



ARE Copyright Alert: New York Court Finds Embedded Instagram Photograph Licensed Under Valid Sublicense Contained In Instagram's Terms Of Use

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A federal district court in New York dismissed a copyright infringement case on a motion to dismiss, holding that when a copyright owner posts a photograph on Instagram under a “public” access profile, a third party who embeds a link to the Instagram posting has a valid copyright sublicense through Instagram’s Terms of Use. *â€Sinclair v. Ziff Davis LLC*, No. 18-CV-790 (KMW), 2020 U.S. Dist. LEXIS 64319 (S.D.N.Y. Apr. 13, 2020) (Wood, D.J.) (“*Sinclair*”).

Background

In *Sinclair*, the Plaintiff, a â€professional photographer, posted a copy of her copyrighted photograph on her public Instagram account. â€Mashable, a third-party website, after being unable to obtain a license directly from Plaintiff to post the photograph, posted an embedded link using the Instagram API to the public Instagram â€version of â€the photograph in an article discussing female photographers. â€Plaintiff sued Mashable (the organization running the Mashable website) and its corporate parent Ziff Davis LLC for copyright infringement.

Discussion

In a pithy and direct decision, the Court found that Mashable’s use of theâ€ photography by embedding it into itsâ€ own website â€using Instagram’s API was pursuant to a valid sublicense granted by Instagram under its Terms of Use.â€

Under Instagram’s Terms of Use,â€ “[b]y accessing or using”â€ Instagram, the userâ€ “grants to Instagram a non-exclusive, fully paid and royalty-free, transferable, sub-licensable world-wide license to the Content that you post on or â€through [Instagram]” subject to Instagram’s Privacy Policy. â€Instagram’s Privacy Policyâ€ in turn provides that when a user designates â€content asâ€ “public” (as Plaintiff did in this case), all content that â€the users upload andâ€ designate asâ€ “public” is searchable by â€the public and subject to use by others via Instagram’s API, which enables others to embed publicly-posted content in its websites.

Based on these interwoven agreements, and Plaintiff’s uploading and designating the photograph on Instagram asâ€ “public”,â€ the Court foundâ€ that Mashable’s use of an embedded link to the photograph using Instagram’s API on Mashable’s own website, was authorized under a sublicense from Instagram.



The Court rejected Plaintiff's arguments completely.

1. The Court found the failure of Plaintiff to grant a direct license to Mashable did not prevent Defendant from, instead, obtaining a sublicense from Instagram. Plaintiff could have posted the photograph in "private" mode if it wanted to avoid granting a sublicense.

2. The Court rejected the argument that it took "public notice" of the meaning of Instagram's agreements and policies. Instead, the Court took public notice of the existence of such agreements, and then interpreted them directly.

3. The Court rejected the argument that since Mashable was not an intended beneficiary of plaintiff's agreement between itself and Instagram it could not enforce the agreement. The Court noted that since Mashable was not trying to enforce the agreement between Instagram and Plaintiff, whether or not it was an intended beneficiary was irrelevant.

4. The Court rejected the argument that the complexity of the Instagram's agreements and its incorporation by reference of multiple agreements somehow made them invalid. Under California law, the form of Instagram's agreement was acceptable.

5. The Court rejected the argument that Instagram's agreement was invalid as "circular", "incomprehensible", and "contradictory" as unsupported by Plaintiff's arguments.

6. The Court rejected the argument that Mashable "sold" the photograph in violation of the Instagram Terms of Use, since Mashable merely embedded the photograph on its website, as the sublicense authorized it to do. Significantly, the Court failed to address the unsettled question of "whether embedding an image constitutes 'display' that is capable of infringing a copyright in the image". We will have to wait another day for an answer to that seminal and hotly contested question.

7. The Court rejected Plaintiff's objection to being forced to choose between posting her photograph in "public" mode (and thus giving up enforcement rights when it is embedding) or restricting access using "private" mode. The Court found "Plaintiff made her choice", and "[t]his Court cannot release her from the agreement she made."

The Court also dismissed the claim against Ziff Davis (Mashable's corporate parent) because Plaintiff failed to allege Ziff Davis's involvement in Mashable's alleged copyright infringement.

Conclusion

According to this Court, when a copyright holder (or presumably one acting under authority



of the copyright holder) posts a copyrighted photograph in a “public” Instagram posting, others can repost the work within an embedded link to Instagram using its API, without violating copyright law.

We will continue to monitor and report on the use of embedded links of photographs. In the meantime, for more information feel free to contact us.

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