UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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STEPHANIE SINCLAIR,

Plaintiff,

-against-

ZIFF DAVIS, LLC, and MASHABLE, INC.,

Defendants.

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18-CV-790 (KMW)

OPINION & ORDER

KIMBA M. WOOD, United States District Judge:

Plaintiff Stephanie Sinclair ("Plaintiff"), a professional photographer, brings this copyright suit against Mashable, Inc. ("Mashable") and its parent company, Ziff Davis, LLC ("Ziff Davis") (together, "Defendants"), alleging that Defendants infringed Plaintiff's copyright when Mashable posted one of Plaintiff's copyrighted photographs on its website. Defendants have moved to dismiss Plaintiff's Second Amended Complaint. The Court finds that Mashable used Plaintiff's photograph pursuant to a valid sublicense from Instagram, and that Plaintiff fails to state a claim for copyright infringement against Ziff Davis. Therefore, the Second Amended Complaint is DISMISSED.

BACKGROUND

Plaintiff is a professional photographer. (Second Amended Complaint ("SAC") ¶ 9, ECF No. 15.) Plaintiff owns an exclusive United States copyright in the image titled "Child, Bride, Mother/Child Marriage in Guatemala" (the "Photograph"). (*Id.* ¶ 47 & Ex. F.) Plaintiff maintains a publicly-searchable website to showcase her photographs to potential customers. (*Id.* ¶ 15.) Plaintiff also maintains an account on Instagram, a photograph- and video-sharing social media platform. (*Id.* ¶ 31 & Ex. D.) Plaintiff posted a copy of the Photograph to her Instagram

account, which is a "public" account, viewable by anyone. (*Id.*)

Defendant Ziff Davis is a digital media and advertising company that owns multiple online brands and print titles. (*Id.* ¶ 16.) Ziff Davis owns Defendant Mashable, a media and entertainment platform that operates the website www.mashable.com. (*Id.* ¶ 17.)

On March 11, 2016, an employee of Mashable contacted Plaintiff via email and sought to license the Photograph for use in an article about female photographers, to be published on Mashable's website. (*Id.* ¶ 22.) Mashable offered Plaintiff $50 for licensing rights to the Photograph. (*Id.*) Plaintiff did not accept Mashable's offer. (*Id.* ¶ 23.) On March 16, 2016, Mashable published an article about female photographers on its website, which included a copy of the Photograph (the "Article"). (*Id.* ¶ 24.)

Mashable used a technical process called "embedding" to incorporate the Photograph into the Article. (*Id.* ¶ 24, 36.) Embedding allows a website coder to incorporate content, such as an image, that is located on a third-party's server, into the coder's website. (*Id.* ¶ 37.) When an individual visits a website that includes an "embed code," the user's internet browser is directed to retrieve the embedded content from the third-party server and display it on the website. (*Id.* ¶ 38.) As a result of this process, the user sees the embedded content on the website, even though the content is actually hosted on a third-party's server, rather than on the server that hosts the website.[1] (*Id.* ¶ 39.)

Here, Mashable embedded in its Article the copy of the Photograph that Plaintiff had previously uploaded to the server of Instagram. Instagram uses a service called "application programming interface," or "API," to enable users to access and share content posted by other

[1] A more detailed explanation of the embedding process is helpfully set forth in *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 587 (S.D.N.Y. 2018) (Forrest, J.).

users whose accounts are set to "public" mode. (*Id.* ¶ 33.) Pursuant to certain Instagram policies, users can use the API to embed Instagram posts in their websites. (*Id.*) That is exactly what happened here: Mashable used the API to embed, in the Article, the copy of the Photograph that Plaintiff previously posted to her public Instagram account.

On or about January 19, 2018, Plaintiff demanded that Defendants take down the copy of the Photograph from the Article, and compensate Plaintiff for infringing on her copyright. (*Id.* ¶ 41.) Defendants refused to do so. (*Id.* ¶ 42–43.) On January 29, 2018, Plaintiff brought this copyright suit against Defendants. (ECF No. 1.) Plaintiff filed an Amended Complaint on March 15, 2018, and, with consent of Defendants, filed a Second Amended Complaint on April 10, 2018. (ECF Nos. 11, 15.) On May 2, 2018, Defendants moved to dismiss the Second Amended Complaint (the "Motion"). (ECF No. 18.)

LEGAL STANDARD

A complaint must be dismissed if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Aschroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). For purposes of deciding a motion to dismiss, "[a] complaint is deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are 'integral' to the complaint." *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004) (citations omitted).

DISCUSSION

I. Mashable Used the Photograph Pursuant to a Valid Sublicense from Instagram.

Defendants contend that Mashable used the Photograph pursuant to a valid sublicense

from Instagram, so its use of the Photograph does not infringe Plaintiff's copyright. It is well established that a copyright owner may license his or her rights in copyrighted material, including the rights of use, distribution, and sublicensing, to one or more parties. *See Davis v. Blige*, 505 F.3d 90, 98–99 (2d Cir. 2007). A copyright owner who permits a licensee to grant sublicenses cannot bring an infringement suit against a sublicensee, so long as both licensee and sublicensee act, respectively, within the terms of their license and sublicense. *See United States Naval Inst. v. Charter Commc'ns Inc.*, 936 F.2d 692, 695 (2d Cir. 1991); *cf. Spinelli v. Nat'l Football League*, 903 F.3d 185, 203 (2d Cir. 2018) (sublicensee cannot acquire valid rights in copyrighted works if sublicensor had no right to issue a sublicense).

Here, Plaintiff granted Instagram the right to sublicense the Photograph, and Instagram validly exercised that right by granting Mashable a sublicense to display the Photograph. By creating an Instagram account, Plaintiff agreed to Instagram's Terms of Use ("Terms of Use"). *See* Motion at 12–13 (quoting Terms of Use ("By accessing or using the Instagram website, the Instagram service, or any applications (including mobile applications) made available by Instagram . . . you agree to be bound by these terms of use.")).[2] Plaintiff concedes that she is bound by the Terms of Use. (Opposition to Motion to Dismiss ("Opp.") at 19, ECF No. 23.)

The Terms of Use state that, 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 you post on or through [Instagram], subject to [Instagram's] Privacy

[2] Plaintiff annexed Instagram's' Platform Policy to the Second Amended Complaint, but did not annex any of the other Instagram policies referenced therein. (SAC Ex. E, ECF No. 15-5.). The Court takes judicial notice of Instagram's contemporaneous Terms of Use and Privacy Policy, both of which are publicly available online. *See* Fed. R. Evid. 201(b)(2); *Force v. Facebook, Inc.*, 934 F.3d 53, 59 n. 5 (2d Cir. 2019). These agreements, which are incorporated into the Platform Policy by reference, are properly considered in deciding this motion to dismiss. *See Sira*, 380 F.3d at 67. Finally, the Court notes that Instagram's policies have been updated since the infringement alleged in the Second Amended Complaint.

Policy." (Terms of Use, Rights § 1.) Pursuant to Instagram's Privacy Policy ("Privacy Policy"), Instagram users designate their accounts as "private" or "public," and can change these privacy settings whenever they wish. (Privacy Policy, Parties With Whom You May Choose to Share Your User Content § 1.). All content that users upload and designate as "public" is searchable by the public and subject to use by others via Instagram's API. (*Id* § 2.) The API enables its users to embed publicly-posted content in their websites. (Platform Policy, Preamble.). Thus, because Plaintiff uploaded the Photograph to Instagram and designated it as "public," she agreed to allow Mashable, as Instagram's sublicensee, to embed the Photograph in its website.

Plaintiff advances a number of objections to this interpretation of her agreements with Instagram, but none is persuasive.

First, Plaintiff argues that Mashable's failure to obtain a license to use the Photograph directly from Plaintiff means that Mashable should not be able to obtain a sublicense from Instagram to use the Photograph. (Opp. at 11–12.) Plaintiff's right to grant a license directly to Mashable, and Instagram's right, as Plaintiff's licensee, to grant a sublicense to Mashable, operate independently. Mashable was within its rights to seek a sublicense from Instagram when Mashable failed to obtain a license directly from Plaintiff—just as Mashable would be within its rights to again seek a license from Plaintiff, perhaps at a higher price, if Plaintiff switched her Instagram account to "private" mode.

Second, Plaintiff argues that the Court cannot take judicial notice of the meaning of Instagram's agreements and policies because they are complex and subject to different interpretations. (Opp. at 13–15.) Although the Court takes judicial notice of the existence of Instagram's agreements and policies, *see supra* at Note 2, the Court does not purport to take judicial notice of their meaning. The meaning of these contracts is a question of law for the court, rather than a question of fact to which the principles of judicial notice would be applicable.

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