” the content.¹⁶⁶ The intention of this licence is to al-

¹⁶⁰ O. Nov et al. ‘Analysis of Participation in an Online Photo-Sharing Community: A Multidimensional Perspective’, *Journal of The American Society For Information Science and Technology*. vol. 61, no. 3 (2010) p.557.

¹⁶¹ ‘What are tags?’, <https://www.flickr.com/help/tags/>, [downloaded-12-03].

¹⁶² ‘Yahoo Terms of Service’, Art. 1 & 2, *Yahoo Policies* [website], <https://policies.yahoo.com/ie/en/yahoo/terms/utos/>, [downloaded 2015-11-20].

¹⁶³ Art. 18(3), <https://policies.yahoo.com/ie/en/yahoo/terms/utos/index.htm>, [downloaded 2015-12-06].

¹⁶⁴ Art. 5(2), <https://policies.yahoo.com/ie/en/yahoo/terms/utos/index.htm>, [downloaded 2015-12-02].

¹⁶⁵ Art. 7-8, <https://policies.yahoo.com/ie/en/yahoo/terms/utos/index.htm>, [downloaded 2015-11-18].

¹⁶⁶ Art. 9(1), (2), <https://policies.yahoo.com/ie/en/yahoo/terms/utos/index.htm>, [downloaded 2015-11-25].

low Yahoo to perform the users request to post on the service, but also to use content that is published, in this case on Flickr, to promote Flickr. This only applies to content that is made publicly accessible on the service, users can decide to only share their content with a limited group and thereby not grant Yahoo permission to use their content for promotion.¹⁶⁷ It is worth noting, the licence granted to Yahoo differs when the content in question is anything other than photos, graphics, audio or video. For other content, the licence would be a “worldwide, royalty-free, non-exclusive, perpetual, irrevocable, and fully sub-licensable licence to use, distribute, reproduce, adapt, publish, translate, create derivative works from, publicly perform and publicly display the User Content anywhere on the Yahoo network or in connection with any distribution or syndication arrangement with other organisations or individuals or their sites in any format or medium now known or later developed.”¹⁶⁸

When uploading to Flickr, it is possible to choose between a variety of licences, and also later on change the licence given to a photo. It is worth noting, however, that the six Creative Commons licences linked on the Yahoo help page are older versions of the licences.¹⁶⁹ The licence that a work is uploaded under is then shown next to the work, with a link to a page providing more information about the licence. It is also possible to search the site for pictures uploaded under a certain licence.¹⁷⁰ Under a few circumstances, Yahoo has the right to delete or limit your account. It is stated that if a user decides to cancel their account, this can result in any content within that account being removed. However, there is no further information regarding what will happen to the content on an account that has been deleted by either Yahoo or the user.¹⁷¹

Copyright infringement on Flickr is reported directly to Yahoo Copyright/IP agents by filing a form that is available only by logging in with a Yahoo account. It is stated on the IP Policy and Copyright site that users can report copyright infringement “If you believe that your work has been copied”.¹⁷² This is done either by email, mail or fax.¹⁷³ Any disputes

¹⁶⁷ Art. 9, <https://policies.yahoo.com/ie/en/yahoo/terms/utos/index.htm>, [downloaded 2015-11-18].

¹⁶⁸ Art. 9(4), <https://policies.yahoo.com/ie/en/yahoo/terms/utos/index.htm>, [downloaded 2015-11-25].

¹⁶⁹ ‘Change your photo's license in Flickr’, *Yahoo help* [website], <https://help.yahoo.com/kb/SLN25525.html>, [downloaded 2015-11-18].

¹⁷⁰ Searchword “car” filtered on CC BY-SA 2.0 licence, <https://www.flickr.com/search/?text=car&license=4%2C5%2C9%2C10>, [downloaded 2015-11-28].

¹⁷¹ Art. 14, <https://policies.yahoo.com/ie/en/yahoo/terms/utos/index.htm>, [downloaded 2015-11-12].

¹⁷² ‘IP Policy and Copyright’, <https://policies.yahoo.com/ie/en/yahoo/ip/index.htm>, [downloaded 2015-11-12].

¹⁷³ *Ibid.*

that may arise regarding Flickr, its terms or copyright policy is regulated by legislation with-
in Ireland since the corporate office of the service provider is located there.¹⁷⁴

¹⁷⁴ Art. 25, <https://policies.yahoo.com/ie/en/yahoo/terms/utos/index.htm>, [downloaded 2015-11-13].

4 Conditions for use of photo sharing sites: A comparative analysis

4.1 Copyright on the sites

From analysis of the terms, it can be said initially that the size of the sites, all having several million registered users, is reflected within the terms. Extensive as the terms are, there are naturally differences regarding content on all of the sites in question. Given that the content on all of the sites is to be considered as artistic, the focus on the protection of this right seems to vary throughout the sites. All of the sites clearly have a way for authors to report or file complaints on copyright infringement, and thus the problem of online copyright protection is recognised. The extent of the attention that copyright protection is given on the sites is difficult to determine without going through the process of actually filing a copyright complaint. However, it could be said that whether the site provides the copyright owner and the users of the site with information on what is considered as copyright infringement, how to avoid it and in any way guides users in intellectual property matters or not can be seen as the site having an interest in preventing infringement. Instagram is the only site of the three to provide the online form without requiring signing in to an account.

The terms of the sites are, in most part, written with the idea of both individuals and companies as users. Instagram states that persons or businesses can with authorization create accounts on behalf of employers or clients, which means that the terms apply to companies as well as individuals.¹⁷⁵ This means that there is no evident difference in the aspect of ownership if the user is an individual or a company. DeviantArt's terms state that commercial activities are permitted for small corporations, which would mean that the registration of such entities is accepted.¹⁷⁶ The Yahoo terms that relate to Flickr, however, state that the terms apply to "individuals" using the site.¹⁷⁷ The term individual is in US law defined as "every infant member of the species homo sapiens who is born alive at any stage of development."¹⁷⁸ However, Flickr is an Irish company and therefore states that the relationship with the user is governed by Irish law. Within Irish company law, there is no direct definition of an individual. Ireland, being a member of the EU, is additionally bound by EU leg-

¹⁷⁵ 'Terms of Use', Basic Terms 3., <https://help.instagram.com/478745558852511>, [downloaded 2015-11-28].

¹⁷⁶ 'About Us: Terms of Service', 19A. Commercial Activities, <http://about.deviantart.com/policy/service/>, [downloaded 2015-11-28].

¹⁷⁷ 'Yahoo Terms of Service', 1(2), Your Relationship With Yahoo, <https://policies.yahoo.com/ie/en/yahoo/terms/utos/index.htm>, [downloaded 2015-11-28].

¹⁷⁸ 1 U.S.C. §1 *et seq.* (2015), Pub. L. 107–207, §2(a), Aug. 5, 2002, 116 Stat. 926, as amended, §8.

islation. In Directive 95/46/EC, which regulates the protection of individuals with regard to personal data, the objective of the Directive obliges member states to protect “the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data”¹⁷⁹. This could point towards individuals being separated from legal persons, but there is no given definition of what “individual” refers to. Given this, it could mean that the Yahoo terms of service does not apply to legal persons. However, it can be stated that it is not entirely clear whether the terms do apply to companies as the term individual is not given a clear definition in jurisdictions other than the US.

An interesting aspect of the terms is the licence that the user binds themselves to bestow upon the sites. The licence that Yahoo and DeviantArt are granted is in its initial formulation identical; the licence given to Yahoo is a “worldwide, royalty-free and non-exclusive licence”¹⁸⁰ while DeviantArt holds a “worldwide, royalty-free, non-exclusive license”¹⁸¹. However, the rights that the user grants to the services with these licences differ, and DeviantArt would seem to be the site given more extensive rights of the two. The site has, as an addition to the terms of service, a submission policy which gives the site the right to sublicense. The licence that is given to Instagram differs further. In Instagram’s terms of use, the licence is a “non-exclusive, fully paid and royalty-free, transferable, sub-licensable, worldwide license”¹⁸². The licence matter on the sites would seem to be one of the most prominent differences between the sites that is of importance for the users. The licence being transferable means that the licence a user grants can be transferred upon someone else, giving them the right to use the content of the user in the way that the licensee originally was able to do.¹⁸³ To sublicense is the act of taking a licence in possession and granting the rights given by that licence to someone else.¹⁸⁴ This can for example mean that Instagram grants rights to use the content to a third party. It would seem that the licensing on Instagram proves to be the least beneficial for the user, as the purpose of the licence is not only

¹⁷⁹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Art. 1.

¹⁸⁰ Art. 9(2), <https://policies.yahoo.com/ie/en/yahoo/terms/utos/index.htm>, [downloaded 2015-11-25].

¹⁸¹ Art. 16, <http://about.deviantart.com/policy/service/>, [downloaded 2015-11-08].

¹⁸² ‘Rights, section 1, *Instagram Help Center* [website], <https://help.instagram.com/478745558852511>, [downloaded 2015-11-07].

¹⁸³ J. E. Bullock, ‘Passing it on – Beware new ground rules, new hazards’, *Business Law Today* [online magazine], vol. 12, no. 6, (2003), <http://apps.americanbar.org/buslaw/blt/2003-07-08/bullock.html>, [downloaded 2015-11-25].

¹⁸⁴ *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 SCR 129, 1998 CanLII 791 (SCC).

to enable Instagram to post the users content on their site, as is the purpose of the licence DeviantArt and Yahoo are granted. Rather, the user is forced to give Instagram rights that go beyond what would be deemed necessary for the purpose of the site, given that they want to use the site.

Instagram and DeviantArt are based in the US, suggesting that they write their terms with US legislation as a measure. Disputes regarding the terms of the services are to be resolved according to US legislation,^{185, 186} except those regarding Flickr as those are provided by a company based in Ireland, thus having close relation to Irish laws.¹⁸⁷ The US has throughout the years signed several international copyright agreements, meaning that companies based in the US need to comply with them as well as the 1976 Act. Ireland has signed the same agreements as the US, but has the addition of the EU directives as they are part of the EU. As the sites due to this are bound to comply with several laws, the users also have this obligation, as stated in the terms. It could prove difficult for users to determine how to apply these, and also to have knowledge regarding which laws they are obligated to comply with. This could possibly be solved by the sites providing for further guidance regarding what laws may apply. However, this would put further pressure on the sites, and would require legal knowledge to some extent. The positive aspects of such an addition to the terms or provision of some information on the sites, such as decreasing the amount of infringement due to lack of knowledge, would have to be weighed against the negative, such as risks of providing incorrect information.

An interesting point is that the site which is granted the least extensive licence, Flickr, is the site that offers the largest variety of licences for users to chose from, as shown in table 2. A simple way to avoid copyright infringement would be for the author or rightsholder to licence the work in a way that allows for others to use the work in a satisfying manner. Allowing users to upload content under a different licence than with all rights reserved could be seen as having intent to avoid and minimise the occurrence of copyright infringement. This because it is a simple way to give permission. It eliminates the need to contact the copyright holder, which could prove helpful, as a simple route to achieve something is often preferred. If the site provides information regarding the way in which a specific work is allowed to be used this would, possibly, also help in avoiding copyright infringement. In

¹⁸⁵ 'Governing Law & Venue', <https://help.instagram.com/478745558852511>, [downloaded 2015-12-01].

¹⁸⁶ Art. 11, <http://about.deviantart.com/policy/service/>, [downloaded 2015-12-01].

¹⁸⁷ Art. 25, <https://policies.yahoo.com/ie/en/yahoo/terms/utos/index.htm>, [downloaded 2015-11-13].

making users aware that there are simple ways to give and also receive permission, this could improve the awareness of both copyright infringement and how to avoid it.

4.2 Congruence with copyright law

Initially, it should be said that there is no restriction on the sites gaining the right to use the works uploaded, since the users agree to grant the service providers the licences by uploading material to their sites. Flickr, being governed by Irish law, is subject to the EU legislation. Instagram and DeviantArt are in the same way subject to US legislation, as they are governed by US law. The right to transfer copyright is stated in the 1976 Act¹⁸⁸ and the Directive 2001/29/EC¹⁸⁹, which provide that transfer of rights by way of a licence is acceptable. Further, there is no restriction on transferring rights according to international legislation, which also applies to the sites as Ireland and the US are subjects to the international conventions. The WCT, being an addition to the Berne Convention as regards technological developments, also allows for transfer of rights. As the international legislation in an extensive manner allows for national legislation to provide for exceptions and limitations and therefore only provides minimum requirements for protection, the 1976 Act and the EU legislation hold importance.

4.2.1 Instagram

The Berne Convention provides that the author of a work shall have the right to object to any use of or action taken in regards to the work that would result in his reputation being harmed.¹⁹⁰ As Instagram gives itself the right to use the users content, without any direct limitation other than the use being subject to their privacy policy, by license and to also transfer or sublicense said license, the question whether such an act can be deemed harmful needs to be investigated. To determine and lay down an exhaustive list of actions that would result in harm of the author's honour or reputation would not be possible, as it is a matter for the courts to decide.¹⁹¹ However, it may be fair to say that there are some kinds of exposure that would put an author in bad light. Such an 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. Having their work por-

¹⁸⁸ U.S. 1976 Copyright Act §201.

¹⁸⁹ Directive 2001/29/EC, recital 30.

¹⁹⁰ Berne Convention, Art. 6bis.

¹⁹¹ C. Masouyé, *Guide To the Berne Convention* [online facsimile], tr. W. Wallace, WIPO, Geneva, 1978, p. 41-44, <ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/Guide-Berne-Convention-wipopub615E.pdf>, [downloaded 2015-11-25].

trayed in relation to a controversial company name could potentially result in the author being weighed down by the same controversy, harming the possibility for the author to reach out to a new potential market.

Moral rights are in the 1976 Act not given the same protection as in international treaties, as shown in US courts.¹⁹² As the Act calls for “fine art” produced in a limited amount of copies, it is questionable whether digital photographs such as those posted on these sites can be said to fall into this category. The term copies is defined 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.”¹⁹³ This could mean that the content on the sites can be considered as copies within the frame of the 1976 Act. However, 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. This would suggest that the users do not receive any moral rights for the content posted on the sites according to US law. But the US has signed the Berne Convention, which provides that the moral rights of the users need to be upheld even after the licence is in effect. This is due to the fact that regardless of the transfer of economic rights, the moral rights of an author are alienable.¹⁹⁴ This gives that even though Instagram does not state any limitation for the purpose of the extensive licence they are granted, there will still be limitations on the way they can exercise their right as the author’s reputation needs to be considered.

4.2.2 DeviantArt

The same issue as that of the Instagram licence should not arise on the DeviantArt site. As shown in a situation where a work posted on DeviantArt was later noticed being sold as a print on a t-shirt without permission from the copyright owner, DeviantArt expressly states that it “cannot license it to others either (be it individual or company) without the express permission and written agreement of the artist.”¹⁹⁵ The reason being that the licence does not grant ownership of the authors work. DeviantArt also responds to the situation with a

¹⁹² R. B. Standler, ‘Moral Rights of Authors in the USA’, available at: <http://www.rbs2.com/moral.pdf>, (2012-04-17), p. 29.

¹⁹³ U.S. 1976 Copyright Act §101.

¹⁹⁴ Berne Convention, Art. 6bis.

¹⁹⁵ <http://deviantart.tumblr.com/post/84568873007/languidness-joyouscatus-you-remember-that>, (2014-05-04), [downloaded 2015-11-25].

statement that copyright is an important matter to them.¹⁹⁶ From this, DeviantArt chose to clarify in its FAQ, stating that they do not retain ownership of the users work.¹⁹⁷ However, they receive the right to sublicense the licence granted to them, and thereby bestow the rights upon someone else. According to its terms of service, the sole reason for the licence that is provided to DeviantArt is to enable making the content available on the site. Whether the site would need the ability to sublicense in order for this is difficult to answer, but it means that, as the result is with Instagram's terms, the problem with protection of moral rights arises. As it is stated that the submission policy is considered a part of the terms of service, the act of DeviantArt sublicensing should have to comply with this statement. This would mean that if rights are granted to someone else by DeviantArt, because the site only does this in a fashion that is required for it to be able to make the content available, this would not result in any actions harmful to the author. If it did, it could be questioned whether the site would be very popular. It would also, possibly, be simpler to find infringement cases regarding the site, given that the moral right is irrevocable and holds a rather strong protection in some legislations.

4.2.3 Flickr

Analysing the terms of Flickr, this seems to be the site that by licence obtains the least rights. The licence is the only one out of the three that does not give the site a right to sublicense, and neither is it transferable. As Flickr states that the licence exists for the purpose of enabling the content to be published on the site. Also, they gain the right to use the content in promoting the site, both within the Yahoo network and in connection with persons, legal or natural.¹⁹⁸ Given that Flickr has been mentioned on the Creative Commons website as a site with a notable amount of content that is licenced to enable others to use the content¹⁹⁹, the site can be said to work towards minimizing infringement of copyright. However, simply providing alternative licences does not help as the problem of users not understanding the licences remains. This is shown in a case brought by the district court in Columbia, where plaintiff had uploaded a photo he had taken onto his Flickr account under the Creative Commons Attribution-ShareAlike 2.0 licence (CC BY-SA 2.0 licence). Defendant had downloaded a copy of the photo which he used on the front cover of an atlas, giving credit to plaintiff, that he then published and sold for profit. Plaintiff complained

¹⁹⁶ Ibid.

¹⁹⁷ 'Help & FAQ', *Does DeviantArt own my art?*, <http://help.deviantart.com/226/>, [downloaded 2015-11-25].

¹⁹⁸ Art. 9, <https://policies.yahoo.com/ie/en/yahoo/terms/utos/index.htm>, [downloaded 2015-12-01].

¹⁹⁹ 'Who Uses CC?', <https://creativecommons.org/who-uses-cc/>, [downloaded 2015-12-01].

about defendant using his work commercially, however as plaintiff had uploaded the photo under the CC BY-SA 2.0 licence, he had authorised commercial use. The Court therefore chose to only discuss the question whether defendant had complied with the terms of the licence, which the Court found.²⁰⁰ It can be said that the case arose as a result of the user of the site not understanding the terms of the licence or not having read them. Simply allowing users to licence their material under other licences than the default “all rights reserved” does not mean issues regarding copyright will cease to be brought to court. The problem lies in the understanding of terms, and use of licences. However, as Flickr provides information regarding the licences in connection to the photos, it could be questioned if further information would result in better understanding.

4.3 Governmental agencies and licences on the sites

As shown in table 1, several of the 16 IT intensive governmental agencies appointed for eGovernment (‘E-delegationen’) in Sweden have chosen to create accounts²⁰¹ on at least one of the sites analysed. In 2010, eGovernment put forward guidelines for agencies’ use of social media. These guidelines, which are to be seen as guidance, states that agencies should examine the terms of the sites before deciding to use the service to communicate with their users.²⁰² From this it can be taken that the terms on the sites are acceptable enough to make them interesting for these agencies as a means to reach and communicate with individuals in the broader society. Amongst the 16 agencies, only Bolagsverket has chosen to appear on Flickr. None of them are represented on DeviantArt, while Instagram is the most popular out of the three sites. The reason or reasons for this could be many, it simply might be that Instagram is preferred as it is the largest in number of users. With Flickr’s choice of wording, stating that “individuals” are bound by its terms, it is interesting to note that there is a governmental authority on the site. From what can be seen on the account of Bolagsverket, the account is made in the name of the authority and not by an individual as

²⁰⁰ *Draughis v. Kappa Map Grp., LLC*, No. 14-1043 (ABJ) (D.D.C., 2015).

²⁰¹ In the table, cells containing “-” indicate that no account created by the governmental agency has been identified on the site. It should be noted that for one governmental agency (Migrationsverket) an account has been created with no apparent affiliation with this agency.

²⁰² E-delegationen, ‘Riktlinjer för myndigheters användning av sociala medier’, Stockholm, Version 1.0, (2010), available at: http://www.edelegationen.se/Documents/Vagledning%20mm/Riktlinjer_sociala_medier_v1_0.pdf, p. 20.

defined by the US code.²⁰³ As previously mentioned, it is not clear whether this is acceptable under the terms or not.

Table 1: Number of photos uploaded on analysed photo sharing sites by governmental agencies in E-delegationen.

	Instagram	Flickr	DeviantArt
Arbetsförmedlingen	128	-	-
Bolagsverket	3	4	-
Försäkringskassan	-	-	-
Centrala Studiestödsnämnden	-	-	-
Kammarkollegiet	3	-	-
Lantmäteriet	0 ²⁰⁴	-	-
Migrationsverket	-	-	-
Myndigheten för Samhällsskydd och Beredskap	-	-	-
Pensionsmyndigheten	-	-	-
Riksarkivet	363	-	-
Rikspolisstyrelsen	102 + 44 ²⁰⁵	-	-
Skatteverket	-	-	-
Statens Jordbruksverk	863 + 124 ²⁰⁶	-	-
Tillväxtverket	-	-	-
Transportstyrelsen	-	-	-
Tullverket	-	-	-

Table 2 shows the possible licences a user can upload their work with on the sites.²⁰⁷ As shown, Flickr provides for the largest variation, while Instagram limits the user to only apply the default copyright licence. The fact that Instagram holds the largest number of active users even though they give the most restricted possibility in terms of licence could indicate that users of the sites are either not concerned by what licence they apply to their photos or are not aware of the possibility of applying another licence other than “all rights reserved”.

²⁰³ However, as Flickr is subject to Irish law, as is stated in 3.3, the outcome from an analysis is not entirely clear. It should rather be seen as a comparison.

²⁰⁴ The agency has an account with no photos uploaded.

²⁰⁵ The agency has two accounts on the site.

²⁰⁶ Ibid.

²⁰⁷ In the table, cells containing “-” indicates that this licence is not supported for content on the site.

Table 2: Licences supported by analysed photo sharing sites.

	Instagram	Flickr	DeviantArt
All rights reserved	Supported	Supported	Supported
Public domain work	-	Supported	-
CC0	-	Supported	-
Attribution	-	Supported	Supported
Attribution-ShareAlike	-	Supported	Supported
Attribution-NoDerivs	-	Supported	Supported
Attribution-NonCommercial	-	Supported	Supported
Attribution-NonCommercial-ShareAlike	-	Supported	Supported
Attribution-NonCommercial-NoDerivs	-	Supported	Supported
United States government work	-	Supported	-
No known copyright restrictions	-	Supported	-

5 Analysis

5.1 On general conditions for use of sites for photo sharing

Social media sites usually lay down general conditions that apply to users. The extent and application of these can differ. It can usually be said that the general or basic conditions are a set of the most fundamental rules, giving a basic understanding of the finer print that usually follows.

The general conditions on DeviantArt are a set of rules that apply to anyone that visits the site, regardless of having an account or not. Instagram chooses to bind anyone, both people and businesses, that uses or accesses the service to their terms in their entirety. As for Flickr, they state that “individuals” using the site are bound by the terms. As mentioned in 4.1, it is therefore uncertain what the general conditions are. The terms might only apply to individuals within the meaning of natural persons, but might also include legal persons as these exist on the site, as shown by table 1. Instagram and Flickr have a restriction stating that anyone under the age of 13 may not use the site, while DeviantArt holds the same requirement although only for anyone wanting to register as a member. What lies within the meaning of “use” could be questioned. Judging by Instagram’s terms, where “accessing” and “using” the service are being separated, use could probably be seen as the act of a registered member as it is only possible to view photos on public accounts (but not comment or like) as a non-registered member. DeviantArt provides that using the site could be done by a non-registered member, meaning that you do not have to meet the age requirement in order to view photos or be bound by the general terms. As for Flickr, there is little indication as to whom the age restriction applies. It is stated that the age restriction applies to registered Yahoo users²⁰⁸, but as registration to Yahoo does not automatically result in an account on Flickr, it is not entirely clear.

The yearly study conducted by IIS (The Internet Foundation In Sweden), interviewing 3000 Swedes regarding their use of Internet, showed that the number of Internet users on Instagram was highest within the age group of 12-15 years.²⁰⁹ Although the survey cannot be regarded as general fact, given that it only surveys the use of a smaller group of Swedes, it could possibly be an indication that there are users on the site that do not meet the age requirement. It has also been shown in previous studies regarding young users that the age

²⁰⁸ Art. 5(2), <https://policies.yahoo.com/ie/en/yahoo/terms/utos/index.htm>, [downloaded 2015-12-02].

²⁰⁹ O. Findahl, P. Davidsson, *Svenskarna och Internet 2015*, Diagram 5.4, 2015.

requirement of social media sites in general is not always complied with.²¹⁰ This would mean that there are users on the sites not able to enter into agreement.

5.2 On conditions for use of photos

Photo sharing sites usually have some kind of mention of copyright. The extent varies, some sites provide for policies on copyright, while others mention copyright infringement, among other things, as something you are not allowed to do on the site.

Instagram, DeviantArt and Flickr all have distinct mention of copyright in some form within their terms. Instagram provides for a short section in their terms regarding violation of intellectual property rights, then directs towards pages specifically addressing copyright. There is fairly little information anywhere within the service giving clarity to copyright infringement, and any advice given is formulated carefully. In the FAQ section, Instagram states that they cannot provide legal advice.²¹¹ However, the site directs the user towards what they say is WIPO's website, although the link actually directs the user to the US copyright office website. The knowledge on copyright of the employees of Instagram possibly could be in question. Instagram not being able to give correct legal advice is not a problem, since it is a site providing a social media service rather than advise on copyright protection, but it could be said that an infringement case is more likely to occur on a site that does not provide, in a clear and easily accessible way, for information that would be useful. Instagram states that it may remove infringing content,²¹² which may constitute an affective strategy to protect the rights of the rightsholder. Relatedly, Flickr uses termination of accounts as a consequence of infringement.²¹³ Also DeviantArt takes actions such as removing infringing content or terminating accounts in order to protect the rightsholder.²¹⁴ To support its users, DeviantArt provides a basic run through of copyright with information on how to avoid copyright infringement. However, DeviantArt does not provide links directing users towards any form of sources on copyright, other than regarding fair use.

As the sites do provide for information but there still is misunderstandings regarding it, it could possibly be the case that users, regardless if they are given information or not, will

²¹⁰ E. Wauters, E. Lievens, P. Valcke, 'Children as Social Network Actors: A European Legal Perspective on Challenges Concerning Membership, Rights, Conduct and Liability', *Computer Law & Security Review*, vol. 31, iss. 3, (2015), p. 351-364.

²¹¹ 'I want to post something on Instagram, but I'm not sure if it would infringe someone's copyright. What should I do?', <https://help.instagram.com/354736791367645>, [downloaded 2015-11-29].

²¹² 'Rights', section 7, <https://help.instagram.com/478745558852511>, [downloaded 2015-11-07].

²¹³ 'IP Policy', <https://policies.yahoo.com/ie/en/yahoo/ip/index.htm>, [downloaded 2015-12-07].

²¹⁴ Art. 5, <http://about.deviantart.com/policy/service/>, [downloaded 2015-12-07].

not use it as shown in the *Drauglis v. Kappa Map Grp* case, where the copyright holder had misunderstood the licence which he had provided his work under on the site.²¹⁵ This could possibly mean that regardless the actions the sites take in order to minimize infringement, these will still occur as it is a matter of the users not taking in the information rather than the sites not providing it. As shown in another case regarding photos uploaded to Flickr under a Creative Commons licence, CC BY-NC-SA 2.0, there is a probable lack both in understanding the Creative Commons licences, but also in actually using information provided. In this case, first claimant had uploaded photos to Flickr under the CC BY-NC-SA 2.0 licence, with a clear notice regarding the applied licence next to the photos, which were then published in a magazine with an “all rights reserved” notice. The defendant had taken the photos assuming that they were eligible for use as they were publicly posted on the site.²¹⁶ This gives that despite being given the necessary information, even in close relation to the work, users or third parties might still not consider it and therefore still end up in a situation of copyright infringement. The sites should not have to force users to read up on and understanding licences. In the end it is up to the user. For supporting users to analyse complex contracts, a community effort initiated by legal experts has been initiated.²¹⁷ Such a community could possibly help in the

5.3 On conditions for reuse and reproduction of photos

It is common that social media sites provide functions that allow photos to be shared and reposted. Actions like these can result in copyright infringement, which means that it is important as a user to think before doing such an action. As stated, some sites provide for information regarding copyright infringement, but as the sites usually disclaim any form of liability for the infringement of a user it lies with the user to avoid such actions.

Given that the purpose of the site is for users to upload and share photos, and other content, the act of resharing photos often occurs on these sites. The sites usually have means of sharing photos by others on the sites within the service, or to a third party. It can also be a matter of the users using a separate application in order to reshare photos. The purpose of resharing lies with the user, and there could be many. It might be that the user finds an appealing photo that the user wants to post on their own account as an act of showing appreciation to the photographer, it could be a matter of wanting “likes” and therefore re-

²¹⁵ *Drauglis v. Kappa Map Grp., LLC*, No. 14-1043 (ABJ) (D.D.C., 2015).

²¹⁶ *Adam Curry v. Audax Publishing B.V.*, No. 334492 / KG 06-176 SR, (Mar. 9, 2006).

²¹⁷ ‘Terms of service: Didn’t read’ is a users rights initiative, analysing website terms, <https://tosdr.org/>.

sharing a photo that potentially could generate these or simply stealing a photo hoping that no one notices. In previous studies regarding Flickr, it has been shown that there is variety in the intention users have when using and uploading to the site.²¹⁸ In a case where not all of the users on the site have the mindset or interest of sharing photos, this could possibly support the thought that some users are more likely to infringe copyright. Users that themselves do not have an interest in uploading photos might not reflect on the will for content owners to get recognition for their work. It could possibly be more important for sites that recognise a wide variety in the use of the site to provide information regarding copyright and clarity in showing that the photos uploaded are protected. The way in which photos are reshared on these sites differ. It can simply be a repost of a photo, meaning that the photo ends up in connection with the user resharing it in the same form as the original work. It could also be uploaded with new filters added, some effects or other attributions that would make it more distinguished from the original.

A concept of law that could possibly be applicable to the use of photos on these sites is that of limitation on the exclusive rights the copyright holder has. This would be the fair use within the US legislation, and exceptions and limitations within the international and EU legislation. In order for fair use to be applicable it needs to be reviewed in the light of the four criteria for fair use. The first criteria, the purpose of the use, where the court takes into account how distinguishable the work is in relation to the original would probably not be met, as simply resharing a photo often does not alter it in any fashion in the way resharing is commonly used on Instagram, and perhaps also Flickr and DeviantArt. It should also be noted that the enumeration within §107, although not being exhaustive, states that the use should hold the purpose of teaching, research, criticism, commenting and such.²¹⁹ Even though fair use can be at hand even if the use is not of such nature, the enumeration gives guidance on the kinds of use that have been deemed to be fair. However, as the fair use is considered a very complex area within copyright law, it is questionable whether it should be considered at all by users as a way of legally using other's photos.^{220, 221} Another aspect that should be considered is that not only registered users of the sites can access the photos,

²¹⁸ O. Nov et al. 'Analysis of Participation in an Online Photo-Sharing Community: A Multidimensional Perspective', *Journal of The American Society For Information Science and Technology*, vol. 61, no. 3 (2010) p.557.

²¹⁹ U.S. 1976 Copyright Act §107.

²²⁰ M. F. Makeen, *Copyright in a Global Information Society – The Scope of Copyright Protection Under International, US, UK and French Law*, p.121-122.

²²¹ A. May Wyatt, S. E. Hahn, 'Copyright Concerns Triggered by Web 2.0 Uses', *Reference Services Review*, vol. 39, iss. 2, (2011), p. 306.

given that a users content is public on the site. Fair use in news reporting is permitted by §107, given that the court would find the use fair according to the four factors.²²² This could possibly result in third parties being able to use the content uploaded on the sites, however, courts have not viewed fair use in such a way in any extent.²²³ From this, it would not be unimaginable that other purposes could call for fair use of content on social media sites, giving that users need to consider that their content could be fairly used by third parties. As shown in an analysis of journalism and social media compared to the four factors, the conclusion that fair use could be at hand was drawn.²²⁴ Regarding exceptions and limitations, the situations when use can be considered fair is limited as the first criteria is that it regards “special cases”. This calls for the use to be something other than every day 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.

5.4 On conditions for termination of services

The conditions of termination are an important aspect in the use of services that store content. Users need to consider that the sites usually put up conditions regarding what will happen to the content. Important questions are those regarding the impact on the licence and what happens with the content stored on the site.

Users of Instagram are made aware that their content may remain on the site even upon termination of their account due to resharing and other activities.²²⁵ Regarding licences it is stated that rights granted to the user will cease if the account is terminated.²²⁶ However, there is no information regarding the licence Instagram is granted by the user. It is stated that the content of a user who has terminated or deactivated their account may still remain on the site “for a commercially reasonable time for backup, archival, and/or audit purposes.”²²⁷ As there is no statement that Instagram’s licence will also cease, this would mean that Instagram is still able to use the content in the same ways as when the user was registered, if the user does not actively revoke the licence. As with Instagram, DeviantArt gives

²²² U.S. 1976 Copyright Act §107.

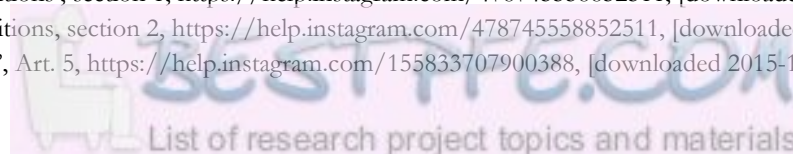
²²³ D. R. Stewart, ‘Can I Use This Photo I Found on Facebook? Applying Copyright Law and Fair Use Analysis to Photographs on Social Networking Sites Republished for News Reporting Purposes’, *Journal on Telecommunications and High Technology Law*, vol. 10, iss. 1, (2012), p. 100.

²²⁴ D. R. Stewart, ‘Can I Use This Photo I Found on Facebook? Applying Copyright Law and Fair Use Analysis to Photographs on Social Networking Sites Republished for News Reporting Purposes’, *Journal on Telecommunications and High Technology Law*, p. 113.

²²⁵ ‘General Conditions’, section 1, <https://help.instagram.com/478745558852511>, [downloaded 2015-12-03].

²²⁶ ‘General Conditions’, section 2, <https://help.instagram.com/478745558852511>, [downloaded 2015-12-03].

²²⁷ ‘Privacy Policy’, Art. 5, <https://help.instagram.com/155833707900388>, [downloaded 2015-12-02].



little information regarding what will happen with the content stored on the site, and the licence granted to them, upon the termination of the account. It is stated that DeviantArt “may” delete the content, but this would mean that it also might stay on the site.²²⁸ If the licence still is in effect, DeviantArt could still use the content. However, as the terms differ from Instagram’s by stating that the licence is only to make content available, DeviantArt should not be able to do much with the content even if it remains on the site, as the user would not upload content. Flickr states that the licence that the user grants will cease if either the user or Yahoo removes the content from Flickr.²²⁹ This would mean that the user actively needs to remove all of the content they have stored on Flickr before they cancel their account, otherwise the content could remain available for Yahoo to use.²³⁰

It is only Flickr that among the sites recognises the users’ rights as consumers. Consumer protection laws differ between countries, but in general they provide a lot of provisions that are supposed to protect, in these cases, the user of the services, such as in the process of termination of service. However, the sites have fairly extensive waivers that seem to put aside the users’ rights as consumers.²³¹ Shown by previous analysis of termination of licences, if an irrevocable licence has been granted in writing there should be high demands on the formality if it is to be terminated.²³² As the licences granted to the sites are revocable, and also non-exclusive, this could possibly call for that the requirement for the termination of them should not be high set. However, it would be preferable for the sites to clarify the terms in regards of what the outcome of termination will be in regards of the users copyrighted content.

5.5 On conditions under different jurisdictions

As these types of sites are located in different countries and the content on the sites are usually stored on servers in different countries, the jurisdiction that applies to them and the users of the sites differ. It is important to remember this before using a service as there may be some restrictions to use services as regards territory, due to restrictions by law.

²²⁸ Art. 20, <http://about.deviantart.com/policy/service/>, [downloaded 2015-12-03].

²²⁹ Art. 9, <https://policies.yahoo.com/ie/en/yahoo/terms/utos/index.htm>, [downloaded 2015-12-02].

²³⁰ Art. 14, <https://policies.yahoo.com/ie/en/yahoo/terms/utos/index.htm>, [downloaded 2015-12-02].

²³¹ M. L. Rustad, T. H. Koenig, ‘Wolves of the World Wide Web: Reforming Social Networks’ Contracting Practices’, *Wake Forest Law Review*, vol. 49, no. 14-25, (2014), p. 27-28.

²³² C. M. Newman, ‘A License Is Not a “Contract Not To Sue”’: Disentangling Property and Contract in the Law of Copyright Licenses’, *Iowa Law Review*, vol. 98, no. 3, (2013), p. 1156.

While the terms of the sites are written with national legislation as a measure, it is within the terms of all of the sites recognised that users can be subject to other legislation, and users are made aware that there might be restrictions on the use of the services due to this. Since users, as shown²³³, have a tendency of not reading the terms of the sites,²³⁴ it is questionable if those users would take the time to search for and read through applicable law before signing up. This could prove problematic for the user, as the sites waiver liability for a number of occurrences that possibly could rise from use of the sites. The sites cannot be held responsible for the users' negligence of law, but as the sites allow children over 13 on the sites, it could be helpful to provide some guidance regarding this matter rather than simply waiving any sort of responsibility.

As the aspect of copyright differs between different nations, and the sites are subject to different copyright law, this could cause problems regarding protection even though the sites mainly are subject to laws that are applicable in a wide range of countries. In EU:s report on the responses to a public consultation that reviewed copyright within the EU, many respondents saw problems in sites that are established in jurisdictions outside of the EU. The report finds that a coherent system would prove beneficial as a means of prohibiting infringement.²³⁵ The report is simply a review and not a binding legal document. However, as there is a recognised problem regarding infringement relating to the difference in jurisdiction, this could possibly call for need of sites such as these to revise the terms. The sites would probably not want such a revision as it could complicate their work further, but it could be a possible point to consider if the sites would want to take actions in order to minimize infringement.

²³³ Consumer Affairs Victoria, 'Unfair Contract terms in Victoria: Research into their extent, Nature, Cost and Implications', no. 12, (2007), p. 15.

²³⁴ 'Fixing The Biggest Lie on The Web', presentation at: Open World Forum, Paris, 2014, <http://www.slideshare.net/OpenWorldForum/hugo-roy-legal-track>.

²³⁵ Directorate General Internal Market and Services Directorate D – Intellectual property D1 – Copyright, 'Report on the responses to the Public Consultation on the Review of the EU Copyright Rules', (2014), p. 84.

6 Conclusions

Even though popular social media have a significant number of users, the terms regulating the relationship between the service provider and the user is often accepted by the users without reading them through and understanding them. With this as a background, the purpose of this study has been to investigate the terms of use for specific online services available on the Internet for distribution of digital content and analyse the legal conditions in order to establish congruence with European and US copyright law.

It would in some cases be preferable if the terms were clarified as this would assist the user in understanding and complying to them. As the sites provide ways to guide users in the matter of copyright, however, it can be said that the sites have the intention to minimize the occurrence of copyright infringements. As it has been shown, there are cases where users and those accessing the sites do not understand the terms nor the licences attached to the content uploaded. This could possibly call for clarification or some sort of additional information. However, it has been shown that even in cases where the sites provide for information in direct relation to the content, users have still been confused as to what terms apply. This could mean that it is a lost case for the sites to try to minimize infringements. Instead, it needs to lie in the interest of users of the sites to work towards this.

As the legislation governing the sites allows for transfer of rights, there is no limitation on the sites gaining the rights the terms of service grant, despite the rights in some cases being fairly extensive. As the users sign up for or publish work on the sites, they agree to the terms and therefore proper transfer of rights has occurred. A problem that, however, seems to arise is that of protection of moral rights. As stated in the Berne Convention, the moral rights of an author cannot be transferred, regardless of whether he still holds the economic rights or not. As work is uploaded onto the Internet, especially on these types of social media sites that allow for sharing of content, monitoring where work is published further can prove difficult. It would seem that the preservation of an author's reputation and honour is at risk when their work is uploaded on sites allowing content sharing, despite the author himself or the copyright owner not intending for it to happen.

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Appendix

Figure 1: Screenshot of a public profile page on Instagram.

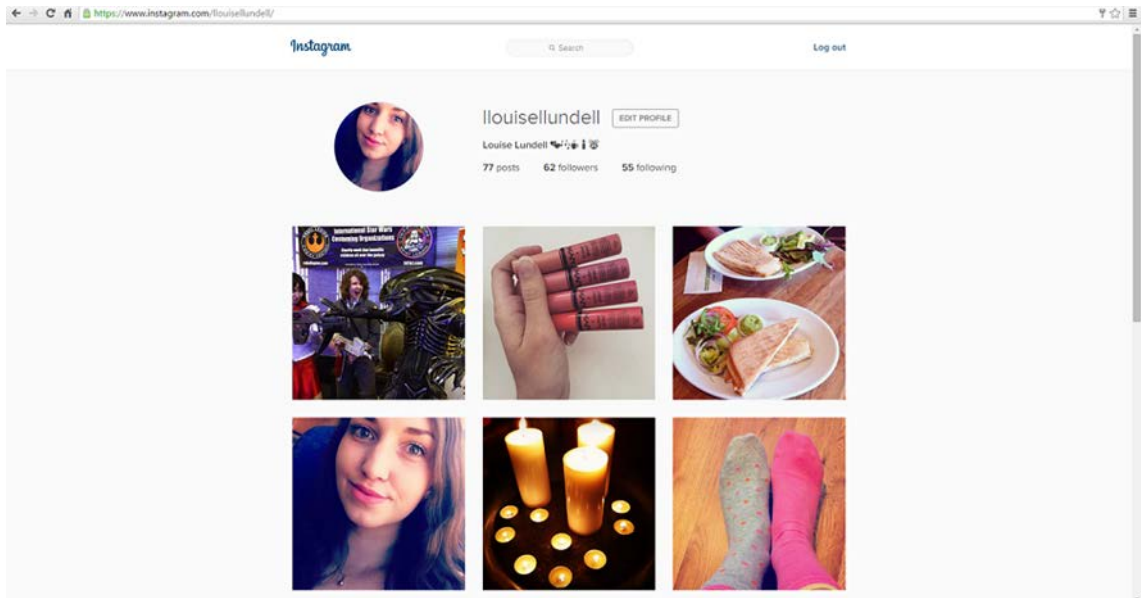
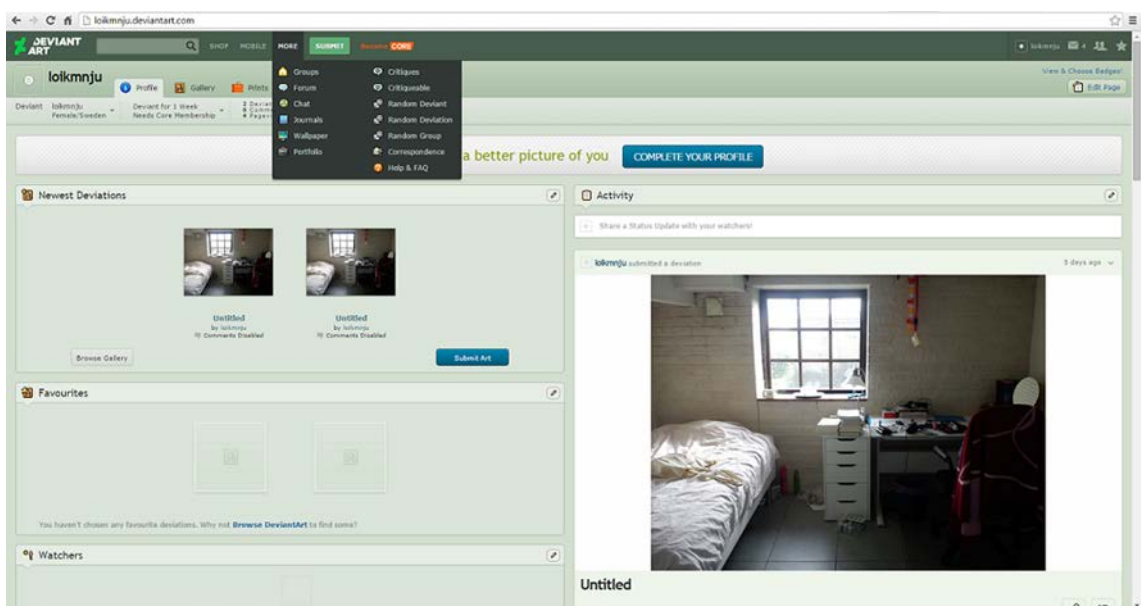


Figure 2: Screenshot of a user account on DeviantArt.



Appendix

Figure 3: Screenshot of a search page on Flickr viewed as a nonregistered user.

