

July 2021
MPT-1
Drafters' Point Sheet

Winston v. Franklin T-Shirts Inc.

The MPT point sheet addresses the factual and legal points encompassed within this MPT. It presents the expected issues that might be addressed by an examinee in a thorough answer to the problem, but it should not be construed as a model answer.

Winston v. Franklin T-Shirts Inc.
DRAFTERS' POINT SHEET

In this performance test item, the examinee is a law clerk to a United States District Court judge. The basis for the case before the court is claimed copyright infringement. At a pretrial conference in the judge's chambers, the defendant stated that it would make a motion for summary judgment based on a claim of fair use, a codified doctrine in the Copyright Act that excuses acts that otherwise would be infringement. The litigants have yet to file briefs arguing for and against the motion.

The judge has noted that the relevant section of the Copyright Act sets forth an illustrative introduction followed by four factors, which must be analyzed to determine if fair use applies, based on the specific facts of each case. The judge has asked the examinee to prepare a memorandum analyzing each of those factors and setting forth the examinee's conclusion as to whether fair use applies. The judge has specifically noted that she will not rule until she has considered the arguments that the litigants will present in their briefs supporting and opposing the motion, and that she is therefore asking the examinee to make a preliminary analysis in the absence of those arguments. The examinee need not restate the facts but, as fair use is specifically fact-based, must incorporate them as appropriate in his or her analysis. The examinee must set forth the arguments each side would likely use and fully explain the basis for his or her analysis of each of the factors, as well as his or her conclusion that the use is or is not fair use.

The File contains the instructional memorandum and an agreed statement of facts. The Library contains the relevant sections of the Copyright Act (17 U.S.C. §§ 106 and 107), and three Franklin U.S. District Court cases bearing on the legal issues posed by the claim of fair use:

(a) *Brant v. Holt* (D. Frank. 1998), in which a copyrighted song was used in a political campaign without permission. After analyzing all factors, the court found that the use was not fair use and found infringement.

(b) *Allen v. Rossi* (D. Frank. 2015), in which part of a copyrighted photograph was used without permission in a collage depicting endangered species. The court referenced a 1994 Supreme Court case, *Campbell v. Acuff-Rose Music, Inc.*, which held that one touchstone of fair use analysis is the degree to which the use is "transformative," adding new creative elements. After analyzing all factors and relevant precedents, the court found fair use.

(c) *Klavan v. Finch Broadcasting Co.* (D. Frank. 2017), in which a brief excerpt from a copyrighted video was used without permission in a televised news broadcast. The court also referenced *Campbell*, for the proposition that commercial uses may nevertheless be found to be fair uses. After analyzing all factors, the court found fair use.

The following discussion covers all the points the drafters intended to raise in the problem.

I. FORMAT AND OVERVIEW

The examinee must (1) master the facts at issue; (2) master the seemingly simple framework set forth in the statute governing claims of fair use; (3) master the case law presented, which illuminates that framework; and (4) set forth the resulting analysis in the form of a memorandum that will inform the judge.

The examinee should address five aspects of the fair use statute:

- (1) The introductory language of § 107, and whether the claimed infringing use falls within any of its illustrative areas.
- (2) The first fair use factor, dealing with the purpose and character of the use.
- (3) The second fair use factor, dealing with the nature of the copyrighted work.
- (4) The third fair use factor, dealing with the amount and substantiality of the use in relation to the copyrighted work as a whole.
- (5) The fourth fair use factor, dealing with the effect of the use on the potential market for or value of the copyrighted work.

Examinees will be expected to apply the facts to each of these factors and to state a conclusion as to whether each cuts in favor of or against a finding of fair use. Examinees should ultimately conclude that the alleged infringement is likely fair use.

II. DISCUSSION

A. Facts

Although the examinee is instructed not to restate the facts, they must be mastered properly so as to apply them to the highly fact-specific fair use doctrine. The plaintiff, Naomi Winston, is a professional photographer. In 1985, she attended the annual “Franklin Fun Fair,” a street fair event in Riverside, Franklin, a small town with a population of 15,000. Over the years, the event has been used to make political statements, and that was the case when Winston attended it; she was the only professional photographer in attendance that year. Jim Barrows was a college student at that time, participated in a political demonstration, and was arrested for and convicted of disorderly conduct. Winston took a photograph of the arrest (the “Photograph”), showing a sneering Barrows being led away in handcuffs; it was the only pictorial record of the arrest. As copyright owner of the Photograph, Winston granted a single-use license for \$500 to the *Riverside Record*, a local paper, to use the Photograph in its story about the demonstration. In 1992, she also licensed the use of the Photograph, along with 72 other pictures that she had taken, to a book publisher for a coffee-table book entitled *Franklin in the 1980s—A Pictorial History* (the “Book”). She received a one-time license fee of \$10,000 for the photographs, plus a royalty for each copy sold. The Book

went out of print in 1995. It sold 3,500 copies, and Winston received royalties of \$9,800. She has received no revenue for uses of the Photograph since then.

In 2020, Barrows, now a successful businessman, ran for mayor of Riverside. At a news conference, a reporter brought up his arrest in 1985 and asked how it compared to his current “law and order” stance. Barrows said, “I was young and foolish and impetuous back then, and my arrest was justified. Now, I’m older and wiser, and I recognize the virtues of law and order.”

The defendant, Franklin T-Shirts Inc., is a commercial T-shirt manufacturer and seller. Its owner is active in Riverside politics and supported Barrows’s opponent in the mayoral election. During Barrows’s mayoral campaign, Franklin T-Shirts Inc. took a copy of the Photograph from the Book without authorization and reproduced it in its entirety on a T-shirt, with the caption “BARROWS IS A HYPOCRITE!” In addition, the words “Arrested & Convicted” were stamped in red over the reproduction of the Photograph. The T-shirt was sold at cost, \$4, and sold around 2,000 units. Purchasers were overwhelmingly supporters of Barrows’s opponent.

Barrows lost the election, in large part because of the arrest and conviction and publicity about them, including widespread appearances of the T-shirts. Barrows subsequently withdrew from public life, retired from his businesses, and moved out of state.

B. Analysis

1. Introductory Illustrative Uses

The introductory language of § 107 states that fair use can be found in uses “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” Importantly, because of the term “such as,” these uses are illustrative and not exhaustive. Here, the use on the T-shirts might be seen to fit as a political “comment” on Barrows’s “law and order” stance.

Far more significant to the analysis is the final introductory sentence: “In determining whether the use made of a work in any particular case is a fair use[,], the factors to be considered shall include— [the four factors listed].” Hence, the use of the term “in any particular case” indicates that the analysis must be highly fact-based and fact-specific, and so the examinee’s analysis of each of the four factors is crucial.

2. Four-Factor Analysis

a. First Factor: Purpose and Character of the Use

The first factor listed is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” Here, the defendant’s use, while by a commercial enterprise, was not for profit—the T-shirts were sold at cost. Further, the use was a political comment, a use that, absent any other contradictory fact, is likely a fair use, as noted in

Brant v. Holt. Second, even if the use was seen to be commercial, that does not necessarily mean that it was not a fair use. *Allen v. Rossi*. Third, the more “transformative” a use, the more likely it is to be found fair. *Campbell*, cited in *Allen*.

The plaintiff might argue that the use is not transformative by citing *Rodgers v. Koons* and *Blanch v. Koons*, both referenced in *Allen*. In *Rodgers*, fair use was rejected because the defendant merely took a two-dimensional photograph and rendered it, without any other change, as a three-dimensional sculpture. In *Blanch*, fair use was found because the defendant took only a part of a photograph and used it in a collage of other photographs to make a social commentary, transforming its message. The plaintiff could argue that the written caption and stamp do not in any way physically transform the Photograph, which was used in its original form.

But the defendant can argue that both the caption and the stamp transformed the simple photograph of an arrest to a commentary on the political agenda of a candidate for mayor, a creative transformation that had nothing to do with the original character of the Photograph. Further, that comment was a significant factor in Barrows’s loss, adding evidence of its transformative nature.

On balance, this factor cuts in favor of a finding of fair use.

b. Second Factor: Nature of the Copyrighted Work

The second factor to be analyzed is the nature of the copyrighted work. Most cases do little analysis of this factor, and it usually does not weigh heavily in the fair use calculus. *See Brant; Klavan*. This factor usually turns on whether the copyrighted work is (a) published (more likely fair use) or unpublished (less likely fair use, but note the last sentence of § 107 stating that the unpublished nature of a work does not in itself mean that the use may not be fair); and (b) scientific or factual (more likely fair use) or a creative or expressive work (less likely fair use). Here, those continuums are balanced: the work was published but factually newsworthy. The plaintiff will likely so argue.

However, the defendant will cite *Klavan*, which in turn referenced *Time, Inc. v. Bernard Geis Assocs.*, a 1968 Southern District of New York case. There, the use of line drawings made from single frames of a motion picture that was the only visual record of the moment of President John Kennedy’s assassination was found to be fair use, in part because it was the *only* visual record of an event of transcendent national importance. That case was decided before the present Copyright Act, with its codification of previously only judge-made fair use analysis, but the court in *Klavan* found it persuasive.

Here, the situation is somewhat, albeit not completely, analogous to *Time*. The Photograph was the *only* visual record of the arrest, and it became significant to a political question before the public. While it may be argued that the Photograph is a creative work, militating against fair use, the unique political significance of the Photograph cuts the other way. This factor is moderately in favor of fair use.

c. Third Factor: Amount and Substantiality of Portion Used

The third factor to be analyzed is the “amount and substantiality of the portion used in relation to the copyrighted work as a whole.” Here, the plaintiff would argue, the entire work, unchanged, has been used, and so fair use should not apply. The defendant might counter that making the political comment necessitated using the entire work. The defendant would cite language in *Brant* noting that in some circumstances, the entire work must be used to make a necessary comment—here, a political comment—and fair use may be found even though the entire work is used. This factor slightly favors a finding of fair use, but it could persuasively be argued that it is neutral.

d. Fourth Factor: Effect on Potential Market or Value

Some courts have said that the fourth factor, the effect of the use on the potential market for or value of the copyrighted work, is of great importance. *Brant*. The plaintiff would argue that the Photograph had demonstrated value both when it was taken (the one-time license to the *Riverside Record*) and when it was used in the Book, producing a one-time payment and royalties for its use. She would further argue that use on the T-shirts preempts any licensing of the Photograph to other T-shirt manufacturers.

The defendant would argue that the market for the Photograph is so limited that there would be no further use or effect of its use on the T-shirts. The newsworthiness of the Photograph is long over; those who bought the T-shirts were overwhelmingly opponents of Barrows, whose opposition is now moot as he was defeated. The Photograph was only one of 73 used in the Book, and so the value from use in the Book is minimal. The defendant’s argument is supported by the fact that the Photograph has generated no revenues since the Book went out of print in 1995. And Barrows’s unsuccessful bid for office, withdrawal from public life, and retirement out of state show that the market for the Photograph is likely exhausted. (Note that the defendant could not argue that the use of the Photograph actually enhances its value because it renews interest in the work—as *Klavan* states, it is the copyright owner who should decide what enhances the value of the work.)

On balance, this factor cuts in favor of fair use.

C. Conclusion

In sum, it can be argued that, as each factor favors fair use to some extent, the four-factor test applied to the facts likely leads to the conclusion that fair use applies, and the defendant’s motion for summary judgment should be granted. Note that, given the nature of the arguments presented, an examinee may conclude otherwise—that the use is infringement rather than fair use—and, if the analysis is sufficiently persuasive, still receive substantial credit.