

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MICHAEL J. HEBENSTREIT Trustee of)
the Bankruptcy Estate for Richard N.)
Bell,)

Plaintiff,)

v.)

No. 1:18-cv-00056-JPH-DLP

MERCHANTS BANK OF INDIANA,)

Defendant.)

_____)
Bankruptcy Trustee Michael J)
Hebenstreit MICHAEL J. HEBENSTREIT,)
TRUSTEE OF THE BANKRUPTCY)
ESTATE OF RICHARD N. BELL)
agent TRUSTEE OF THE)
BANKRUPTCY ESTATE OF RICHARD N.)
BELL,)
Trustee.)

**FINDINGS OF FACT & CONCLUSIONS OF LAW UNDER FEDERAL RULE OF
CIVIL PROCEDURE 52**

After granting Richard Bell¹ summary judgment on his copyright infringement claims against Merchants Bank of Indiana, dkt. 98, the Court held a bench trial on damages. The parties have submitted proposed findings of fact and conclusions of law. Dkt. 141; dkt. 142. The Court sets forth its findings of fact and conclusions of law below.

¹ Shortly before trial, Michael Hebenstreit was substituted as Plaintiff in this case because of a pending bankruptcy action filed by Mr. Bell. Dkt. 138.

**I.
Findings of Fact**

Except where otherwise noted, the following facts are based on testimony from the February 9, 2021 bench trial.

Mr. Bell owns the copyright to the Indianapolis Nighttime Photo ("the Photo"). In 2004, Mr. Bell began selling licenses for use of the Photo, charging a \$25 fee for a private individual license and a \$200 fee for a commercial license. Mr. Bell has earned a total of \$825 from selling licenses for the Photo. Mr. Bell has also received a total of \$135,200 for settlements of copyright-violation claims associated with the Photo.

In September 2014, Merchants entered into a written agreement with Sonar Studios ("Sonar") to develop a new website for the bank. Rebecca Marsh, Merchants' Vice President of Marketing & Communications, was the Merchants employee who worked with Sonar on the website project. Only Ms. Marsh and Sonar had access to the website while it was being developed.

Sonar created a content management system ("CMS") which allowed Sonar and Ms. Marsh to add, edit, and remove content from the website. Merchants' contract with Sonar included a \$1,000 fee for images and the loading of images onto the website. Sonar provided stock images² by uploading digital image files to the CMS's Media Library. Merchants did not direct or request Sonar to provide any specific stock image.

² Ms. Marsh explained that a stock image is "a collection of photography that someone else has taken . . . [that is] offered up for a fee through a stock photography manager."

The Photo was in the initial set of stock images that Sonar uploaded to the Media Library. It is undisputed that Sonar uploaded the Photo to the Media Library.

Ms. Marsh is familiar with the custom and practice of website developers, and has been involved in the development of approximately ten websites. She selected Sonar for the project based on her past experience working with them.

Ms. Marsh testified that it is industry custom for website developers, such as Sonar, to upload stock images that they either own, have a license to use, or otherwise have permission to use. It was Ms. Marsh's understanding that, as part of their contract pricing, Sonar would purchase any required licensing for the stock images it supplied. Ms. Marsh's expectation therefore was that Sonar had permission to use any image it uploaded.

Sonar supplied Ms. Marsh drafts of webpages containing images pulled from the Media Library, all of which had watermarks.³ None of the images in the Media Library contained watermarks after the website went live. This signified to Ms. Marsh that Sonar had obtained licenses for the photos in the Media Library.

In March 2017, Ms. Marsh created a blog post to recruit potential employees. To make the post more attractive, Ms. Marsh selected the Photo from the CMS's Media Library. Merchants included its standard copyright language at the bottom of the webpage: "Copyright 2017 Merchants Bank. All

³ As Ms. Marsh explained, a watermark is "a transparent image . . . that lays over the top of the image so that it is very recognizable that the image is not available for public use [] [a]nd not licensed."

Rights Reserved." Merchants included this language on every webpage on the website. No copyright language appeared on the Photo. *See* dkt. 23-2.

On December 15, 2017, Ms. Marsh received an email from Mr. Bell stating that Merchants was not authorized to use the Photo and demanding that Merchants immediately take down the Photo and pay him \$5,000. *See* Defendant Exhibit 204. It is undisputed that the sole reason for Mr. Bell's demand was that he saw the Photo on Merchants' website. As soon as Ms. Marsh read the email, she immediately removed the Photo and deleted it from the Media Library.

Less than one month later, Mr. Bell filed a lawsuit for copyright infringement against Merchants without checking to see if Merchants took down the Photo. Dkt. 1. On August 11, 2017, before conducting any discovery, Mr. Bell filed a motion for summary judgment seeking damages of \$150,000. Dkt. 56. In his deposition, Mr. Bell admitted that he increased his damages from \$5,000 to \$150,000 because of Merchant's "obstinace."

Mr. Bell amended his complaint to add Sonar as a defendant. In November 2019, Mr. Bell settled with Sonar, which paid him \$2,000 for a release and dismissal with prejudice from the action. *See* dkt. 92; dkt. 93.

On April 27, 2020, this Court granted Mr. Bell summary judgment on the issue of copyright infringement and granted Merchants summary judgment as to willfulness. Dkt. 98.

II. Conclusions of Law

A. Statutory Damages

A "copyright owner may elect . . . to recover, instead of actual damages and profits, an award of statutory damages . . . in a sum of not less than \$750 or more than \$30,000 as the court considers just." 17 U.S.C. § 504(c)(1). Mr. Bell elected to recover statutory damages. Dkt. 111 at 2.

The Court has broad discretion to assess damages within the statutory limits. *See F.E.L. Publ'ns, Ltd. v. Catholic Bishop of Chi.*, 754 F.2d 216, 219 (7th Cir. 1985). In exercising this discretion, the Court considers several factors including: "(1) the infringer's state of mind; (2) the expenses saved, and profits earned, by the infringer; (3) the revenue lost by the copyright holder; (4) the deterrent effect on the infringer and third parties; (5) the infringer's cooperation in providing evidence concerning the value of the infringing material; and (6) the conduct and attitude of the parties." *Bell v.*

DiamondIndyLimo.com, No. 1:13-cv-00035, 2014 WL 2747578, at *1 (S.D. Ind. June 17, 2014) (citing *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 144 (2d Cir. 2010)). Statutory damages thus "serve a dual purpose" of compensating a plaintiff for actual damages that are not easily ascertainable and deterring future copyright infringement. *Malibu Media, LLC v. Julien*, No. 1:12-cv-1730-TWP-MJD, 2013 WL 5274262, at *2 (S.D. Ind. Sept. 17, 2013) (citations omitted).

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