



American Society of Media Photographers

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April 17, 2020

Adam Mosseri
Chief Executive Officer
Instagram, Inc.
181 South Park Street, Ste. 2
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Delivered via Electronic Communication and Certified Mail

Mark Zuckerberg
Chairman and Chief Executive Officer
Facebook, Inc.
1 Hacker Way
Menlo Park, CA 94025

Delivered via Electronic Communication and Certified Mail

Re: Embedding Images, Terms of Use, and Communication

Dear Messrs. Mosseri and Zuckerberg,

As General Counsel for the American Society of Media Photographers, Inc. (“ASMP”) I write today on behalf of eight organizations who collectively represent tens of thousands of photographers, designers, illustrators, cartoonists, artists, and other visual creators. Earlier this week, a District Court in the Southern District of New York issued an opinion which stated, in brief, that the use of the Instagram API to “embed” a user’s image on a third-party site did not constitute copyright infringement.¹ This opinion has acted as a catalyst within the visual creator community who have extensively utilized the Instagram platform to display their work. With one opinion, the fears and concerns of artists that social media will serve as a vehicle for unauthorized use have been laid bare, and Instagram’s Terms of Use and policies are at the core of this case.

The court’s opinion and order were based on a series of policies and features that Instagram could change at its discretion. In an effort to remediate the effect of this ruling on your users, we respectfully request that Instagram: (1) change the functionality of its platform to allow all users, including business accounts, to both make their settings “private” and prevent the embedding of their images both on an account-wide and individual-image basis; (2) adjust the Terms of Use, Platform Policy, and associated policies accordingly to prevent similar situations to the one Ms. Sinclair encountered; and, (3) create and maintain open communication between Instagram and the visual creator community moving forward.

The Problem

In the case referenced above, *Sinclair v. Ziff Davis*, the publication Mashable, Inc. sought permission from photojournalist Stephanie Sinclair to use one of her photographs on its site to accompany an article. When

¹ *Sinclair v. Ziff Davis, LLC, and Mashable, Inc.*, No. 1:18-CV-00790 (S.D.N.Y. April 13, 2020).

Ms. Sinclair declined the bottom of the barrel \$50.00 licensing fee that Mashable proposed, the site then chose to simply embed the image in that same article via Instagram's API. In this case, the API was used to circumvent the creator's stated wishes and undermine her copyright in the image. We would hope that the underlying policy of your company is not to allow its API to act as a work-around to fair licensing negotiations or recognition of Ms. Sinclair's work as having value and worth.

As the court indicated, Ms. Sinclair agreed to the Terms of Use and other policies when setting up her Instagram account, and made her account "public." That was enough for the court to find that Mashable was permitted to use her image by displaying it via the Instagram embed feature on their site, a site supported by revenue-generating advertising in the sidebar of the same page.

The specific language of Instagram's policies that triggered this interpretation was Instagram's Terms of Use content as follows:

[By] posting content to Instagram, the user "grant[s] to Instagram a non-exclusive, fully paid and royalty-free, transferable, sub-licensable, worldwide license to the Content that [the user] post[s] on or through [Instagram], subject to [Instagram's] Privacy Policy. *Sinclair v. Ziff Davis, LLC, and Mashable, Inc.*, Case 1:18-cv-00790-KMW, 4-5 (S.D.N.Y. April 13, 2020).

While the specific language has changed in format since the policies under review in *Sinclair*, the current Terms of Use state:

Instead, when you share, post, or upload content that is covered by intellectual property rights (like photos or videos) on or in connection with our Service, you hereby grant to us a non-exclusive, royalty-free, transferable, sub-licensable, worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content (consistent with your privacy and application settings).²

In addition, Instagram's Privacy Policy indicates that any user who designates her account as "public" subjects herself or her content to be used by others through Instagram's API, subject to the additional terms of the Platform Policy. The court ruled that since the photographer in this case had a public profile, as many users do, Instagram's Terms of Use and Privacy Policy granted Mashable a sublicense to share the photographer's image against her previously expressed refusal to do so by embedding it on their website via Instagram's API. This puts photographers in the difficult position of choosing whether to make their account private and rejecting the functionality of a business account or allowing their work to be used widely without permission via a public profile. However, we believe there may be a reasonable solution for both Instagram and photographers.

² [Instagram Terms of Use](https://help.instagram.com/581066165581870), <https://help.instagram.com/581066165581870> (last visited April 16, 2020).

The Proposed Solutions

We propose that Instagram could follow the pattern of other platforms, such as YouTube, and allow photographers to choose whether or not they want to permit embedding of their works on either a global or a post-by-post basis; consider changing its Terms of Use and Platform Policy to prevent users from shielding themselves from liability based on Instagram's policies; and open a frank and ongoing dialog with the creative community in order to protect the rights of photographers, designers, and visual artists throughout the world. We would be happy to be a part of any conversations towards this goal.

Given the strong relationship between photographers and Instagram, we have faith that the intentions of Instagram were never to strip a photographer of the right to choose whether to license or not license her work to a third party. We hope that any creator using Instagram's platform to express themselves and showcase their work and personality won't have to choose between the rock of limiting their exposure to a narrow audience by setting their profile to "private" (thereby limiting the usefulness of Instagram) and the hard place of having their work usurped against their wishes by an outlet or in a way that is unacceptable to them economically or morally.

We hope that Instagram will consider revising its policies to better reflect the laws that protect copyright holders and their work. We look forward to working with you on resolving our concerns. Thank you for your attention and consideration in this matter.

Sincerely,



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On behalf of:

American Photographic Artists
American Society for Collective Rights Licensing
Digital Media Licensing Association
Graphic Artists Guild
North American Nature Photographers Association
National Press Photographers Association
Professional Photographers of America