

Photographer can't sue a website for embedding her Instagram post, says court

A court that *Mashable* can embed a professional photographer's photo without breaking copyright law, thanks to Instagram's terms of service. The New York district court determined that Stephanie Sinclair offered a "valid sublicense" to use the photograph when she posted it publicly on Instagram.

The case stems from a 2016 *Mashable* post on female photographers, which included Sinclair and embedded an image from her Instagram feed. *Mashable* had previously failed to license the image directly, and Sinclair sued parent company Ziff Davis for using Instagram embedding as a workaround.

But Judge Kimba Wood noted that Instagram reserves a "fully paid and royalty-free, transferable, sub-licensable" right to photos on its service. If a photo is posted publicly, it also offers embedding as an option – which, in Wood's estimation, effectively grants a sublicense to display the picture. "The user who initially uploaded the content has already granted Instagram the authority to sublicense the use of 'public' content to users who share it," Wood wrote. That makes copyright questions moot.

"By posting the photograph to her public Instagram account, Plaintiff made her choice."

Among other things, Sinclair argued that Instagram's terms of use were too "circular," "incomprehensible," and "contradictory" for this interpretation. She also said Instagram had set up an unfair dichotomy: either let people legally post their photos on other sites or avoid one of the

world's most popular photo-sharing services. "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 [Sinclair]'s dilemma is a real one," responded Wood. "But by posting the photograph to her public Instagram account, Plaintiff made her choice. This court cannot release her from the agreement she made."

This decision diverges from a 2018 ruling that said embedding a tweet could potentially infringe copyright. As *The Hollywood Reporter* notes, though, the decisions rest on different lines of reasoning. The earlier case considered and rejected the long-standing "server test," which says that sites aren't infringing copyright if they simply embed a picture that's hosted elsewhere. This ruling doesn't explain when that rule still applies. Instead, it emphasizes that a web platform's terms of service can have serious repercussions for users, even if almost nobody reads them.

<https://www.theverge.com/2020/4/14/21221078/stephanie-sinclair-mashable-instagram-embed-copyright-lawsuit-dismissed>