

## Instagram Artists Rejoice? Not Quite. Judge Reconsiders Prior Ruling, But Instagram Maintains Its Foothold On Rights

***Sinclair v. Ziff Davis, LLC, 2020 WL 1847841 (S.D.N.Y. Jun. 24, 2020)***

By: Barry Irwin and Manon Burns | June 24, 2020

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 originally granted Defendants’ Motion to Dismiss, finding that the Defendants had a valid sublicense from Instagram to post the photograph. However, on a rare grant of a Plaintiff’s Motion for Reconsideration, the Court revised its original decision and determined that there was insufficient evidence showing that Instagram granted Mashable a sublicense.

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.

The Court maintained its original holding that Sinclair, by agreeing to Instagram’s Terms of Use, authorized Instagram to grant sublicenses to Instagram API users. Consequently, Instagram content creators must still endeavor to understand exactly what rights they are giving away when they choose to make public posts by reading through Instagram’s Terms of Use.

However, while the Court originally held that Instagram had granted Mashable a sublicense to embed the photograph, on reconsideration it determined that Instagram’s API Policy may not convey explicit consent to the API users to use copyrighted works. A license to a copyrighted work must convey the licensor’s explicit consent. The Policy’s statement that it was intended to “help broadcasters and publishers discover content, get digital rights to media, and share media using web embeds” could be subject to different interpretations.

While Sinclair will get another chance to pursue her claim against Mashable, there is no saving grace for Instagram account-holders whose content is shared by the explicit permission of Instagram.