

Take Two: Photographer's Copyright Suit Over Embedded Instagram Post is Revived

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by Sarah Robertson



We recently [blogged](#) about an April 2020 decision of the federal court for the Southern District of New York, which dismissed a copyright infringement suit brought by Stephanie Sinclair, a Pulitzer-Prize winning photojournalist, against the online publisher and entertainment platform, Mashable. Mashable had embedded a public Instagram post of Sinclair's featuring one of her images in one of Mashable's news pieces, after unsuccessfully approaching Sinclair for a license. Judge

Wood dismissed the case at that time based on the Court's view that Instagram's terms granted a valid sublicense of Sinclair's photo to users of Instagram's application programming interface (API), such that Mashable was free to embed the photo using this API.

On June 24th, Judge Wood [revised her ruling](#) on a motion for reconsideration filed by Sinclair. The Court did not change its earlier holding that, by agreeing to a combination of Instagram's Terms of Use, Privacy Policy and Platform Policy, Sinclair had authorized Instagram, through such terms, to grant API users a sublicense to embed Sinclair's Instagram content.

But the Court reconsidered its prior view that Instagram had actually exercised its right to grant such a sublicense to Mashable and other API users. According to Judge Wood,

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while “courts may find a license on a motion to dismiss where the terms of the governing contracts are clear”, the Court held that the following language of Instagram’s Platform Policy was, in fact, insufficiently clear to warrant a dismissal of Sinclair’s suit since it was open to more than one interpretation: “[Instagram] provide[s] the Instagram APIs to help broadcasters and publishers discover content, get digital rights to media, and share media using web embeds.” In reaching this conclusion, Judge Wood held that the Court “did not give full force to the requirement that a license must convey the licensor’s ‘explicit consent’ to use a copyrighted work.”

Judge Wood also brought her holding into line with a June 1 decision of the Southern District court in McGucken v. Newsweek, another copyright case involving the use of an embedded image, which held that the terms of Instagram’s Platform Policy were insufficiently clear to warrant the dismissal of McGucken’s claims against Newsweek.

The revival of the case comes on the heels of a statement made by Instagram in early June to the digital publication Ars Technica that “[w]hile our terms allow us to grant a sub-license, we do not grant one for our embeds API.” Instagram has also disclosed possible changes to its platform to allow content creators to disable embedding even if their images are posted publicly.

It remains open whether fair use considerations, or the server test, which provides that websites that display copyrighted images without authorization are not liable if that image is retrieved from a third-party server and not hosted by the website’s own server, and which has been upheld by the Ninth Circuit, may continue to shield online publishers against infringement.