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COPYRIGHT INFRINGEMENT: ALL IS FAIR AS FALWELL HUSTLES FLYNT

In *Hustler Magazine, Inc. v. Moral Majority, Inc.*[1] ("*Hustler*"), the United States District Court for the Central District of California accepted that Hustler Magazine, Inc. ("Hustler Inc.") was the registered owner of a copyrighted magazine, and was entitled to the exclusive right to reproduce, distribute and display copies of its work.[2] Nonetheless, the district court held that Reverend Jerry Falwell's[3] ("Falwell") reproduction and use of one of *Hustler Magazine's* ("*Hustler Magazine*") advertisement parodies constituted "fair use" under the copyright laws.[4]

In November, 1983, Hustler Inc. and its publisher, Larry Flynt, included in their monthly issue a single-page parody of an advertisement for Campari liquor. The parody patterned itself on genuine Campari advertisements, which typically consist of an interview with a famous person who talks about their "first time" with Campari liquor. The *Hustler Magazine* parody featured a photograph of Reverend Falwell and was entitled, "Jerry Falwell talks about his first time."[5] Campari advertisements typically use a general tone of double entendre; the *Hustler Magazine* advertisement involved Falwell's "first time" with Campari and his first sexual experience—with his mother in an outhouse. At the bottom of the page the following appeared: "AD PARODY—NOT TO BE TAKEN SERIOUSLY."[6] The parody was listed in the table of contents

1. 606 F. Supp. 1526 (C.D. Cal. 1985). Throughout this casenote: "Hustler Inc." refers to the corporate plaintiff; "*Hustler Magazine*" refers to the monthly publication; and "*Hustler*" refers to the instant court action.

2. *Id.* at 1533.

3. There are three named defendants in this action: Reverend Jerry Falwell, the well known fundamentalist minister; the Moral Majority, Inc., a political lobbying group for conservative causes; and the Old Time Gospel Hour, the corporate sponsor of television and radio broadcasts of religious services originating in Lynchburg, Virginia. *Id.* at 1529. Falwell is the founder and president of both these corporate defendants. *Id.* at 1536 n.2.

4. *Id.* On October 31, 1983, in a separate action not the subject of this casenote, Falwell filed a lawsuit in the United States District Court against Hustler Inc., Larry Flynt and Flynt Distributing Company, Inc. The suit involved the same advertisement parody as does the case at bar, and Falwell asserted claims of libel, invasion of privacy and intentional infliction of emotional distress. The trial court directed a verdict for the defendants on the invasion of privacy claim. The jury found for the defendants on the libel claim, but returned a verdict against them on the emotional distress claim, awarding Falwell $200,000 in general and punitive damages. *Id.* at 1529-30. The decision of the trial court was upheld by the United States Court of Appeals. *See* Falwell v. Flynt, 797 F.2d 1270 (4th Cir. 1986).

5. *Hustler,* 606 F. Supp. at 1529.

6. *Id.*

as "Fiction: Ad and Personality Parody."[7]

On November 15, 1983, Falwell distributed two mass mailings to members of the Moral Majority.[8] The first was sent to 458,370 "rank and file" donors. It described the advertisement parody and requested donations of up to fifty dollars to help wage a legal battle against " 'Porno King' Larry Flynt."[9] The second mailing was sent to 26,980 "major donors" who were asked to contribute $500 for the same purpose. These "major donor" solicitations included a copy of the advertisement parody,[10] and brought in approximately $45,000.[11]

On November 18, 1983, Falwell sent a third mailing to 25,586 followers of The Old Time Gospel Hour.[12] This mailing also included a copy of the *Hustler Magazine* advertisement parody and sought contributions—this time not for a legal battle but rather to finance Falwell's television and radio network. In response to this appeal, Falwell received more than $672,000.[13] Finally, on December 4 and December 11, 1983, while delivering his weekly televised sermon on the Old Time Gospel Hour, Falwell at several points held up the November issue of *Hustler Magazine* and made financial pitches for funds to support his media network.[14]

Hustler Inc. then filed the subject action, alleging that Falwell's copying and use of the advertisement parody infringed on its registered copyright.[15] At trial, Falwell claimed that he needed to send his followers a copy of the advertisement in order to give them the information necessary to rebut the statements it contained;[16] he stated that the appeal for money was no more than an "ancillary motive," and that the request

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7. *Falwell,* 797 F.2d at 1272.

8. *See supra* note 3 for discussion of the Moral Majority and Falwell's relation to this corporate defendant.

9. *Hustler,* 606 F. Supp. at 1530. There is no indication in the record as to the amount of money brought in by the "rank and file" solicitation. *Id.*

10. *Id.* Both of the first two mailings also included a copy of a photograph of Falwell's mother. *Id.*

11. *Id.*

12. *Id.* at 1529. *See supra* note 3 for discussion of the Old Time Gospel Hour and Falwell's relation to this corporate defendant.

13. *Hustler,* 606 F. Supp. at 1530.

14. *Id.* No monetary figures were provided to the court as to the amount of money received as a result of these television appeals. *Id.*

15. *Id.* at 1529.

16. *Id.* In his deposition, Falwell stated that he felt he needed to respond to the advertisement parody because " 'what Mr. Flynt has done has not attacked my philosophy to which I do not object but he has attacked me, my morality, my decency, my sincerity.' " *Id.* At trial in his suit against Larry Flynt, Falwell, when asked about his reaction to the parody, testified as follows:

A. I think I have never been as angry as I was at that moment. . . . My anger

would have been made in the course of any such communication.[17] However, both the executive vice-president of the Moral Majority and the chief executive officer of the Old Time Gospel Hour admitted that sending an actual copy of the advertisement parody was part of Falwell's "marketing approach" to fund raising.[18] Hustler Inc. contended that, as the advertisement was clearly a parody, there was nothing to rebut,[19] and that Falwell was guilty of copyright infringement.[20]

The dispute in *Hustler* was before the district court on the parties' cross-motions for summary judgment. In determining that it could prop-

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became a more rational and deep hurt. . . . [I]n all of my life I had never believed that human beings could do something like this. I really felt like weeping. . . .

Q. In your whole life, Mr. Falwell, had you ever had a personal experience of such intensity that you could compare with the feeling that you had when you saw this ad?

A. Never had. Since I have been a Christian I don't think I have intentionally hurt anybody. . . . I certainly have never physically attacked anyone in my life. I really think that at that moment if Larry Flynt had been nearby I might have physically reacted.

Falwell, 797 F.2d at 1276. Further, in his December 4, 1983 sermon on the Old Time Gospel Hour, Falwell said of his reaction, "I'll admit I almost lost my sanctification, but I believe God used it to stir me up—to say Jerry, don't cut another station, don't quit. . . ." *Hustler*, 606 F. Supp. at 1533.

17. *Hustler*, 606 F. Supp. at 1530.

18. *Id.*

19. *Id.* Hustler Inc. pointed out that Falwell and his aides could not identify a single person who had believed the statements in the parody. *Id.* Further, in Falwell's earlier suit against Hustler Inc. and Flynt, *see supra* note 4, the jury specifically found as part of a special verdict that *Hustler Magazine* could not reasonably be understood as describing actual facts about Falwell or actual events involving him. *Hustler*, 606 F. Supp. at 1530. Nonetheless, while maintaining that no one could have taken the parody seriously, Flynt readily admitted his motivation for publishing it. At his deposition, Larry Flynt, after identifying himself as Christopher Columbus Cornwallis I.P.Q. Harvey H. Apache Pugh and stating that the parody had been written by rock stars Yoko Ono and Billy Idol, testified as follows:

Q. Did you want to upset Reverend Falwell?

A. Yes. . . .

Q. Do you recognize that in having published what you did in this ad, you were attempting to convey to the people who read it that Reverend Falwell was just as you characterized him, a liar?

A. He's a glutton.

Q. How about a liar?

A. Yeah. He's a liar too.

Q. How about a hypocrite?

A. Yeah.

Q. That's what you wanted to convey?

A. Yeah.

Q. And didn't it occur to you that if it wasn't true, you were attacking a man in his profession?

A. Yes. . . .

Q. And wasn't one of your objectives to destroy [Falwell's] . . . integrity, or harm it, if you could?

A. To assassinate it.

Falwell, 797 F.2d at 1273.

20. *Hustler*, 606 F. Supp. at 1529.

erly dispose of a fair use defense through summary judgment, the court relied on case authority[21] and the fact that the fair use doctrine is essentially an "equitable rule of reason," which makes it appropriate for the court to decide whether the fair use defense applies when the underlying facts are undisputed.[22] The court concluded that, as Hustler Inc. had made out a prima facie case of infringement,[23] the only question was whether the defendants had established any valid defense as a matter of law.[24]

Falwell raised the affirmative defense that his copying of the parody constituted "fair use" of the material.[25] Pursuant to section 107 of the 1976 Copyright Act,[26] the district court considered four specific factors in determining whether Falwell's use of the advertisement parody constituted fair use. These factors included: (1) the purpose and character of the defendant's use; (2) the nature of the work; (3) the amount and substantiality of the portion used; and, (4) the effect of the use upon the potential market for or value of the work.[27]

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21. The court relied on Marcus v. Rowley, 695 F.2d 1171 (9th Cir. 1983); Universal City Studios v. Sony Corp. of America, 695 F.2d 963 (9th Cir. 1981), *rev'd on other grounds,* 464 U.S. 417 (1984); and Higgins v. Baker, 309 F. Supp. 635 (S.D.N.Y. 1969). *Hustler,* 606 F. Supp. at 1532.

22. *Hustler,* 606 F. Supp. at 1532.

23. *Id.* at 1531 (citing Walker v. University Books, Inc., 602 F.2d 859, 862 (1979) (where the court stated that "in order for a plaintiff to prevail on an action for infringement, two elements must be established: Ownership of a valid copyright and copying of the protected work by the defendant.")). The *Hustler* court accepted as undisputed the fact that Hustler Inc. was the registered owner of the copyrighted work in question and that Falwell had copied it without permission. *Hustler,* 606 F. Supp. at 1531.

24. *Hustler,* 606 F. Supp. at 1531.

25. Fair use is most often defined as the "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner. . . ." Rosemont Enters. v. Random House, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied,* 385 U.S. 1009 (1967).

26. Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1982). Section 107 provides:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (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.

17 U.S.C. § 107 (1982).

27. *Hustler,* 606 F. Supp. at 1531. The court noted that section 107, and the four factors enumerated therein, provide only guidelines, leaving the court considerable latitude in deter-

As to the purpose and character of the defendant's use, the court found that Falwell's motives were "personal, political, and financial all at once."[28] The court acknowledged that Falwell had seized upon the advertisement parody for use in his continuing battle against various groups "including publishers of pornography,"[29] and that the communications "involved outright appeals for donations."[30] Nonetheless, the court concluded that because Falwell was not engaged in profit-making activities or soliciting funds for his own personal advantage,[31] his use of the parody was not "commercial."[32] Further, the court stated that, even if Falwell's use had been purely commercial, commercial motivation in and of itself does not preclude a finding of fair use.[33] The court stated that it "must also consider whether 'the alleged infringers copied the material to use it for the same intrinsic purpose for which the copyright owner intended it to be used.' "[34] The court noted that Falwell did not use the advertisement parody for the same intrinsic purpose as Hustler Inc.[35] and that generally, fair use is sustained if a defendant's use is not in competition with the copyrighted use.[36]

Additionally, the district court noted that First Amendment consid-

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mining whether in a given case an alleged infringement constitutes fair use. *Id.* The court cited the Report of the Committee on the Judiciary of the House, which stated:

> [S]ince the doctrine is an equitable rule of reason no generally applicable definition is possible, and each case raising the question must be decided on its own facts. . . . [T]he endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute. . . . Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.

H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65-66, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS, 5659, 5679-80 (hereinafter H.R. REP. NO. 1476).

28. *Hustler,* 606 F. Supp. at 1533.

29. *Id.*

30. *Id.* at 1534.

31. *Id.* at 1534 n.1.

32. *Id.* at 1534. The court acknowledged that neither the legislative history of the Copyright Act nor the Supreme Court decisions interpreting it expressly define "commercial" as the term is used in section 107. The court noted that commercial and non-profit uses have been contrasted, suggesting that the latter may more easily be categorized as "fair." *Id.* at 1534 n.1. Thus, the court stated that, "[a]lthough the drafters of the Act eliminated any blanket exemption from the copyright laws for nonprofit corporations [citations omitted], the court believes that for the purposes of Section 107(1) the fund-raising efforts of religious, charitable, or political entities not organized for profit should be treated more liberally than the business activities of profit-making corporations." *Id.*

33. *Id.* at 1534-35 (citing MCA, Inc. v. Wilson, 677 F.2d 180, 181 (2d Cir. 1981)).

34. *Hustler,* 606 F. Supp. at 1535 (quoting *Marcus,* 695 F.2d at 1175).

35. *Hustler,* 606 F. Supp. at 1535.

36. *Id.* (citing Italian Book Corp. v. American Broadcasting Cos., 458 F. Supp. 65, 70 (S.D.N.Y. 1978)).

erations may also enter into the analysis of the purpose and character of a defendant's use,[37] reiterating the general principle that "when an act of copying occurs in the course of a political, social or moral debate, the public interest in free expression is one factor favoring a finding of fair use."[38] The court reasoned that both Hustler Inc.'s copyrighted work and the defendant's acts of copying reflected particular moral and social viewpoints, which were part of a broader, continuing debate over pornography and other social issues.[39] Thus, the court concluded that "the public interest in free expression would be served by facilitating an effective response by Falwell."[40]

The second factor that the court considered was the nature of the copyrighted work, i.e., whether the plaintiff's work was primarily creative or informational.[41] The court accepted Hustler Inc.'s characterization of the work as "creative," but believed that the defendants had copied the parody not for its creative worth, but rather in order to criticize its contents and protest its publication.[42] Thus, the court concluded that the defendant's use of the advertisement was "purely communicative and informational,"[43] and that the creative nature of Hustler Inc.'s work was "not very significant."[44]

Next, the court considered the amount and substantiality of the portion used of the copyrighted work. The court focused on the fact that the parody represented only one page from *Hustler Magazine,* which bore a single copyright registration,[45] and concluded Falwell "did not copy a substantial part of the plaintiff's work by reproducing this one page [and] . . . Falwell's copying of the parody in its entirety does not preclude a

37. *Hustler,* 606 F. Supp. at 1536.

38. *Id.* (citing Keep Thomson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957, 959-60 (D.N.H. 1978) (where the defendant committee's use of a portion of rival candidate's musical composition amounted to fair use in light of the absence of injury to the plaintiff and the public interest in full debate over the election); and Robert Stigwood Group v. O'Reilly, 346 F. Supp. 376, 383-84 (D. Conn. 1972) (where priests' unauthorized copy of a rock opera was found not to constitute fair use because the facts did not support the defendants' contention that their performance was a counterattack to the original's "perverted" version of the Gospel), *rev'd on other grounds,* 530 F.2d 1096 (2d Cir.), *cert. denied,* 429 U.S. 848 (1976)).

39. *Hustler,* 606 F. Supp. at 1536.

40. *Id.*

41. *Id.* The defense of fair use has been given a greater reach when the work copied is informational in nature. *Id.* (citing Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 455 n.40 (where the Court noted that the copying of a news broadcast may have a stronger claim to fair use than the copying of a motion picture) and *Marcus,* 695 F.2d at 1176).

42. *Hustler,* 606 F. Supp. at 1537.

43. *Id.*

44. *Id.*

45. *Id.*

finding of fair use."[46]

The final factor that the district court considered was the economic effect of the defendant's use of the material on the market for or value of the copyrighted work.[47] The court pointed out that: (1) the November, 1983 issue of *Hustler Magazine* was long off the newsstands by the time the mailings went out; therefore, Falwell's reproduction could not have interfered with the magazine's initial sales; (2) any effect the use might have had on marketability of back issues would be de minimis; and, (3) the advertisement parody was not sold separately from the magazine, thus, a free copy of this one page would not satisfy the demand for the entire issue.[48] The court declared that Hustler Inc. had failed to offer a logical explanation as to the connection between Falwell's use of the parody and any concrete injury to its copyrighted work.[49] Accordingly, the court concluded that "the impact of defendant's use on the plaintiff's work (be it the ad parody itself or the entire magazine) is nil."[50]

After considering the factors set out in section 107, the court found that the balance tilted sharply in favor of a finding of fair use.[51] The court concluded that Falwell was entitled to use the advertisement parody as he did, and ordered that summary judgment be entered for defendants.[52]

The decision of the United States District Court for the Central District of California with regard to the propriety of summary adjudication of a fair use defense, is one founded on sparse authority;[53] however, this lack of clear precedential support seems to indicate that the court is standing on fresh ground, more so than that its position is incorrect. In

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46. *Id.* at 1538.

47. The court pointed out that "[t]he potential for harm to a copyrighted work arises if the defendant's use would tend to diminish the sales of the plaintiff's work, interfere with its marketability or fulfill the demand for the original." *Id.* at 1539 (citing Encyclopedia Britannica Educ. v. Crooks, 542 F. Supp. 1156, 1169 (W.D.N.Y. 1982)).

48. *Hustler,* 606 F. Supp. at 1539.

49. *Id.*

50. *Id.*

51. *Id.* at 1540.

52. *Id.*

53. The only direct support cited by the court is *Higgins,* 309 F. Supp. at 635. The *Hustler* court acknowledged the lack of support for its position, but noted that, "[a]t least one court has stated that this is precisely the situation in which fair use can be determined on summary judgment." *Hustler,* 606 F. Supp. at 1532. While this directly supports the court's position, there is substantial authority that "fair use normally is a question of fact for the jury." *Id.* (citing DC Comics Inc. v. Reel Fantasy, Inc., 696 F.2d 24, 28 (2d Cir. 1982); MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981); Triangle Publications v. Knight-Ridder Newspapers, 626 F.2d 1171, 1175 (5th Cir. 1980); Eisenschiml v. Fawcett Publications, 246 F.2d 598, 604 (7th Cir.), *cert. denied,* 355 U.S. 907 (1957)).

fact, there is direct authority to support summary adjudication of a fair use defense,[54] and in a recent case, the Ninth Circuit entered summary judgment for a plaintiff, after finding that the fair use defense was unavailable as a matter of law to the defendant.[55] Further, the court's "equitable rule of reason" argument is strengthened by the accepted fact that fair use is not the sort of factual issue that turns on matters within the common experience of jurors.[56] Thus, it may indeed be more appropriate for the court itself to decide if the fair use doctrine applies to a given factual situation.

Considering the purpose and character of Falwell's use, the court concluded that it was not "commercial"; thus, it was more likely to be found fair.[57] The court focused on the fact that Falwell "was not engaged in profit-making activities . . . and did not solicit funds for his personal advantage. Rather the donations went to the Moral Majority and the Old Time Gospel Hour. . . ."[58] Yet distinguishing between Reverend Falwell and his organizations is no more possible than is separating the dance from the dancer. Donations to the advantage of Falwell's organizations are equally advantageous to him. The court itself noted that to view Falwell as separate from the Moral Majority and the Old Time Gospel Hour is a "narrow view" because "the Reverend Falwell is linked inextricably with the two corporate defendants. He is their founder and president."[59]

Flawed as this separation between Falwell and the two corporate defendants may be, it is of little actual importance. The court acknowledged that Hustler Inc. was correct in its assertion that an unauthorized reproduction of a copyrighted work for a commercial or profit-making purpose is considered *presumptively unfair*.[60] However, the court concluded that even if Falwell's use had been purely commercial, the result-

54. *See supra* note 53 for discussion of *Higgins*.

55. *Marcus*, 695 F.2d at 1178-79 (where the defendant, a school teacher, had copied several pages of an informational booklet she had prepared from certain copyrighted materials written by the plaintiff). While the *Hustler* court did rely on this case, it also acknowledged that the Ninth Circuit had not yet addressed the propriety of finding fair use as a matter of law, and that it was trying to "glean" the Circuit Court's position. *Hustler*, 606 F. Supp. at 1532.

56. *See* SCHWARZER, SUMMARY JUDGMENT UNDER THE FEDERAL RULES: DEFINING GENUINE ISSUES OF MATERIAL FACT, 99 F.R.D. 465, 472 (1983).

57. *Hustler*, 606 F. Supp. at 1534 (citing Martin Luther King Jr. Center for Social Change, Inc. v. American Heritage Prods., 508 F. Supp. 854, 861 (N.D. Ga. 1981) (where unfair use was found because defendants copied protected work for no purpose other than their own financial gain), *rev'd on other grounds*, 694 F.2d 674 (11th Cir. 1983)).

58. *Hustler*, 606 F. Supp. at 1534 n.1.

59. *Id.* at 1536 n.2.

60. *Id.* at 1534.

ing presumption of unfairness would be overcome.[61] Here, the district court is on more stable ground. The court correctly stated that a defendant's use is more likely to be fair if it serves a different function than the plaintiff's,[62] and pointed out that Hustler Inc.'s use was satirical,[63] while Falwell's was designed to rebut the information contained in the parody, to stimulate political debate, and to raise money.[64]

To further support the rebuttal of the presumption of unfairness, the court relied on the legislative history of section 107, quoting the House Report which states: "When a copyrighted work contains unfair, inaccurate, or derogatory information concerning an individual . . . the individual . . . may copy and reproduce such parts of the work as are *necessary* to permit understandable comment on the statements made in the work."[65]

On its face, the legislative history seems to lend strong support to the court's holding; however, it in fact weakens the court's analysis of the defendant's use. The court fails to explain why it was "necessary" for the defendant to copy the parody to make understandable comment on the statements made in the work. Apparently, even Falwell himself did not believe this was "necessary," as he sent out 458,370 mailers in which he was able to explain the "tasteless and libelous attack"[66] without including a copy of the advertisement parody.[67] In fact, as the testimony of the Old Time Gospel Hour's chief executive officer and the Moral Majority's executive vice-president indicated, the inclusion of Hustler Inc.'s copyrighted parody was a result of Falwell's deliberate "marketing approach" to fund raising rather than an attempt to explain any derogatory statements.[68]

As for the nature of the copyrighted work, the district court correctly noted that the reach of the fair use defense is greater where a work is informational in nature, rather than creative.[69] Further, the court properly rejected Hustler Inc.'s precedentially unsupported claim that the inverse was true, i.e., that creative works were therefore entitled to greater protection than informational ones.[70] Unfortunately, while pur-

61. *Id.* at 1534-35.
62. *Id.* at 1535 (citing *Italian Book Corp.*, 458 F. Supp. at 65).
63. *Hustler,* 606 F. Supp. at 1535.
64. *Id.* at 1533.
65. *Id.* at 1535 (emphasis added) (citing H.R. REP. NO. 1476, *supra* note 27, at 73).
66. *Hustler,* 606 F. Supp. at 1530.
67. *Id.*
68. *Id.*
69. *Id.* at 1536.
70. *Id.* at 1537.

porting to continue its discussion of the nature of the copyrighted work, the court instead returned to its discussion of the purpose and character of the defendant's use. The court stated that, "[d]efendants copied . . . [the parody] in order to criticize its contents and protest its publication. Whatever value the article had for defendants was purely communicative and informational in character."[71] The court did not explain what the defendant's use had to do with the nature (creative or otherwise) of the copyrighted work. Nonetheless, on the basis of Falwell's use, the court concluded that the creative nature of Hustler Inc.'s work was "not very significant."[72] There is nothing in the Copyright Act, the legislative history, or the case law to support such an approach. In fact, Professor Nimmer[73] specifically criticized this portion of this opinion, stating that "[this] analysis properly belongs under the first factor . . . rather than under this second factor."[74]

The third criterion prescribed under section 107 involves the amount and substantiality of the portion used in relation to the copyrighted work as a whole. Thus, the inquiry was how much of the work was taken, and whether that portion was an essential element of the plaintiff's work.

The court, on the basis of recent Supreme Court authority, properly rejected Hustler Inc.'s claim that reproduction of an entire work cannot constitute fair use.[75] The court found that in view of relevant case law[76]

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71. *Id.*

72. *Id.* at 1537.

73. Until his death in 1985, Melville B. Nimmer was the recognized authority in the field of copyright. Nimmer authored the present comprehensive four volume set, *Nimmer on Copyright*, and he remains the dominant force in this area of law. He also authored *Nimmer on Freedom of Speech*, won a landmark case before the Supreme Court, and wrote extensively about civil rights. The wealth of judicial citations to his work pays tribute to the respect he commanded. 1 NIMMER, NIMMER ON COPYRIGHT, at iv(a)-iv(b) (Supp. 1986); Sobel, *A Memorial Tribute to Melville B. Nimmer*, 6 LOY. L.A. ENT. L.J. 1 (1986).

74. 3 M. NIMMER, NIMMER ON COPYRIGHT, § 13.05[A] at 13-76 (1986). According to Professor Nimmer, in analyzing the nature of a work, the factors to be considered include: (1) whether the work is informational or creative, (2) the availability of the work to the potential user, (3) whether or not the work is published, and (4) whether the work represented a substantial investment of time and labor. *Id.* at 13-76-77. However, Nimmer does not so much as hint that the work's value to the defendant or the nature of the defendant's use should play any role in this analysis.

75. *Hustler*, 606 F. Supp. at 1537. The court concluded that in light of the Supreme Court's decision in *Sony Corp.*, 464 U.S. 417 (where fair use was found despite the complete reproduction of a copyrighted work) authorities precluding the application of the fair use doctrine where wholesale copying had occurred were no longer controlling. *Hustler*, 606 F. Supp. at 1537 n.3.

76. In *Triangle Publications*, 626 F.2d at 1171, the court found that the defendant's unauthorized reproduction of only the cover of *T.V. Guide* constituted fair use. The *Hustler* court followed the reasoning of the *Triangle* court, and quoted from that opinion: " 'the cover of a

and the fact that Falwell had copied only one page of an entire magazine bearing a single copyright registration,[77] the infringement was "insubstantial."[78] In fact, the district court stated that even if the advertisement parody was viewed as an "entire work," the ultimate result would remain unchanged.[79] The court noted that the parody consisted of only approximately 300 words, and stated its belief that "in the case of such a short work the substantiality of the copying should not be given great weight in determining fair use."[80] No authority is cited for this proposition, and there are no cases supporting this view. In fact, just one week after this court announced its decision, the Supreme Court implicitly rejected such an approach.[81]

Further, the court was unable to confine itself to a review of the statutorily prescribed prong, and again felt compelled to discuss Falwell's use of the copied material—this time by quoting, in the text of the opinion, long passages from letters sent out by Falwell.[82] The court made no connection, and none is apparent, between the scope of Falwell's criticism of *Hustler Magazine* and whether he copied a substantial portion of the copyrighted material. Thus, this digression, amusing

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magazine is entitled to copyright protection as part of the magazine, just as a paragraph in a book may be. . . . However, it makes no sense to us to say that the use of a cover constitutes the use of "an entire copyrighted work." As a matter of logic and common sense, [the defendant's] . . . conduct would have been far more serious had it reproduced entire articles. . . .' " *Hustler,* 606 F. Supp. 1537-38 (quoting *Triangle Publications,* 626 F.2d at 1177 n.15).

77. *Hustler,* 606 F. Supp. at 1537.

78. *Id.* at 1538.

79. *Id.* at 1538 n.4.

80. *Id.*

81. In Harper & Row Publishers v. Nation Enters., 471 U.S. 539 (1985), the Supreme Court refused to find fair use, even though the alleged copyright infringement consisted of verbatim quotes of only 300 to 400 words.

82. Almost two pages of the court's opinion consist of text of the letters Reverend Falwell sent to his supporters. For example, Reverend Falwell wrote:

> Sane and moral Americans all across our nation are outraged. . . . Pornography has thrust its ugly head into our everyday lives and is multiplying like a filthy plague. Flynt's magazine, for example, advertises pornographic telephone services where, for a fee, men or women will engage in an "obscene phone call" with you! . . . Entire organizations have sprung up whose sole purpose is to promote deviant sexual practices. The motto of the National Association for Man-Boy Love is "Sex before eight or else it's too late"! . . . *And now Larry Flynt has been bold enough to print shocking and disgusting statements and pictures against my mother and me*—as well as against President and Mrs. Reagan, Pope John Paul II, and the Chief Justice of the United States.

Hustler, 606 F. Supp. at 1538 (emphasis in original). Still further, the court printed portions of one of Falwell's sermons. Falwell stated: "I just can't allow pornographers and abortionists and secular humanists and atheists who crucify a frog on the cross to blaspheme Christ to silence me. I can't allow people who come outside my buildings with red hammer and sickle flags to stop me from preaching what I'm preaching." *Id.* at 1533.

as it is, serves only as a distraction and adds nothing to the weak analysis contained in this portion of the opinion.

Finally, the court considered the effect of the defendant's use upon the market for or value of the copyrighted work, noting that this factor is frequently the decisive one.[83] This criterion is often the most important because, as the court noted, the very "purpose of copyright is to create incentives for creative effort," and "*a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create.*"[84]

Hustler Inc. pointed to the republication of the parody in its March 1984 issue as evidence that the item had some lasting value which may have been reduced by Falwell's copying.[85] The court rejected this argument, terming it "disingenuous at best."[86] The court noted that the membership of the Moral Majority would probably not be counted among the regular readers of *Hustler Magazine* and concluded that the distribution of the parody to Moral Majority members was not likely to have much economic effect on Hustler Inc.[87]

The court's assumptions as to the make-up of *Hustler Magazine's* audience may be subject to some attack. On appeal, Justice Poole dissented from the Ninth Circuit's affirmation of the district court decision, and on this issue stated:

> I have problems with the district court's conclusion, accepted by the majority opinion, that the Moral Majority or Old Time Gospel Hour members would probably not be counted among Hustler's readers. If such a showing was made or Hustler stipulated to this fact, then such a conclusion can be accepted. Otherwise, I do not think a court can take judicial notice of such a matter.[88]

In spite of this criticism, the district court's reasoning remains as logical as it is simple; as Hustler Inc. failed to offer any explanation as to the connection between Falwell's use of the parody and any concrete injury, the court was entitled to find that the use did not decrease the value of the parody to Hustler Inc., or discourage it from publishing such works.[89] Thus, the court properly viewed this criterion as mandating a

83. *Id.* at 1538.

84. *Id.* (emphasis in original) (quoting *Sony Corp.*, 464 U.S. at 450-51).

85. *Id.* at 1539.

86. *Id.*

87. *Id.*

88. Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1158 n.1 (9th Cir. 1986) (Poole, J., dissenting).

89. *Hustler*, 606 F. Supp. at 1540.

finding of fair use.

In conclusion, the finding that Falwell's copying of the *Hustler Magazine* advertisement parody constituted fair use appears to be correct. The court can be comfortable with the result if not proud of its opinion. In fact, the court should be embarrassed by the weakness of its reasoning and misapplication of authority. Not surprisingly, not a single case has cited this decision. Equally predictable was the result in the case on appeal; the Ninth Circuit stated that the district court did not err in finding that the defendant's use was fair,[90] but specifically criticized the lower court's evaluation of the second and third statutory criteria, i.e., the nature of the copyrighted work and the amount and substantiality of the portion used.[91]

The district court did correctly state and apply certain principles underlying copyright law and the fair use doctrine; however, there is a judicial wellspring of carefully analyzed and well reasoned authority to support such basic principles. The district court's questionable reasoning, creative reading of previous authority, and the existence of a critical appellate decision make the case extremely weak precedent. Rightfully so. Thus, in the search to refine the scope of the fair use doctrine, the entertainment industry, artists, and interested parties should look elsewhere for guidance.

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90. *Hustler*, 796 F.2d at 1156.

91. *Id.* at 1154-55; *see supra* note 81 and accompanying text.