

Trump's a Wedding Crasher and News Outlets Can't Poach Photos Off Instagram

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A lesser-known feature of selecting a TRUMP-branded property as a wedding venue is that the President himself may decide to crash your wedding. It also may end up leading to a substantial copyright law development, specifically regarding the fair use doctrine and photographs posted to social media.

Trump's crash at the Trump National Golf Club in New Jersey in June of 2017, was exposed by wedding attendee Jonathon Otto via his amateur iPhone photograph of the newsworthy moment. Otto took a photo of Trump and the bride and then texted his photo to one friend. The next day his photo appeared in articles across the country, including on outlets such as TMZ, CNN, the Washington Post, the Daily Mail, and Esquire. The publications swiped the photo from another wedding

attendee's personal Instagram account. Having indicated to a friend that he "wanted [his] cut" from the attention garnered by his photo, Otto registered the photo with the Copyright Office and brought infringement suits against five media companies who published his photo without permission. Four media companies have since settled with Otto.

Otto's suit against Hearst Communications, Inc., owner of Esquire Magazine, is ongoing in the Southern District of New York, but a recent ruling may be a substantial new



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development in U.S. Copyright law. U.S. District Judge Gregory H. Woods entered an Opinion and Order granting summary judgment in Otto's favor on the issues of infringement and fair use.

The court's infringement analysis was over in a flash. The court concluded that Otto has a valid, registered copyright in the photo. Hearst did not dispute actual copying or substantial similarity of the photos. Thus, the court easily concluded Hearst infringed Otto's copyright.

The court then addressed Hearst's defense of fair use, and on cross motions for summary judgment, the court again sided with Otto.

Fair use is an affirmative defense to copyright infringement that permits the unauthorized use of a protected work for certain purposes. Notably, "news reporting" is one of a number of statutorily-enumerated purposes. However, according to Judge Woods, an entity's status as a news publication "does not render that entity immune from liability under intellectual property laws."

To determine whether the use of another's copyrighted work is fair use, courts look to four statutory factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

In this case, the court concluded that factors one, three, and four weighed in favor of Otto, while only factor two, the nature of the copyrighted work, favored Hearst.

According to the court, Hearst's use of Otto's photo was commercial. Online readers could view the photo (and corresponding article "President Trump is the Ultimate Wedding Crasher") online at Esquire for free, but Hearst earned revenue from advertisements displayed with the article. Further, the court did not consider Hearst's use of Otto's photo to be transformative because the photo is merely used as an "illustrative aid" and "depicted the subjects described in the articles." As the court stated, "[s]tealing a copyrighted photograph to illustrate a news article, without adding new understanding or meaning to the work, does not transform its purpose—regardless of whether that photograph was created for commercial or personal use."

Favoring Hearst, the court determined that the photo was factual in nature, not expressive or creative. The law recognizes a greater need to disseminate facts than to disseminate fantasy. However, Hearst essentially used the entire photo, and Hearst's publication potentially harmed Otto's reasonable financial opportunities in the market for licensing the photo for publication and use in derivative works. The court noted that a creator "should not be precluded from future profits should they lack the marketing prowess to capitalize on the work at the time of creation." Hearst's publication of the viral photo essentially destroyed the primary market. Finally, the court explained that allowing a publisher to poach an image from an individual's social media account for an article that does little more than describe the setting of the image does not promote "the

Progress of science and the useful Arts,” one of the bases of the fair use defense in furthering the mission of copyright law. According to the court, if Hearst was permitted to use Otto’s photo without authorization by relying on the fair use defense, “amateur photographers would be discouraged from creating works and there would be 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?”

In concluding its fair use discussion, the court emphasized the “fact-driven nature” of the fair use inquiry. This cautious language highlights the uncertain impact of this opinion upon other similar cases “involving personal photographs used by the media[.]” Whether this ruling will be upheld by appellate courts or applied in other circuits also remains to be seen.

A jury will ultimately decide whether Hearst acted willfully in infringing on Otto’s copyright (the trial date has not yet been set). Otto’s willfulness arguments are based on the media conglomerate’s long history of photography licensing and previous charges of copyright infringement. While the court found that a reasonable jury could differ on the issue of willfulness, and thus denied summary judgment on the issue, the court also cautioned that “it is not clear to this Court that an entity’s status as a media publisher *alone* can establish a reckless disregard for the copyright holder’s rights.”

The TMCA will continue to update you with the latest developments in the case and the effects this decision has on future reliance on the fair use defense.