

#igers Beware - Embedded Instagram Post Found Not To Infringe Copyright

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by Sarah Robertson



A recent decision of the Southern District of New York shields digital publishers from copyright infringement when embedding public Instagram posts in news pieces posted online.

In the case, Stephanie Sinclair, a Pulitzer-Prize winning photojournalist focusing on gender and human rights topics, sued the online publisher and entertainment platform Mashable in 2018 for using her image of a mother and

child in Guatemala without permission in a piece that Mashable ran on female photographers featuring Sinclair's photo along with the photos of others. Masahable approached Sinclair for a license to use the photo. When she refused, Mashable embedded a public Instagram post of Sinclair's featuring the photo instead.

Embedding refers to the incorporation of content, such as a photo, into digital media, whereby the photo is stored on a remote server (here, Instagram's) while being displayed elsewhere (here, Mashable's website).

Unhappy with Masahable's embedded post that resulted in her photo still being displayed, Sinclair sued for copyright infringement.

Analyzing Instagram's terms of use, Justice Wood held that Sinclair's display of her

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photo on her public Instagram account gave Instagram the right, under those terms, to validly sublicense the photo to third parties such as Mashable to display on their sites through embedding. As noted by Justice Wood, Instagram uses an “application programming interface” (or API) to let third parties access and share content posted by other users whose accounts are set to ‘public’ mode, and Instagram’s terms expressly state that “[a]ll content that users upload and designate as ‘public’ is searchable by the public and subject to use by others via Instagram’s API.” Since Instagram’s API enables its users to embed publicly-posted content in their websites, by agreeing to these terms, Sinclair gave third parties the right to use the API to embed her public Instagram posts in their websites, which is exactly what Mashable did in this case.

Sinclair argued, among other things, such as the complexity and interconnectedness of Instagram’s policies, that it was unfair for Instagram to force her to choose between using Instagram in private mode only and letting her works be used for free. Although Justice Wood expressed sympathy for Sinclair’s dilemma, she held that she could not release Sinclair from the Instagram terms that she had adhered to:

“[Sinclair] argues that it is unfair for Instagram to force a professional photographer like [her] to choose between ‘remain[ing] in “private mode” on one of the most popular public photo sharing platforms in the world,’ and granting Instagram a right to sub-license her photographs to users like Mashable. Unquestionably, Instagram’s dominance of photograph- and video-sharing social media, coupled with the expansive transfer of rights that Instagram demands from its users, means that Plaintiff’s dilemma is a real one. But by posting the Photograph to her public Instagram account, Plaintiff made her choice. This Court cannot release her from the agreement she made.”

Since news outlets frequently use embeds of Instagram photos to illustrate or build stories, the case provides some comfort that they can continue such practice, so long as the photos involved are posted in public mode. The decision can be viewed as a departure from a 2018 decision of the Southern District of New York, *Goldman v. Breitbart News Network*, which held that embedding an image is still a “display” that is capable of infringing copyright in an image. However, because Justice Wood dismissed Sinclair’s action solely based on the license contained in Instagram’s terms, her decision does not address that specific question as raised in *Goldman* and still unsettled in the Second Circuit.