

COURT RULES NEWS ORGANIZATION NOT LIABLE FOR COPYRIGHT INFRINGEMENT BASED ON INSTAGRAM'S TERMS OF USE

Hodgson Russ Media & First Amendment Alert
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In a decision that could have wide-reaching implications for media outlets in New York, a federal judge in Manhattan has ruled that a company did not infringe upon a photographer's copyright by embedding in its article an image from the photographer's Instagram account featuring her photo.

In *Stephanie Sinclair v. Ziff Davis, LLC and Mashable, Inc.*, 18CV-790 (KMW), a professional photographer unwittingly gave away her product for free. That was the lesson from the Southern District's April 16, 2020 decision, where a photographer was deemed to have given a sublicense to fellow Instagram users to use her copyrighted photographs because she had posted them on her public Instagram page.

The Facts

Stephanie Sinclair is a professional photographer who maintains a website where you can search her photographs. She also has an active social media presence designed to showcase her work and drive consumers to her website. Ms. Sinclair copyrights her photographs before posting them on her website or social medial platforms, including her Instagram account.

Ziff Davis LLC is media conglomerate that maintains a large online presence through multiple companies, including Mashable, Inc. Mashable was reporting a story on female photographers and wanted to highlight Ms. Sinclair. In conjunction with the story, Mashable reached out to Ms. Sinclair about licensing one of her photographs for inclusion in the story—Ms. Sinclair declined. Nonetheless, Mashable ran the story with Ms. Sinclair's photograph. Importantly, at least to the court, was the fact that the photograph was not copied from Ms. Sinclair's Instagram account, but rather it was embedded into the article from her Instagram account. Embedding is a process by which a computer programmer includes content from a third party website, into the programmer's website, without actually copying the content. As a result of the embedding process, a user will see the content (*i.e.*, a photograph or video) on the programmer's website, even though the content is actually hosted on a third-party website.

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When Mashable refused to take down the photograph and compensate Ms. Sinclair, she sued for copyright infringement in the United States District Court for the Southern District of New York. The same court that issued a landmark decision in *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585 (S.D.N.Y. 2018). In *Goldman*, the court held the online media companies liable for copyright infringement when they displayed a photograph of Tom Brady meeting with Kevin Durant and courting him to join the Boston Celtics. The online news networks, like Mashable, did not copy the photograph to their own servers, but rather embedded the photograph from Twitter. Applying *Goldman*, it would seem Ziff Davis and Mashable were liable.

Not so said the *Sinclair* court. The court found that Mashable used the photograph pursuant to a valid sub-license based on Instagram's terms and conditions. When signing up for her Instagram account, Ms. Sinclair agreed to its terms of use which included, among many other things, a provision granting Instagram a "non-exclusive, transferable, sub-licensable, royalty-free and worldwide license to the Content you post on or through [Instagram], subject to [Instagram's] Privacy Policy." Pursuant to that Privacy Policy, all users who have their pages set to "public" agree that their content is publicly searchable and can be used by other Instagram users. As such, because Mashable was also an Instagram user and its use of Ms. Sinclair's publicly available photograph was limited to embedding (as opposed to copying) the photograph from Ms. Sinclair's Instagram account, it was a permitted use pursuant to Instagram's Terms of Use and the sub-license granted to each Instagram user.

The *Sinclair* court reconciled its decision with that of *Goldman* based on the licensing determination. In *Goldman*, the photograph was originally shared on the author's SnapChat account but then reposted by others to their respective Twitter accounts. The defendant news organizations embedded the photograph from one of those Twitter accounts, which did not belong to the author. So in *Goldman*, there was no argument that the news organizations were using the photograph subject to a valid sub-license from Twitter.

The Takeaway

Be careful! The *Sinclair* decision does **not** mean that news organizations are free to embed content from all social media sites without fear of liability for copyright infringement. It means only that, when an artist posts a copyrighted work onto a social media platform that provides a sub-license to all of its other users, then a news organization in New York that is a member of the platform can embed the post, including the copyrighted work within its article.

Authors and news organizations need to be aware of the Terms of Use of their social media platforms and to carefully abide by those terms. The terms utilized by Instagram are not unique; it is owned by Facebook. SnapChat, Pinterest, Tik Tok, and other social media sites include similar licensing/sub-licensing language and some, as in the case of Tik Tok, actually assign over certain copyrights to the company merely by the uploading of content.

If you are an author, be aware of what intellectual property rights you are giving away by uploading content to these sites.

If you are a news organization, be sure that you are embedding from the author's social media account and not from a third-party's account, that you have strictly complied with the platform's Terms of Use, and that you credit the author.

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If you believe your organization is dealing with a similar situation and you would like to discuss the best way to respond or proceed, please contact Ryan Cummings (716.848.1665) or Aaron Saykin (716.848.1345), or any of our other Media & First Amendment Practice attorneys.

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