

# New Decision Addresses Consent to Use Photos on Social Media

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We often get questions from clients about whether they can use content they find on social media. In response, we'll usually walk them through options to get consent, which can range from relatively informal options (such as getting consent through messages on the social media platform) to the more formal options (such as getting a signed release). Although there are different ways to approach this issue, a recent lawsuit in California illustrates some of the challenges.

A child posted a photo on his Instagram account of himself and a cousin wearing 1 Hotel branded robes at one of their hotels. 1 Hotel commented on the post stating: "We love this photo! Reply to this comment with #sharemy1pic if you're happy with us sharing your photo on our social channels." The child's account responded: "@1hotels thank you! #sharemy1pic." 1 Hotel then used the photo on its Instagram account. It later also posted the photo on its website to sell the robes in the photo.

Two years after the photo was posted, the plaintiffs obtained a copyright registration for the photo. The plaintiff later filed a lawsuit against 1 Hotel in the Central District of California, alleging (among other things) that the hotel's use of the photo constituted copyright infringement and unauthorized use of the child's likeness. The hotel then filed a motion to dismiss.

All causes of action were dismissed for different reasons, but some will likely be revived because the plaintiffs were given the opportunity to amend a few of them so that they were passable under the applicable pleading standards. Importantly though, the court substantively determined that the exchange between the plaintiff and hotel on Instagram created an "implied license" to use the photo on the hotel's "social channels." (It's not clear why the license was implied, rather than express.) However, the court found that the hotel may have exceeded the scope of that license by using the photo to sell robes on its website since the exchange never mentioned that. Accordingly, the court denied the hotel's motion to dismiss the copyright claim on substantive grounds, because there is a material issue of fact as to whether the implied license extended to the sale of robes on a website.

The hotel sought to dismiss the misappropriation claim related to use of the minors' likenesses by arguing (1) that the plaintiffs consented to the use of the photo, (2) the use was incidental, and (3) the children are not readily identifiable. The court rejected the first argument for the reasons mentioned above. Although the hotel may have had consent to post the photo on its social channels, it may not have had consent to post it on its website. The court also easily found that the use was not incidental and that the children were readily identifiable.

The causes of action referenced above may be litigated further if the Plaintiffs submit an Amended Complaint, but this present decision still includes some helpful lessons for companies that want to

use content they find on social media. First, although getting a signed release is likely always the safest approach, companies can likely get consent in a less formal matter, such as the one illustrated above. However, when getting consent, it's important to be clear about the scope of that consent. Make sure you're clear about how and where you want to use content to help avoid any surprises (and lawsuits).