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Use My Photo? Not Without Permission

By [NOAM COHEN](#)

THIS is no “star is born” story for the digital age, though at first it may seem like one.

One moment, Alison Chang, a 15-year-old student from Dallas, is cheerfully goofing around at a local church-sponsored car wash, posing with a friend for a photo. Weeks later, that photo is posted online and catches the eye of an ad agency in Australia, and Alison appears on a billboard in Adelaide as part of a Virgin Mobile advertising campaign.

Four months later, she and her family are in Federal District Court in Dallas suing for damages.

On the billboard, Alison’s friend has vanished and so has the [Adidas](#) logo on her hat. Her image is accompanied by a mocking slogan — according to the ad, Alison is the kind of loser “pen friend” (pen pal) whom subscribers will finally be able to “dump” when they get a cellphone.

The conduit for this unusual bit of cultural exchange, it quickly emerged, was the Flickr photograph-sharing service, which is owned by [Yahoo](#). The image had been uploaded to the site by the photographer, Justin Ho-Wee Wong, Alison’s church youth counselor.

Much more than a virtual attic for old photographs, Flickr has flourished as a gathering point for friends and family who want to keep in touch with one another’s lives — a social network with photographs as the organizing principle.

The site simultaneously has become a global clearinghouse for images; at last count, it had more than a billion of them. With its extensive cataloging, the site allows users to search through strangers’ digital photo albums for topics, faces or locations that interest them. That includes, apparently, Australian ad executives holding a casting call for exuberant young Americans.

There are many accusations of people misusing Flickr photographs, including the case of an Icelandic woman who says an online gallery based in Britain sold her work without her approval, and a German photographer who says a right-wing Norwegian political party used a photo of her sister in its materials also without permission.

A most recent example concerns Lindsay Beyerstein, a Flickr member, who says she sent a cease-and-desist letter to Fox News last week over the use by “The O’Reilly Factor” of her photograph of a blogger; the photo can be viewed at Flickr where Ms. Beyerstein has reserved all her rights. Fox News said it had not received the complaint yet.

In another Flickr twist to the Virgin Mobile case, it was a Flickr member from Adelaide, Brenton Cleeland, who first noticed the ad on Churchill Road and, naturally, photographed it to share on Flickr. In the spirit of a site populated with amateur photographers in search of an audience, Mr. Cleeland wanted to spread the news of Mr. Wong's success. "I wonder if he knows that his photo is being used here," he wrote in a posting, adding, "Anyway, congratulations!"

Alison, however, was the first to chime in online, and was hardly as pleased: "Hey that's me! no joke. i think i'm being insulted."

Chang v. Virgin Mobile USA is not the typical intellectual property rights case. A prolific member of Flickr, Mr. Wong has more than 11,000 photographs there that anyone with the time or inclination could page through. And, until recently, those photographs carried a license from Creative Commons, a nonprofit group seeking alternatives to copyright and license laws. The license he selected allowed them to be used by anyone in any way, including for commercial purposes, as long as Mr. Wong was credited.

Instead, the case hinges on privacy, the right of people not to have their likeness used in an ad without permission. So, while Mr. Wong may have given away his rights as a photographer, he did not, and could not, give away Alison's rights. In the lawsuit, which Mr. Wong is also a party to, there is an argument that Virgin did not honor all the terms of the nonrestrictive license.

(Virgin Mobile USA, in a statement, did not address the issues in the lawsuit but said that, as a "independent entity from Virgin Mobile Australia," it had been "erroneously named" in the suit. An e-mail message to a Virgin Mobile Australia spokeswoman was not answered.)

Damon Chang, Alison's brother, wrote in an e-mail message from Taiwan that he "personally sent Virgin Mobile a complaint letter" asking for an explanation. "They responded by saying they are 'promoting creative freedom,' that they didn't do anything wrong," Mr. Chang wrote. "I take that as, 'We didn't do anything wrong, hence we could do it again.'"

The lawsuit, filed by the Changs' lawyer, Ryan Zehl, from the Houston law firm Fitts Zehl, also names Creative Commons. Mr. Zehl said, "as the creator of this new license, they have an obligation to define it succinctly."

He said that the term "commercial use" was too vague to inform users of the license and that it was incumbent on Creative Commons to raise the issue of the rights of the people who appear in the picture.

[Lawrence Lessig](#), the Stanford law professor who was served the papers on behalf of Creative Commons, said he was sympathetic to the Changs' plight.

But, added that, "the part about us is puzzling. It says we failed to instruct the photographer adequately, but the first question is, 'do you want to allow commercial uses?'"

As for giving more advice about the rights of the subjects who appear in photographs, Mr. Lessig said that Creative Commons has to be careful not to provide "what looks like legal advice." But, he added, "this photographer did nothing wrong when he took this photo of this girl, and posted it on his Flickr page. What

he did wasn't commercial use, which triggers the legal issues. If there was a problem here, it was by Virgin."

In the world of creative works, photography has always been in a category alone. The camera was seen as a "soul stealer" in its infancy, and the fact that a photograph was a copy of reality intrigued theorists like Susan Sontag, who wrote presciently in "On Photography" (1977) about the attraction to photographs felt by ad directors.

"Photography does not simply reproduce the real, it recycles it — a key procedure of modern society," she wrote. "In the form of photographic images, things and events are put to new uses, assigned new meanings which go beyond the distinctions between the beautiful and the ugly, the true and false, the useful and the useless, good taste and bad."

She concluded, "In the form of a photograph the explosion of an A-bomb can be used to advertise a safe."

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