

Absolute Lowest Possible Statutory Damages Award Ordered for Infringing a Viral and Potentially Lucrative Photo of Trump

August 1, 2019 – The TMCA

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You may have heard: infringing a viral photo of the current President of the United States will only cost you \$750. Setting aside whether that valuation was at all related to the subject matter of the photo, let's talk about how we got there.

A Brief Recap of *Otto v. Hearst*

In June of 2017, Jonathan Otto used his iPhone to take an amateur photograph of Trump crashing a wedding and posted it to his Instagram and other social media

accounts. Then, a variety of gossip and news organizations (TMZ, Esquire, and others) reposted Otto's photo and the newsworthy(?) moment "went viral." Otto quickly registered a copyright in the photo and sued a number of news outlets for infringement.

As discussed in our [previous post](#), notwithstanding the statutory fair use exception for "news reporting," the U.S. District Court for the Southern District of New York entered a summary judgment order in December 2018 in favor of Otto, finding infringement and no fair use. As the Court explained, Hearst's use of the photo was commercial; the photo was factual in nature, not creative; and the Hearst publication potentially harmed Otto's reasonable financial exploitation opportunities in the market for licensing the photo. According to the Court, if there were a finding of fair use under these circumstances, then

[A]mateur photographers would be discouraged from creating works and there would be

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no incentive for publishers to create their own content to illustrate articles: why pay to create or license photographs if all personal images posted on social media are free grist for use by media companies, as Hearst argues here?

The Court thus promoted a broad view of artists' rights in the context of news reporting (even for amateur iPhone photos) by limiting the scope of permissible fair use.

Damages Order

Nevertheless, on July 24, in deciding damages, the Court ordered Hearst to pay a meager \$750 — the absolute statutory *minimum* absent innocent infringement. In contrast, Otto was seeking \$30,000 for the infringement, which is the absolute statutory *maximum* (absent proof of willful infringement, in which case the statutory damages award can go as high as \$150,000). One might expect that with a viral photo such as this, a Court could look to a reasonable licensing fee and/or lost market value and might have awarded a sum higher than \$750 (but also perhaps much lower than \$30,000).

In briefing before the damages trial, Otto argued that Hearst, a corporate giant and constant photo user, “should have known that a license was required[.]” Otto also argued that a large fine was necessary to deter such behavior from other media giants to “secure intellectual property rights from widespread invasion by large corporations.”

The docket entry of the Court's July 24 damages Order refers to “reasons discussed on the record” during a July 19 telephone conference. A transcript of that conference is not yet available, so it is not entirely clear at this point why the Court ultimately decided on the very low \$750 statutory damage award.

Up next in this copyright saga involving an amateur Instagram photographer versus a giant news agency: a briefing schedule has been set on attorneys' fees. It will be interesting to see whether the “prevailing party,” Otto, will be awarded fees and, if so, how much. The TMCA will keep you posted!