

LEGAL AND PRIVACY

## Posting content to social media may result in giving up rights to that content: New York court ruling

May 13, 2020



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Visual images are central to online marketing, and luxury goods companies create a great deal of digital content including visual images which they use both in social media and on their own Web sites to promote their product lines.

These images are often protected by copyright, and in recent years there have been many lawsuits based on alleged online misuse of copyrighted photographs and images. Understanding these rights is crucial to avoiding legal problems.

An April 13 decision from Judge Kimba Wood of the U.S. District Court for the Southern District of New York, *Sinclair v. Ziff Davis, LLC* (2020), deals with the common practice of "embedding" photographs from third-party sources in digital content, dismissing a photographer's copyright claim against an online advertising company that had embedded the photograph she had posted on her Instagram site.

The court held that Instagram's terms of use, which the photographer had agreed to, granted Instagram a license to her images, *and* the right for Instagram to sublicense them to other posters. The advertising company relied on this license, and so she had indirectly authorized that use.

Creators of digital content who post on social media should closely examine the terms of use of these sites to ascertain what rights they may be giving up.

Companies who seek to use others' digital content, but who cannot obtain a license, should likewise determine whether social media sites might be sources of already-licensed content.

The *Sinclair* decision

Professional photographer Stephanie Sinclair shot a photo she called "Child, Bride, Mother/Child Marriage in Guatemala." She then posted it to both her own Web site and on her Instagram account, which she maintains as a

"public" page, viewable by anyone.

Mashable is a popular blog featuring articles on various topics. In 2017, Ziff Davis bought Mashable.

Mashable wanted to use Ms. Sinclair's photograph in connection with an article on female photographers, so it contacted Ms. Sinclair and offered her \$50 to license the photograph. She refused, so, Mashable decided to use the photograph anyway, by "embedding" a link to the photograph posted on Ms. Sinclair's Instagram account.

Ms. Sinclair brought suit for copyright infringement against both Mashable and Ziff Davis.



*Stephanie Sinclair. Image credit: Stephanie Sinclair*

Instagram's terms of use include a license

The New York federal court held that Mashable and Ziff Davis were not liable for copyright infringement because the use was licensed.

By creating an Instagram account, Ms. Sinclair had agreed to Instagram's Terms of Use.

The terms of use stated 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 Policy."

Instagram users have an option to designate their postings "public" or "private." All content that users upload and designate as "public" is searchable by the public and subject to use by others via Instagram's "application programming interface," or API. The API enables its users to embed publicly posted content in their Web sites.

By uploading her photograph to Instagram and designating it as "public," Ms. Sinclair agreed to allow Mashable, as Instagram's sublicensee, to embed her photograph in Mashable's Web site.

Ms. Sinclair argued that it was "unfair," given Instagram's powerful social media dominance, that she had to choose between designating her photographs as public, and licensing them to the world, or designating them "private," and foregoing the valuable exposure she would receive from a public account.

While recognizing this as a "dilemma," the court nevertheless found that this was a valid contractual choice Instagram imposed on her as its user, and the license was enforceable.

Meanwhile, Ms. Sinclair has filed a motion for reconsideration.

Embedding remains controversial in copyright law

The *Sinclair* court avoided the question of whether the practice of embedding constitutes copyright infringement at all.

Embedding allows a Web site coder to incorporate content, such as an image, that is located on a third-party's server, into the Web site.

When an individual visits a Web site 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 Web site.

As a result of this process, the user sees the embedded content on the Web site, even though the content is actually hosted on a third-party's server, rather than on the server that hosts the Web site.

Courts are currently divided whether this infringes on the copyright of the image hosted on the third-party server.

In 2007, the Ninth Circuit Court of Appeals (covering California and eight other western states) held in *Perfect 10 v.*

*Google* (2007) that embedding is *not* copyright infringement.

In 2018, however, a federal court in New York in a case named *Goldman v. Breitbart News* (2018) held that embedding infringes the exclusive right to "display" a copyrighted work.

The sublicense defense successfully asserted in the *Sinclair* case avoids that issue completely. Even assuming that embedding is copyright infringement, Mashable and its parent Ziff Davis could rely on the Instagram license. So, Ms. Sinclair lost her copyright case.

#### Takeaways

The *Sinclair* case illustrates that posting content to social media and other third-party sites may result in giving up some or all of one's rights to their content.

Companies who create and own content should review all terms of such sites to ascertain what rights they may be giving up.

And these terms should be reviewed on a regular basis.

The *Sinclair* court noted that Instagram had amended its policies since the events of the lawsuit took place, and our own recent review of Instagram's policies revealed that while Instagram still allows embedding through its API, it has made some efforts to limit this.

Other social media sites, such as Facebook, Twitter and YouTube, each have their own policies that are amended from time to time. An ounce of investigation is worth a pound of cure.

Conversely, companies that may seek to use others' content are well advised to investigate whether that may have been posted to social media or other Web sites with licensing provisions similar to those in Instagram.

WHERE THE owner of the content is unwilling to provide a reasonable license, or is untraceable, then these sites' licenses may be a way to use content without risking liability for copyright infringement.

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