

**Otto v. Hearst Communications, Inc.**  
**No. 1:17-cv-4712-GHW (S.D.N.Y. Dec. 10, 2018)**

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| Year      | 2018  |
| Court     | United States District Court for the Southern District of New York  |
| Key Facts | Plaintiff Jonathan Otto attended a friend’s wedding at the Trump National Golf Club in New Jersey in June 2017. President Donald Trump surprised the celebrants when he stopped by the wedding unannounced. Otto took a picture on his iPhone of President Trump at the wedding. Otto texted the picture to another wedding guest. The next day, Otto learned that his photograph had been published by multiple media outlets, including Defendant Hearst Communications, which had published Otto’s photograph as part of an article about the wedding on Esquire.com. It does not cost money to access Esquire.com, but the page displaying the article about the wedding featured ads from which Hearst earned revenue.   |
| Issue     | Whether a news organization’s unauthorized publication of a photograph in connection with an article about the U.S. President is a fair use.  |
| Holding   | The district court granted Plaintiff’s motion for summary judgment on Defendant’s fair use defense. The court found that the first factor, purpose and character of the use, weighed in favor of Plaintiff. It reasoned that Hearst’s use was not transformative because Otto took the photograph and Hearst used the photograph for the same purpose: to show a noteworthy event. Although the court recognized that in an “extraordinary case,” the public interest in news reporting justify reproduction of an original work without significant alteration, it found that this was not such a case. The court also determined that Defendant’s use was commercial, which weighed against finding a fair use, because Hearst received advertising revenue from the article. The second factor, the nature of the copyrighted work, favored Hearst. Because Otto did not stage or pose the photograph, the court concluded that the photograph was “more factual than creative.” The photograph had also been widely disseminated prior to Hearst’s use, which weighed in favor of Hearst. The third factor, amount and substantiality of the portion used, weighed in favor of Plaintiff, because “Hearst used a slightly cropped but otherwise unedited version of Otto’s photograph.” The court rejected Defendant’s argument that the news reporting purpose of the use required Hearst to use the complete photograph. The final factor, effect of the use upon the potential market, also weighed in favor of Plaintiff. The court observed that “[p]ublishing the [p]hotograph without permission essentially destroy[ed] the primary market for its use.” Although he was not a professional photographer, “Otto had the right to try to sell the [p]hotograph to media outlets, if he decided to do so.” Hearst’s use of a nearly identical version of Otto’s photograph supplanted Otto’s market. Weighing the factors together, the court concluded that Hearst’s publication of Otto’s photograph was not fair use as a matter of law. |
| Tags      | Second Circuit, Internet/Digitization, News reporting, Photograph   |
| Outcome   | Fair use not found  |

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