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# Southern District of New York: Embedding Public Instagram Post Does Not Infringe Photographer's Copyright

*Sinclair v. Ziff Davis, LLC and Mashable, Inc.*, Case No. 18-cv-790-KMW, 2020 WL 1847841  
(S.D.N.Y. April 13, 2020)

By [Daniel M. Nuzzaci](#)

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The United States District Court for the Southern District of New York held on motion to dismiss that embedded use of content that is publicly posted on Instagram by the copyright owner does not give rise to a copyright infringement claim by the copyright owner. The Court's dismissal hinges on contract law and the licensing/sub-licensing provisions of Instagram's Terms of Use. The decision comes two years after the Court's decision in *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585 (S.D.N.Y. 2018), which considered whether embedding a photograph from Twitter on another website constituted "display" of a work under the Copyright Act.

In *Sinclair v. Ziff Davis, LLC*, the plaintiff ("Ms. Sinclair") was a professional photographer who maintained a personal website and public Instagram account displaying her work. To promote and showcase her photography, Ms. Sinclair uploaded the photograph at issue, titled "Child, Bride,

Mother/Child Marriage in Guatemala” (the “Photograph”), to her website and Instagram account. The defendant (“Mashable”), a media and entertainment platform, saw the Photograph and sought to include it in its soon-to-be-published article about female photographers. After Ms. Sinclair rejected Mashable’s request for a license to use the Photograph in its article, Mashable published a version of the article on its website that included an embedded version of the Photograph from Ms. Sinclair’s public Instagram account. Embedding is a “technical process” that “allows a website coder to incorporate content, such as an image, that is located on a third-party’s server, into the coder’s website. When an individual visits a website 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 website. As a result of this process, the user sees the embedded content on the website, even though the content is actually hosted on a third-party’s server, rather than on the server that hosts the website.” *Sinclair v. Ziff Davis, LLC and Mashable, Inc.*, Case No. 18-cv-790-KMV, 2020 WL 1847841, at \*2 (S.D.N.Y. April 13, 2020) (internal citations omitted).

Ms. Sinclair subsequently brought suit against Mashable for copyright infringement, and Mashable filed a motion to dismiss that resulted in the instant decision.

The Honorable Judge Kimba M. Wood held that Mashable’s embedded use of the Photograph did not constitute copyright infringement because Ms. Sinclair granted Instagram the right to sublicense the Photograph, and Instagram validly exercised that right by granting Mashable a sublicense to display the Photograph. Specifically, by creating an Instagram account, Ms. Sinclair agreed to Instagram’s Terms of Use. The Court summarized Instagram’s Terms of Use as follows: “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.” *Id.* at \*3 (modifications in original). In turn, Instagram’s Platform Policy—which is designed to “help broadcasters and publishers discover content, get digital rights to media, and share media using web embeds”—permits other Instagram users to embed publicly-posted content in their websites. (Preamble to Instagram’s Platform Policy, available at <https://www.instagram.com/about/legal/terms/api/>). Thus, the Court held that by uploading the Photograph to Instagram and designating it as “public,” Ms. Sinclair agreed to allow Instagram to sublicense the Photograph to Mashable for embedded use in the article posted to Mashable’s own website. Accordingly, the Court dismissed Ms. Sinclair’s copyright infringement claim with prejudice.

The *Sinclair* decision arrives two years after *Goldman v. Breitbart News Network, LLC*, which considered whether similar conduct (*i.e.* embedding content publicly available via Twitter) constituted an unauthorized public display in violation of the Copyright Act.[1] In *Goldman*, the court ultimately denied summary judgment to the defendant and found that the technical process of embedding an image on a website could constitute copyright infringement as a forbidden public display even if the embedded image did not reside on the alleged infringer's server.[2] Despite this holding, the Court in *Sinclair* noted that whether embedding an image is a public display that constitutes copyright infringement is "unsettled in [the Second] Circuit." However, because the *Sinclair* court found that Mashable's use was permitted under Instagram's licensing provisions—which were agreed to by Ms. Sinclair, the copyright owner of the Photograph, upon publicly posting the Photograph to Instagram—it did not reach this "unsettled" question of law.

The most apparent takeaway from *Sinclair* is that embedding publicly-available images from Instagram (or other social media platforms with comparable licensing provisions) provides a workaround for sharing content that may otherwise constitute copyright infringement, so long as the embedded image was posted on Instagram by the copyright owner. Embedding a photograph from social media that was not uploaded by the copyright owner could constitute copyright infringement as a forbidden public display if courts follow the rationale in *Goldman*—although, this issue is presently an unsettled question of law. Thus, users looking to embed publicly available content must ensure that (1) the social media platform hosting the content has a terms of service agreement that provides a license to third parties for such embedded use and (2) the content sought to be embedded is uploaded to the social media platform by the copyright owner or a person with comparable authority. The *Sinclair* Court's reliance on contracting and licensing provisions as the basis for its decision leaves open the possibility that other types of use might be permissible too—not just embedding. However, while an expansion of permitted uses is theoretically possible, the conduct in *Sinclair* involved embedding and the Court's decision is limited in scope accordingly. Finally, the *Sinclair* decision does not provide authority to embed images or photographs that are publicly available anywhere on the internet. The decision is based on contract principles and the licensing provisions contained in Instagram's various user policies. Without an underlying terms-of-use agreement like Instagram's, embedded use of copyrighted images may still constitute copyright infringement as a forbidden public display based on the *Goldman* court's rationale.

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[1] One critical difference between the *Sinclair* and *Goldman* cases is that in *Sinclair*, the defendant embedded a photograph posted to Instagram by the copyright owner whereas in *Goldman*, the defendant embedded an image that had been posted to Twitter by someone other than the copyright owner.

[2] Notwithstanding its decision, the *Goldman* court acknowledged that (1) factual questions—such as the existence of licensing or authorization agreements—and (2) the fair use defense may ultimately absolve the defendant of liability. *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 596 (S.D.N.Y. 2018).