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Attorneys for Plaintiffs and the Proposed Class

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ALEXIS HUNLEY and MATTHEW SCOTT
BRAUER, Individually and On Behalf of All
Others Similarly Situated,

Plaintiffs,

v.

INSTAGRAM, LLC,

Defendant.

Case No. No. 3:21-cv-03778-CRB

CLASS ACTION

**FIRST AMENDED COMPLAINT FOR DAMAGES
BASED ON COPYRIGHT INFRINGEMENT**

JURY TRIAL DEMANDED

1 Plaintiffs Alexis Hunley and Matthew Scott Brauer, on behalf of themselves and all others
 2 similarly situated, for their complaint against Defendant Instagram, LLC, allege upon personal
 3 knowledge as to their own conduct, and on information and belief based on the investigation of
 4 plaintiffs' counsel, as to all other conducted alleged herein, as follows.

5 I. INTRODUCTION

6 This case seeks to address whether Instagram, LLC ("Instagram"), the world's largest
 7 photo sharing application with more than 50 billion photos uploaded by over one billion
 8 Instagram users since 2012, is liable for secondary copyright infringement of third-party website
 9 publishers who violated Instagram users' exclusive display rights under the Copyright Act.

10 1. Plaintiffs allege that Instagram created a scheme Instagram, LLC ("Instagram") is
 11 the world's largest photo sharing application with more than 50 billion photos uploaded by over
 12 one billion Instagram users since 2012. This case is about Instagram's scheme to generate
 13 substantial revenue for its parent, Facebook, Inc., by encouraging, inducing, and facilitating third
 14 parties to commit widespread copyright infringement. This scheme was accomplished by using
 15 Instagram's "embedding" tool to display copyrighted works of Instagram users on third-party
 16 publisher websites, thereby vastly extending Instagram's reach across the Internet, but without
 17 appropriately compensating the copyright holders or granting third-party website publishers
 18 authorization to display Plaintiff's works.

19 1.2. Instagram will seek to finally dismiss this case based on its reliance on its Terms
 20 of Use for Instagram Users, and point to the "Server Test," a legal doctrine created in the *Perfect*
 21 *10* Ninth Circuit case from 2007, which is not mentioned or found anywhere in any version of
 22 Instagram's Terms of Use or Platform Policy for "embedding" copyrighted content. In other
 23 words, the application of the Sever Test is not simply a legal issue that Plaintiffs maintain is no
 24 longer applicable here, but is a factual issue in dispute based on the evidentiary record found in
 25 this case at this juncture and based on the Copyright Act being technology agnostic when it
 26 comes to the display right.

27 2.3. -Generally, "embedding" means the process of copying the unique hypertext
 28 markup language ("HTML") code (letters, numbers and symbols, etc.) assigned to the location of

1 digital copy of the photo or video (also made up of code, in files known as jpegs for photos or
2 mpegs for videos found on Instagram) ~~each photo or video~~ published to the Internet, and the
3 insertion of that code into a target webpage or social media post so that photo or video appears
4 within the target post. Within the Instagram environment, this means that third party website
5 publishers (such as BuzzFeed.com and Time.com)~~parties~~ can copy the HTML code of an
6 Instagram user's post and paste it into the third party's website, causing the photo or video posted
7 to that Instagram user's account to be simultaneously displayed on that third party website.
8 Simply put, embedding is code interfacing with another form of code to cause a display of a
9 photo or video to occur in two or more places at the same time (e.g., Instagram and
10 BuzzFeed.com and/or Time.com).

11 3-4. Plaintiffs allege that when a third party embeds a copyrighted photo or video from
12 an Instagram user's Instagram account to that third-party's website without a license, permission,
13 or valid legal defense from the copyright owner, or from Instagram, this constitutes an
14 infringement of the copyright owner's exclusive display right under the Copyright Act of 1976,
15 17 U.S.C. §101 *et seq.*, and therefore violates the law.

16 4-5. Creators of photos and videos generally register their works with the U.S.
17 Copyright Office for the primary purpose of licensing those works because each such registered
18 video or photo has value. ~~Plaintiffs allege that~~ Instagram, through the direction and control of
19 Facebook, created and encouraged the use of Instagram's embedding tool to execute a scheme to
20 expand and grow Instagram's presence on third party websites to obtain a direct financial benefit
21 derived from increased traffic, impressions, clicks and views monetized through advertising
22 revenue on Instagram. The effect of this scheme has been the usurpation of the value of the
23 copyrighted works, as the practice of embedding posts from Instagram has vitiated and diluted the
24 market for licensing fees. By encouraging third party online publishers such as BuzzFeed.com,
25 Time.com, Mashable.com, and others to use the embed tool to display copyrighted works without
26 a license or permission from the copyright owners or from Instagram, Instagram is secondarily
27 liable for each instance of those online publishers infringing a copyright owner's display right
28 caused by the unauthorized embedding of the respective photo from the user's Instagram post.

1 5-6. From ~~on or~~ about July 2013 until June 2020, Instagram knew or recklessly
2 disregarded that no third party ever obtained a license or permission from Instagram to embed a
3 copyrighted photo or video. Instagram also knew or recklessly disregarded that no third party ever
4 obtained a license or permission from the copyright owner each time the embed tool was used to
5 display a copyrighted work. Instagram also regularly and systematically handled, controlled,
6 made reference to, and touched valuable copyrighted works with the intent and knowledge that
7 third party online publishers were embedding those works without ever obtaining a license from
8 the copyright owner, which in turn generated more traffic, more clicks, more likes, more shares,
9 and other revenue-generating conduct for Instagram born out of the infringing activity of third
10 parties.

11 6-7. Instagram misled the public to believe that anyone was free to get on Instagram
12 and embed copyrighted works from any Instagram account, like eating for free at a buffet table of
13 photos, by virtue of simply using the Instagram embedding tool. Instagram, by acts of
14 commission or omission, also misled third parties to believe that they did not need to obtain a
15 license or permission from the copyright owner to embed those works. This dramatically changed
16 in June 2020 when Instagram publicly admitted via a Facebook spokesperson that third parties in
17 fact needed to secure a license or permission from the copyright holders to embed copyrighted
18 works. See [https://arstechnica.com/tech-policy/2020/06/instagram-just-threw-users-of-its-
19 embedding-api-under-the-bus/](https://arstechnica.com/tech-policy/2020/06/instagram-just-threw-users-of-its-embedding-api-under-the-bus/).

20 7-8. By this admission, Instagram has been caught red-handed in its scheme to usurp
21 the value from copyrighted works for its own benefit in contradiction of its 2012 promise not to
22 sell and monetize copyright owner's photos and videos to third parties. Instead, Instagram
23 actively and directly encouraged, solicited, induced, facilitated, and handled copyrighted works in
24 its efforts to cause third party "embedders" to use the embed tool which, in turn, caused
25 copyrighted works to be displayed, republished, publicly performed and distributed, without
26 compensation, and in direct and indirect violation of the Copyright Act.

27 8-9. To make matters even more problematic for copyright owners who published their
28 photos and videos on Instagram, Instagram did not provide any tool, device or meaningful way

1 for copyright owners to control or track third party embeds of their Instagram posts, thereby
2 depriving copyright owners of the ability to discover alleged infringements. Meanwhile,
3 Instagram retained for itself the ability to track embeds of Instagram user content across the
4 Internet. It not only shopped certain user content to online publishers for embedding, but it also
5 retained for itself the technological means and ability to track copyrighted works embedded on
6 third party websites – all the while retaining 100% of the benefit and/or revenue from the
7 infringing activity of third-party embedders – of which Instagram had actual and/or constructive
8 knowledge.

9 9.10. From 2013 to 2021, Plaintiffs and members of the Class who owned copyrighted
10 works uploaded their intellectual property in the form of photo and videos to Instagram with the
11 expectation and trust that Instagram (and its parent Facebook) would honor, protect and respect
12 their copyrighted works. Therefore, Instagram’s use of the embed tool and scheme violated each
13 user’s exclusive display rights under the law by its scheme. This scheme utilized the embedding
14 tool to convert Plaintiffs and members of the Class’s copyrighted works to Instagram’s benefit.
15 Instagram misled by causing Plaintiff and members of the Class to believe Instagram would
16 protect and respect copyright owners’ works based on Instagram’s terms of use, the contract that
17 allegedly binds users to Instagram. Instead, Instagram denied copyright owners any meaningful
18 opportunity or means to discover and prevent public display of their works that infringed their
19 copyrights through the embed tool. Plaintiffs and members of the Class are thus victims of
20 Instagram’s embedding scheme. No tool exists for copyright owners to police the extensive
21 infringement of their copyrighted works. Instagram knowingly exploited these limitations to
22 maximize its (and its parent Facebook’s) insatiable drive for user volume and the resulting
23 advertising revenue. The more Instagram could induce and encourage third parties to embed
24 copyrighted works from Instagram, the more revenue Instagram generated from traffic and
25 advertising revenue.

26 10.11. Plaintiffs and the members of the Class are victims of a scheme that denies the
27 copyright owner the right to protect their copyrighted works when uploaded to Instagram. In other
28 words, Instagram knowingly deprived the copyright owner of any means, device or tool to protect

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