

Judge smacks down copyright suit over Instagram embedding

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A New York federal judge has ruled that the tech news site Mashable did not violate copyright law when it embedded an Instagram photo from photojournalist Stephanie Sinclair in an article.

James Grimmelmann, a copyright law expert at Cornell University, said that the ruling will provide a firmer legal footing for sites that embed third-party content. "It gives you a very clear basis for throwing out most of these cases quickly," he told Ars in a phone interview.

The dispute began in 2016, when Mashable published an article highlighting the work of 10 female photojournalists whose work focuses on social justice. Mashable included Sinclair among the 10 featured photographers and initially offered her \$50 for the rights to one of her photos. When Sinclair declined to license the photo, Mashable embedded the photo from Sinclair's official Instagram account instead. Sinclair sued, arguing that Mashable had infringed her copyright.

Forget about the server test

In the past, this kind of legal dispute has revolved around a doctrine called the server test. It focuses on the fact that a

publication using a photo-embed code never stores the photo on its own servers or transmits it to the user. Instead, the embed code tells the user's browser how to download the photo directly from another site (in this case Instagram). Most courts have held that this fact means the publisher (in this case, Mashable) cannot be liable for direct copyright infringement since it didn't distribute or display the photo to users.

But not all courts have bought this logic. In a bombshell 2018 ruling, another New York federal judge held that several news sites had infringed copyright when they embedded a photo of football player Tom Brady in stories. The judge concluded that the technical details of how the photo reached the user's browser shouldn't overshadow the fact that news websites were causing the photo to appear on users' browsers without permission from copyright holders.

So rather than relying on the now-shaky server test, Mashable's defense lawyers took a different approach. They argued that Sinclair had granted a license to Instagram to use her photo when she uploaded it. And Instagram's terms of service state that it has the right to sub-license photos to others. Mashable argued that included users of Instagram's embedding service—like Mashable.

That argument was persuasive to Judge Kimba Wood. While Sinclair didn't directly license her photo to Mashable, Wood wrote, she "granted Instagram the right to sublicense the photograph, and Instagram validly exercised that right by granting Mashable a sublicense to display the photograph."

It's an elegant ruling that neatly sidesteps the complexities and uncertainties of the server test—which isn't even mentioned in Wood's opinion. The courts may or may not ultimately uphold the server test. But even if the test falls, Judge Wood's ruling provides an alternate defense for people embedding content from third-party websites.

More clarity on what's legal

This new legal principle draws a sharp distinction where the server test left things muddled: situations where someone other than the copyright owner uploaded an image or video. The server test said that someone embedding such an unauthorized social media post would not be a direct copyright infringer. But they could still be liable under complicated doctrines of indirect copyright liability.

In contrast, Judge Wood's licensing-based reasoning draws a clear line between authorized and unauthorized social media uploads. Embedding social media posts authorized by copyright holders is unambiguously legal under Wood's reasoning, while the same logic provides no defense to someone who embeds an unauthorized image.

This means that media organizations would be well-advised to train reporters to pay attention to the source of social media posts they embed. Media organizations are on safe legal ground if they embed social media images posted by their legitimate copyright holders. But they should be cautious about embedding images posted by third parties unconnected to the copyright holder—since in that case they'd be wholly reliant on the server test to justify their actions.

The licensing-based legal theory significantly limits how embedded images can be used. Like any Instagram user, Sinclair has the option to disable Mashable's use at any time by marking her Instagram post private. Indeed, she appears to have ultimately exercised this option, as her photo no longer appears in Mashable's article. Sinclair's entire Instagram account, with almost 170,000 followers, is now locked down.

And while Mashable got a license to Sinclair's photos, that license was limited to the use of Instagram's embedding tool. If Mashable wants to use the photo for other purposes, it would need to negotiate a separate license.

Grimmelmann pointed to a 2013 ruling that found French news agency AFP had violated copyright law by redistributing a photo taken from Twitter for printing in newspapers. AFP may have had the right to embed a tweet containing the photo on its website, but that didn't mean that AFP could do whatever it wanted with the photo.

"AFP was not using the photo within the terms of the license, because they weren't using the API-based embedding," Grimmelmann said.

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