



ARE Copyright Alert: New Ruling: Copyright Liability Stems From Use of Embedded Links to Social Media Posts

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In an alert published on April 16, 2020, [we reported on a decision](#) by Judge Kimba Woods of the Southern District of New York, which dismissed a copyright infringement case on a Motion to Dismiss, holding that when a copyright owner posts a photograph on Instagram under a “public” access profile, a third party who embeds a link to the Instagram posting has a valid copyright sublicense through Instagram’s Terms of Use. See *Sinclair v. Ziff Davis LLC*, No. 18-CV-790 (KMW), 2020 U.S. Dist. LEXIS 64319 (S.D.N.Y. Apr. 13, 2020) (Wood, D.J.) (“*Sinclair*” and “April 13th Opinion”).

However, citing a subsequent case from another S.D.N.Y. judge, Judge Woods reversed her dismissal, and these two cases may have been at least partially responsible for Instagram to issue a new policy stating that *websites should not embed links to photos posted on Instagram without clearing all necessary rights*.

Under the old understanding, many website users believed they could simply copy an Instagram page link (or Twitter, Facebook, etc.) without fear of liability if they don’t actually include the underlying photo, because copyright infringement requires “copying,” and if they never copy the photo but instead only copy a link to the photo, they never technically copy the image – and so technically they “don’t infringe (as discussed in our recent April alert). Put another way, the photo never moves from the Instagram/Twitter/Facebook server, and so “copying/infringement” never occurs.

But two recent court rulings have held that posting an embedded link will expose websites to copyright liability.

In *McGucken v. Newsweek LLC*, (subsequent to Judge Wood’s contrary decision in *Sinclair*), Judge Failla of the Southern District of New York ruled that, as a matter of law, the act of embedding of a link to a post on Instagram by the defendant Newsweek does not constitute fair use – stating that **while *Instagram did have a license* from McGucken to display the copyrighted image on Instagram, *there was no evidence of a license or sublicense from either McGucken or Instagram to Newsweek***. *McGucken v. Newsweek LLC*, 2020 U.S. Dist. LEXIS 96126 (S.D.N.Y. June 1, 2020) (Failla, D.J.).

Judge Failla's decision in *McGucken v. Newsweek LLC* resulted in Sinclair filing a motion to request that Judge Wood reconsider her contrary decision in *Sinclair*. In view of *McGucken*, Judge Wood revised her April 13th opinion “in order to correct clear



error.” Revising her April 13th opinion, Judge Wood held that “the pleadings contain[ed] insufficient evidence [to show] that Instagram exercised its right to grant a sublicense to Mashable [(Ziff Davis LLC)].” Judge Wood did, however, “acknowledge[] that it may be possible to read Instagram’s various terms and policies to grant a sublicense to embedders,” – hinting that the story may not be over and that litigation may continue.

Instagram, perhaps in response, has updated and clarified its written policy, noting in a statement to ARS Technica that “While [Instagram’s] terms allow us to grant a sub-license, we do not grant one for our embeds API... Our platform policies require third parties to have the necessary rights from applicable rights holders. This includes ensuring they have a license to share this content, if a license is required by law.” (Lee, “Instagram just threw users of its embedding API under the bus,” [ARS Technica](#) (June 4, 2020).

Those rulings, which merely deny early-stage dismissal orders, have the potential to create large waves in the media industry as a whole, but we think the ultimate rule to live by is anything but clear.

We will continue to monitor this issue and report on developments. For more information, please contact us.

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