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Instagram Policy Ruling Shows How To Avoid Privacy Suits

By **Allison Grande**

Law360, New York (March 12, 2014, 8:27 PM ET) -- A California judge recently rejected a proposed class action challenging contractual changes Instagram LLC made to the way it handles user information, a ruling that shows companies can insulate themselves from privacy suits by properly informing users of policy revisions and allowing them to opt out.

In a Feb. 28 order sustaining Instagram's demurrer without leave to amend, Superior Court Judge Curtis E.A. Karnow shut down plaintiff Lucy Rodriguez' putative class action alleging that Instagram breached its contract with users and violated California's unfair competition law by **rolling out** terms of use changes in December 2012 that, among other things, granted the site a "transferable and sublicensable" license to use the content posted by users.

Because Instagram reserved the right to alter its terms in its original policy, made changes that were consistent with the language of its original terms, gave users a month's notice before implementing the revisions, and told users that they could opt out of the new policy by withdrawing from the service, Rodriguez has no basis for asserting that the photo-sharing site violated the covenant of good faith and fair dealing by amending its terms, Judge Karnow concluded.

"A takeaway from the opinion is that when a provider changes its terms of use, it should do so only after providing clear notice of those changes in advance, and giving users an opportunity to opt out before the changes go into effect," Steptoe & Johnson LLP partner Jason Weinstein told Law360. "Here, Instagram made clear that continued use of the service after the effective date of the new terms constituted agreement to those terms."

With companies amassing more consumer data than ever, it is becoming increasingly important for them to be able to maintain the ability to change their privacy policies to account for new uses of information that were not imagined when the original policy was drafted, attorneys noted.

"It's very much the case that, often in the e-commerce and analytics spaces, folks are realizing that they have been accumulating data over a period of time that now has a value they hadn't foreseen, so they want to make sure that they are maintaining maximum flexibility in being able to use the data they have," said Ryan Ricks, a privacy and intellectual property attorney at Snell & Wilmer LLP.

Given the pressing need for flexibility, Judge Karnow's ruling provides a welcome road map to instituting changes in a way that can reduce legal liability, according to experts.

"It doesn't necessarily tell companies all that much that they didn't already know, but it does give them

some comfort that as long as they give notice in a reasonable manner and give users a chance to consent, then they'll be pretty safe," University of Houston Law Center professor Jacqueline Lipton said.

Attorneys note that companies can also take some solace in the rejection of Rodriguez's attempt to establish harm by arguing that Instagram's imminent plans to sublicense her pictures denigrated her valuable property rights.

"The court's ruling is consistent with an ever-strengthening line of precedent highlighting the difficulty to plead or prove, and lack of courts' willingness to find, the requisite actual damages necessary to move forward in various types of privacy-based actions," said Torin A. Dorros, the managing attorney of Los Angeles-based boutique firm Dorros Law.

Rodriguez **launched her state court challenge** in July, just three days after a federal judge tossed a similar proposed class action over the legality of the policy changes due to a lack of jurisdiction.

Previous cases, such as data breach litigation against Zappos.com Inc. in 2012 and a challenge to a clause added to banking customers' account agreements in the the 1998 case Badie v. Bank of America Corp., have struck down similar policy modifications. But the Instagram policy was able to withstand judicial scrutiny because the original policy provided for notice and affirmative assent to any changes rather than giving the site a unilateral right to change material contract terms, attorneys noted.

"The message here is that you have to give users a chance to take their ball and go play on someone else's court if they don't agree with the changes," said Foley Hoag LLP privacy and data security practice co-chairman Colin Zick.

Rodriguez tried to get around the roadblock by asserting that the notice and consent process was meaningless because Instagram does not purge content posted by users who choose to leave the site, meaning Instagram essentially applies the new terms to all content users upload to site, regardless of whether a user agrees to the new terms.

Judge Karnow did acknowledged that "perhaps it might breach the original terms" if the site sublicenses content of users who never agreed to the new terms, leaving experts to flag the issue as one that could be raised in future litigation.

"Sites that are making material changes to privacy policies that expand information use or sharing must either segregate pre-change from post-change information, or get opt-in from the earlier users for the new use," said Jonathan Ezor, a profesor at Touro Law Center and of counsel at Olshan Frome Wolosky LLP. "Otherwise, they risk Federal Trade Commission and other enforcement action, and potential exposure to lawsuits that may be more successful than this one."

Companies also should watch out for suits brought by plaintiffs who took up the offer to opt-out of the policy changes, which Rodriguez did not do.

"The issue with online agreements, and changes to them, is whether the user has agreed to them," BakerHostetler partner Alan Friel said. "Here the plaintiff did not plead the elements of any of her causes of action because she continued to use Instagram. This would be a different case had she not gotten meaningful notice or had discontinued using the service after getting notice of the upcoming new terms."

Besides the legal risks, companies also would be wise to take into consideration potential reputational risks associated with especially controversial policy changes, which could be even more damaging to the company than resulting litigation, attorneys added.

“The way to comply with the legal standards is fairly straightforward and well-understood, but the ways to manage reputational risks are much more complex, and that's where the larger pitfalls lie,” Ricks said.

Rodriguez is represented by Jeffrey K. Krinsk, Mark L. Knutson and William R. Restis of Finkelstein & Krinsk LLP.

Instagram is represented by Michael G. Rhodes, Matthew D. Brown, Mazda K. Antia and Erin E. Goodsell of Cooley LLP.

The case is Lucy Rodriguez v. Instagram LLC, case number CGC-13-532875, in the Superior Court of California, County of San Francisco.

--Editing by Elizabeth Bowen and Richard McVay.