


IP Insight

by Joseph R. Dreitler and Mary R. True

In the Eye of the Beholder: The Sixth Circuit Examines the Fair Use Defense in *Catherine Balsley v. LFP Inc.*

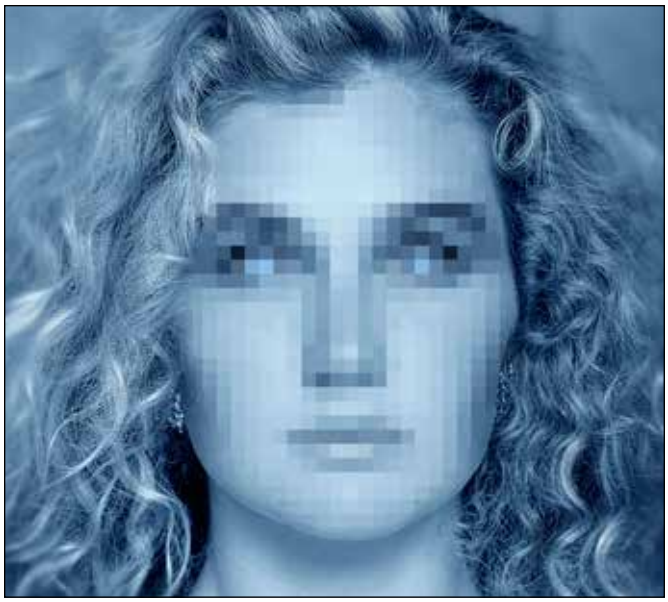
What follows a cautionary tale in a number of ways. This article addresses the U.S. Court of Appeals for the Sixth Circuit's analysis of the fair use defense in the context of copyrighted photographs of the plaintiff dancing in the nude that appeared in defendant's publication, *Hustler*.[1] Not surprisingly, the Sixth Circuit found that the photographs were neither transformative, nor particularly newsworthy. In 2003, Catherine Balsley (a.k.a. Bosley) was a 37-year-old news anchor for a CBS television affiliate in northern Ohio. In March 2003, evidently tired of the bleak weather in northern Ohio and longing for the sunshine of a Florida spring break, she decided to vacation there. After apparently getting caught up in the spring break spirit, she entered a wet t-shirt contest at a bar and ended up dancing completely nude. One can only imagine her shock and surprise when she learned that an "amateur photographer" who was in attendance took pictures of Balsley's performance and published them on his website, with a copyright watermark. The photographs were posted from May to June 2003; a few months later Balsley lost her anchor position when the story, with pictures, was reported. In 2004, Balsley sued several Internet sites for posting the photographs, arguing that they violated her rights of publicity. The district court granted her an injunction in April 2004; three weeks later the Sixth Circuit stayed the injunction on grounds of prior restraint. Balsley discontinued her appeal. Subsequently, in a belated effort to close the barn door, Balsley and her husband purchased all rights in the photographs from the "amateur photographer" and registered their copyright with the U.S. Copyright Office in August 2004. With the national nightmare of Balsley's unwanted 15 minutes of fame over, she was once again able to find employment as a television reporter, albeit in another Ohio city. But of course, the story does not end there. In 2005, a *Hustler* reader took it upon himself to nominate Balsley for *Hustler*'s "Hot News Babes" contest. Although he didn't have a copy of any of the photographs, he mentioned that the photographs had been posted online. Intrigued, *Hustler*'s art department located several pictures online of Balsley, including one that Balsley had purchased (and registered) in 2004. The picture *Hustler* located had the original copyright watermark on it, and defendant may—or may not, depending on who was testifying—have attempted to find the copyright owner. In any event, defendant's retained counsel advised defendant that the photograph could be published as "fair use" without the need for permission. The copyrighted photograph was published in *Hustler* in 2006. Balsley and her husband sued *Hustler* on several counts, but only the claim for direct copyright infringement was heard by the jury. After what was no doubt an extensive review of the photograph, the jury rejected *Hustler*'s fair use defense, and the Sixth Circuit affirmed. The court noted that *Hustler* had stipulated to the elements of direct copyright infringement: "1) the ownership of a valid copyright; and 2) copying of constituent elements of the work that are original"[2] but contended that it was not subject to liability based on its purported fair use of the photograph.

The "fair use" defense has been codified at 17 U.S.C. § 107,[3] and the Sixth Circuit has noted that its purpose is to "ensure that courts avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[4] The court then analyzed *Hustler*'s use of the Balsley photograph under each of the fair use factors.

The Purpose and Character of the Use

In order to determine the "purpose and character" of the use, the court noted that it needed to decide if the work published in *Hustler* was "transformative" and whether use of the work was for commercial or noncommercial, educational purposes.[5] It didn't take long for the court to conclude that *Hustler*'s use was commercial, rather than educational (the educational goals of teenage boys evidently not being taken into account). Although defendant argued at trial that the "Hot News Babes" column was intended to be a "noncommercial, informative commentary" on Balsley, the jury rejected that argument, in part because "the incident giving rise to the picture was three years old and no longer considered newsworthy."[6] *Hustler* then argued that the use was transformative because "the original work was published [on the photographer's website] to depict the fact that Bosley participated in a wet t-shirt contest, whereas Defendant used the picture to 'illustrate its entertainment news story.'"[7]

Joesph R. Dreitler and Mary R. True are principals in Dreitler True LLC in Columbus, Ohio. They can be contacted at www.ustrademarklawyer.com.



The court rejected what it deemed a "tenuous" assertion, finding that it was reasonable for the jury to conclude that the photograph was used "to enhance readership, rather than as a social commentary."[8] The court also noted that defendant did not add any creative message or meaning to the photograph, but used it in the same way as the original photographer had used it, which was "to shock, arouse, and amuse" such that the publication of the photograph in *Hustler* was nothing more than a "market replacement."[9]

Nature of the Copyrighted Work

In determining the nature of the copyrighted work, the court noted that "the law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy."[10] Sticking with its "newsworthiness" argument, *Hustler* contended that the copyrighted photograph was not creative because the photographer "did not direct Bosley or create the background for the image."[11] (Indeed, Balsley was apparently quite capable of doing that herself.) However, and in a salute to everyone with a cell-phone camera, Balsley argued that the original photograph was a creative (if not artistic) work, because the photographer "used his artistic skill to edit the pictures for size, color, and clarity, and chose which images to publish based on the allurement of the subject."[12] The Sixth Circuit declined to weigh in on the relative creative or artistic "merits" of the photograph, or the "allurement of the subject," stating only that the parties' arguments persuaded it that the photograph "possesses a mixed nature of fact and creativity."

The Amount and Substantiality of the Use

The best argument *Hustler* could raise as to the amount and substantiality of its use was to say that at least it didn't publish all of the copyrighted photographs. The court was not persuaded. Moreover, it noted that *Hustler* had published the entire photograph of Balsley with only a small amount of the background cropped (which, of course, depicted substantially all of Balsley), noting that "while wholesale copying does not preclude fair use *per se*, copying an entire work militates against a finding of fair use."[13]

Effect of the Use on the Potential Market

The fourth fair use factor, "the effect of the use upon the potential market for or value of the copyrighter work," generally weighs in the plaintiff's favor if the purpose and character of the use is commercial. The court noted that this is the case because "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."[14] *Hustler* argued that because Balsley clearly had no intention of promoting any further exploitation of the photograph, she was not harmed (at least monetarily) by its publication. The court nixed this argument, noting that under the fair use analysis there was no requirement under the copyright laws for the copyright owner to show actual harm, but merely a "potential" effect on the market for the copyrighted work.[15] Balsley persuasively argued that in light of the "ample evidence" she had shown of the "vast market" for the photograph, it was reasonable to conclude that *Hustler*'s publication and sale of magazines containing the photograph "directly competed for a share of the market for" the photograph.[16] As this case demonstrates, a determination of "fair use" requires a delicate balancing of the factors, and as a defense to copyright infringement should be looked upon as a privilege and not as a right. It is ultimately a subjective determination, and ironically, rather like Justice Potter Stewart's classic definition of pornography: "I can't define it, but I know it when I see it." Thus, "fair use," like beauty, is in the eye of the beholder and, like beauty, should never be presumed or exploited merely because the object is widely available. ⊙

Endnotes

[1]*Catherine Balsley v. LFP, Inc.*, 691 F.3d 747, 758 (6th Cir. 2012) (citing Bridgeport Music, Inc. v. WB Music Corp., 508 F.3d 394, 398 (6th Cir. 2007)).

[2]17 U.S.C. § 107 states: [T]he fair use of a copyrighted work, including such use by reproduction in copies ..., for purposes such as criticism, comment, news reporting, teaching ..., 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.

[3]*Balsley*, 691 F.3d at 758 (citing *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 581 (6th Cir. 2007)).

[4]*Id.* at 758.

[5]*Id.* at 759.

[6]*Id.*

[7]*Id.* (citing *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527, 529 (9th Cir. 1984)).

[8]*Id.*

[9]*Id.* (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985)).

[10]*Id.* at 760.

[11]*Id.*

[12]*Id.* (citing *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003)).

[13]*Id.* (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)).

[14]*Id.* at 761.

[15]*Id.* (citing *Harper & Row*, 471 U.S. at 568).