

Instagram Artists Beware: Posting Equates to Permission

Sinclair v. Ziff Davis, LLC, 2020 WL 1847841 (S.D.N.Y. Apr. 13, 2020)

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Plaintiff Stephanie Sinclair brought suit against Defendant Mashable and its parent company, alleging copyright infringement when Mashable posted Sinclair’s photograph on its website without Sinclair’s authorization. The Court granted Defendants’ Motion to Dismiss, finding that the Defendants had a valid sublicense from Instagram to post the photograph.

Stephanie Sinclair is an acclaimed photojournalist whose work addresses gender and human rights issues. She posts her photographs both on a searchable personal website and on her Instagram account. The particular photograph at issue in this case is entitled “Child, Bride, Mother/Child Marriage in Guatemala,” which concerns child brides in Guatemala. It was posted publicly on her Instagram account. Mashable is a digital media website, known for content generation and aggregating news stories from across the internet. Mashable reached out to Sinclair to license the photograph, but Sinclair refused Mashable’s offer. Mashable published the photograph anyway, embedding the Instagram version of the photograph in an article about female photographers and refusing Sinclair’s request to take the photograph down.

Though the photograph appeared within Mashable’s article and on Mashable’s website, it was encoded via an Instagram API, which allows users to share public Instagram photographs, and was technically still hosted on Instagram’s server. Instagram’s Terms of Use provide that those who use Instagram’s services grant Instagram a sub-licensable license to the content that they post, and all public content is usable by Instagram’s API. Because Sinclair uploaded a public photograph to Instagram, this constituted her agreement to allow Mashable to embed the photograph on its website as Instagram’s sublicensee via Mashable’s use of the API. A developer can register an account with Instagram in order to use Instagram’s API with its applications. They can then code the API to perform certain functions or use Instagram’s official embed widget to publish media from public user counts. According to the court, “[Sinclair] granted Instagram the right to sublicense the Photograph, and Instagram validly exercised that right by granting Mashable a sublicense to display the Photograph.” *Sinclair*, at *4.

Sinclair argued that Mashable’s failure to obtain a license through her should mean it cannot obtain a license through Instagram. However, the court reasoned that Sinclair rights to license and Instagram’s right to sublicense operated independently. Further, Sinclair argued that the Terms of Use and complex web of agreements were invalid, unenforceable, and unfair. However, the court also rejected these arguments, because the agreements were satisfactory under California law and posed no contradictory issues.

This decision represents an impossible choice for many artists, who must either limit their posts to private accounts and fail to receive any exposure, or post their work publicly and risk the work being exploited in a way that the artist would not approve. Especially given the current global pandemic, artists have few options to market their skills to interested buyers other than posting on the internet. Instagram

should adopt a policy that always allows users to opt out of API use, even if photographs are publicly visible on their accounts.