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Copyright Licensing

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SDNY: Instagram Sublicense Protects Against Liability for Embedding of Public Posts

As is the case for most social media networks, photos and videos can be shared in seconds and thousands of users can view the same image or video within the first few moments after clicking the post. And, in a matter of minutes, that new funny photo or quarantine workout can be shared with hundreds of followers.

So, how are intellectual property rights being protected in the chaos of evolving social media? More specifically, what is the effect on your intellectual property rights if you have a public profile? In a recent decision, *Sinclair v. Mashable Ziff Davis, LLC and Mashable, Inc.*, No. 18-CV-790 (KMW), 2020 U.S. Dist. LEXIS 64319, at *2 (S.D.N.Y. Apr. 13, 2020), the United States District Court for the Southern District of New York ruled that a photographer's public Instagram post could be used on other websites, without her prior approval, as a result of Instagram's Terms of Use.

Copyright and Instagram: Terms of Use

Instagram is one of the most popular social media platforms to date. It allows members to access

and share photographs or videos. Accounts can be either private or public. Private accounts require the account holder's permission to follow the account and see posts or stories. Public accounts do not, and posts are readily available for anyone to see.

In the past, it has been generally understood that in order to avoid copyright infringement, you should obtain permission prior to re-posting or sharing an image, story, or video on social media platforms. The court in *Sinclair*, however, concluded that Plaintiff's claims against Mashable, who re-posted Sinclair's public Instagram post containing a photograph on Mashable.com, failed as a matter of law and granted Mashable's motion to dismiss even though Mashable did not have direct authorization from Sinclair for the re-post.

Plaintiff Stephanie Sinclair is a gender and human rights photographer known for her visual expressions of those issues around the world. In this case, Sinclair claimed she owns an exclusive United States copyright in the image titled "Child, Bride, Mother/Child Marriage in Guatemala," a photograph she took herself and posted to her public Instagram page.

Defendant Mashable, an entertainment and media website, contacted Sinclair and sought a license for that photograph to use in an article for publication on its website. Sinclair was offered \$50 for licensing rights. She declined the offer. Mashable posted the article and used Sinclair's photograph anyway. Sinclair demanded the photograph be taken down,

Mashable refused, and the lawsuit ensued.

Mashable filed a motion to dismiss the operative complaint on the primary grounds that it was a sublicensee of Instagram, who granted Mashable sublicensing rights for the re-post. The Court agreed, holding that Mashable's re-post of the photograph was authorized pursuant to a valid sublicense from Instagram.

It is well-recognized that a copyright owner may license her rights to works. And where those licenses permit sublicenses, the copyright owner cannot bring an infringement lawsuit against that sublicensee. *United States Naval Inst. v. Charter Commc'ns Inc.*, 936 F.2d 692, 695 (2d Cir. 1991).

Here, the Court reasoned that when Sinclair created an Instagram account, she agreed to Instagram's Terms of Use. Instagram's Terms of Use state that all users, including Sinclair, "grant to Instagram a non-exclusive, fully paid and royalty-free, transferable, sub-licensable, worldwide license to the Contract that you post on or through [Instagram], subject to [Instagram's] Privacy Policy," which details the difference between a public and private account.

The important and relevant difference in this case, and between a private and public account, is Instagram's API. The API allows public posts to be searchable, subject to use, and enables users to embed public content on their websites. Ultimately, because Sinclair posted "Child, Bride, Mother/Child Marriage in Guatemala" on her *public* Instagram page, she agreed to permit websites, including Mashable, to embed her photograph to its website. According to Instagram's Terms of Use, such websites are Instagram's sublicensees.

Sinclair's rejoinder was that the user agreements are "circular," "incomprehensible," and "contradictory;" but the Court disagreed and ruled in favor of Mashable, citing precedent where many similar types of terms of use are upheld as enforceable agreements. The Court stated, "by posting the Photograph to her public Instagram account, [Sinclair] made her choice. This Court cannot release her from the

agreement she made." This case certainly is neither the first nor the last to arise as a result of an Instagram post. Critics argue that this ruling could be detrimental to the creative individuals who rely upon social media exposure for business promotion and growth, while proponents laud the ruling as furthering the social nature of social media platforms like Instagram—that is, to share content among users.

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This article originally appeared on Gordon & Rees' blog, IP Blitz, which provides 21st-century strategies for patent, trademark, and copyrights, and more at ip-blitz.com.

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