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MPT-1
Item

Winston v. Franklin T-Shirts Inc.

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Winston v. Franklin T-Shirts Inc.

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Chambers of the Hon. Joann Gordon
United States District Court for the District of Franklin
120 N. Henry Street
Centralia, Franklin 33705

MEMORANDUM

TO: Examinee
FROM: Hon. Joann Gordon
DATE: July 27, 2021
RE: *Winston v. Franklin T-Shirts Inc.*, Case No. 21-CV-0530

As you know from the conference in my chambers that you attended as my law clerk, the defendant in this copyright infringement case will make a motion for summary judgment, arguing that its use of the plaintiff's photograph was fair use under the federal copyright statute, 17 U.S.C. § 107. The parties agree that, in the absence of a finding of fair use, the defendant infringed the plaintiff's copyright. While I must await and consider the arguments of the litigants before I rule, I would like your preliminary analysis of the issue.

I am attaching relevant materials. The statute includes illustrative introductory language and calls for the application of four factors in determining whether a particular use qualifies as fair use.

Please prepare a memorandum to me analyzing the possible fair use claim. Do so by applying the statute, including an analysis of each of the statute's four factors. Note that the factors are not applied mechanically; the court has considerable discretion to consider the weight to give each factor in reaching its conclusion. Although you do not yet have the benefit of reviewing the litigants' arguments, be sure to discuss the arguments that the plaintiff and the defendant will likely make for each factor. After that analysis, state your conclusions for each of the four factors and for the overall claim of fair use.

Do not include a separate statement of facts, but be sure to refer to the relevant facts in the record in analyzing the fair use claim.

Winston v. Franklin T-Shirts Inc.**AGREED STATEMENT OF FACTS (record citations omitted)**

1. Since 1979, the “Franklin Fun Fair” has been an annual “street fair” type of event in Riverside, Franklin. Riverside is a small town with a population of 15,000.
2. The fair’s organizers state that the fair is intended to “poke fun at the powers that be and let everybody have a good time.”
3. On occasion, various individuals and groups have used the event to make political statements.
4. In 1985, Jim Barrows, a student at Franklin State University, joined in a political demonstration at the event and was arrested for and convicted of disorderly conduct.
5. Plaintiff Naomi Winston is a professional photographer and was the only professional photographer on the scene that day.
6. Winston took a picture of the police leading a sneering Barrows away from the demonstration in handcuffs (the “Photograph”).
7. Winston’s Photograph of Barrows was the only pictorial record of the arrest.
8. The photographer, Winston, registered the copyright in the Photograph with the United States Copyright Office and is the owner of the copyright in the Photograph. (Barrows has no copyright interest in the Photograph whatsoever, as he is not the “author” of the Photograph.)
9. As copyright owner of the Photograph, Winston granted a single-use license to the *Riverside Record*, a local newspaper, allowing it to publish the Photograph accompanying a story about the political demonstration.
10. Winston received a fee of \$500 for the *Record*’s use of the Photograph.
11. In 1992, Winston licensed the Photograph and 72 other pictures she had created to the publisher of a coffee-table book of her photographs, entitled *Franklin in the 1980s—A Pictorial History* (the “Book”), which retailed for \$40. She received a one-time license fee of \$10,000, plus a 7% royalty for each copy sold.

12. After selling 3,500 copies, the Book went out of print in 1995. Winston's royalties amounted to \$9,800. Winston has not received any revenues from uses of the Photograph since 1995.
13. There have been no other uses of the Photograph to date; Winston has received no other income from any use of the Photograph.
14. In 2020, Barrows, now a prominent businessman, unsuccessfully ran for mayor of Riverside. After he lost the election, Barrows completely withdrew from public life, retired from his businesses, and moved to the neighboring state of Olympia.
15. During Barrows's mayoral campaign, at a news conference he gave, a reporter for the *Record* raised the topic of Barrows's 1985 arrest, compared it to his current "law and order" stance, and asked if he had any comment.
16. 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."
17. Defendant Franklin T-Shirts Inc. is a purely commercial company that manufactures and sells T-shirts. Its owner is active in Riverside politics and was a strong supporter of Barrows's opponent in the mayoral election.
18. During the mayoral campaign in 2020, Franklin T-Shirts Inc. took a copy of the Photograph from the Book and reproduced it in its entirety on a T-shirt. The words "Arrested & Convicted" were stamped in red over the Photograph, and the caption "BARROWS IS A HYPOCRITE!" was printed below the Photograph. Reports of Barrows's arrest and conviction, and publicity surrounding them (including the widespread appearance of the T-shirts), were seen by analysts as significantly contributing to his defeat.
19. Because Franklin T-Shirts Inc.'s owner opposed Barrows's election, he sold the T-shirt at cost, for \$4.00, and sold around 2,000 units.
20. Purchasers of the T-shirts were overwhelmingly supporters of Barrows's opponent in the mayoral election.

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UNITED STATES COPYRIGHT ACT – 17 U.S.C. § 101 *et seq.*
[Excerpted provisions]

§ 106 Exclusive rights in copyrighted works

Subject to sections 107 through 122 [specifying limitations on rights], the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

...

§ 107 Limitations on exclusive rights: Fair use

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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Brant v. Holt

United States District Court for the District of Franklin (1998)

Plaintiff Barbara Brant is a songwriter and the copyright owner of the song “Onward and Upward” (the “Song”). The Song achieved considerable popularity last year, and reached number four on the *Billboard* charts, a standard measure of music popularity based on sales. The Song is an upbeat, inspirational composition, with lyrics that espouse hope and triumph over adversity.

Defendant Ken Holt is a candidate for governor of the state of Franklin seeking his party’s nomination in the upcoming primary election later this year.

In the course of his campaign, Holt has repeatedly had the Song publicly performed at campaign rallies and had it reproduced and publicly performed as background in television and radio commercials, all without Brant’s authorization. Brant has objected to Holt’s use of the Song in his campaign. She sent Holt a “cease and desist” letter, demanding that Holt immediately stop using the Song in any fashion. When Holt ignored the demand, Brant brought an action for copyright infringement and filed this motion for a preliminary injunction to bar any such use.

Holt has claimed that the use of the Song is “fair use” under 17 U.S.C. § 107. For the reasons stated below, we conclude that it is not fair use; the relevant undisputed facts are set forth as appropriate in our analysis.

Overview

[Analysis of standard for granting a preliminary injunction omitted; the court concluded that the standard was met.]

Fair use is an affirmative defense to a claim of copyright infringement. In cases finding fair use, the use in question (absent any other valid defense) would constitute infringement. But the copyright statute excuses acts that would otherwise be infringements if they fall within the limits of the fair use provision of the Copyright Act, 17 U.S.C. § 107. Hence, we must analyze the facts based on the criteria set forth in that statute.

The introductory language of § 107 sets forth some general, illustrative, and non-exhaustive bases for a claim of fair use. Holt correctly notes that his use of the Song was “comment,” one of those bases. However, this is not dispositive. The statute requires a fact-specific analysis under four factors to determine if the unauthorized use is excused.

Factor 1: Purpose and Character of Use

The first factor requires an analysis of the purpose and character of the use, including whether it is “of a commercial nature or . . . for nonprofit educational purposes.” Here, the use is for neither—it is for a political purpose. In that regard, Holt claims that he is using the uplifting message of the Song to parallel his political agenda. He argues that political discourse is and should be encouraged in our society, and that his use of this particular song does so. We agree that political discourse is vital to the essence of our democracy, and uses for that purpose should, absent other factors, weigh heavily in favor of fair use. But that is not the end of our inquiry here, for there are many songs that convey that uplifting message. There was no need to use this particular song to do so. Further, Holt is not using the Song to make any specific comment on his political agenda—it is more of a generalized feeling that all candidates espouse. This factor cuts slightly in favor of the copyright owner and against fair use.

Factor 2: Nature of the Copyrighted Work

This factor usually does not significantly figure in most fair use analyses. Most cases see its application as favoring the use of published as opposed to unpublished works, and scientific or factual works as opposed to those that are creative and expressive. We do not think this factor has much weight here and is neutral in this case.

Factor 3: Amount and Substantiality of Use

The statute requires us to analyze both the quantitative (“amount”) and qualitative (“substantiality”) use of the work. Here, the analysis is simple—the entire work was used, repeatedly, and without modification. While there are circumstances where use of the entire work can nevertheless amount to fair use (e.g., when the entire work is necessary for a commentary or a news report), this is not one of them. This factor cuts against fair use in this case.

Factor 4: Effect on Potential Market or Value

The fourth factor, which some cases (but by no means all) have said is of great importance, is the effect of the use on the market for, or value of, the copyrighted work. One of the purposes of copyright is to protect the economic interests of the copyright owner. Brant has stated in deposition that she fears Holt’s use of the Song will make the Song permanently identified with him and his political views and erode its popularity with members of the public who do not agree with Holt’s political viewpoint. In addition, Brant has stated in deposition that she has publicly opposed the political agenda that Holt espouses and that his use of the Song will undermine her

reputation with her fans. Further, Brant notes that she has not licensed the Song for use in advertising of any sort. We note that the statute speaks not merely of actual harm, but also of harm to the “*potential* market for or value of the copyrighted work” (emphasis added). We find Brant’s testimony compelling in this regard. This factor cuts strongly against a claim of fair use.

Conclusion

For the reasons stated, we hold that Holt’s use of the Song is not fair use, and we grant the preliminary injunction.

Allen v. Rossi

United States District Court for the District of Franklin (2015)

In this copyright infringement case, defendant Stephanie Rossi has moved for summary judgment, claiming that her use of part of plaintiff Martin Allen's photograph in a collage was fair use. We agree.

Facts

The facts are not in dispute. Allen is a noted wildlife photographer. He took the work in question (the "Photo") in 2005; it depicts a scene at a watering hole in Africa. Clustered around the watering hole are various animals—a giraffe, a water buffalo, a rhinoceros, and several others. The Photo was published in 2005 in a book of photographs by many different photographers; Allen received a one-time payment of \$100 for this use of the Photo. He has not made any other sales of the Photo in the 10 years since he took it.

Rossi is a graphic artist whose work is known for espousing social causes. One of those causes is the protection of endangered species. Last year, she created a photographic collage in which she took photographs of many endangered species and placed them in juxtaposition. She took a copy of the Photo, clipped from the book in which it had been published, cut out the picture of the rhinoceros, and then included it in the collage with excerpts of 13 other photographs from various sources, all depicting endangered species of animals. She made the collage into museum-quality poster-sized prints, which she is selling for \$450 each, the proceeds to benefit nonprofit organizations devoted to protecting endangered species.

Analysis

The Copyright Act requires that, to determine if a particular use is a fair use, we analyze four factors.

Factor 1: Purpose and Character of Use

Rossi has testified that her purpose in using the excerpt from the Photo was to draw attention to the plight of endangered species. She hoped, in her juxtaposition of pictures of all the animals in the collage, to educate the public on the beauty of the various animals and the danger they face. She said that she could only do this by showing all the animals together, so as to depict in an overwhelming way the many species at risk. By taking only a part of the Photo and using it to make a comment on a social issue, Rossi has transformed the original aspect of the Photo. The

courts, up to and including the Supreme Court, have made such transformative use one touchstone of fair use analysis.

Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (citations omitted). Although Rossi is selling copies of the collage—a commercial use—we note that the proceeds are going for noncommercial educational purposes, a use endorsed by the statute.

We believe, as the Supreme Court has instructed and as many other courts have found, that the transformative nature of the use is crucial in this case. There may be cases where the reproduction of the entire work is transformative, by making a new work different in character and meaning from the original. But, as a general matter, simply reproducing the copyrighted work, even in another medium, is not the “transformation” that would justify a finding of fair use. *See Rodgers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (reproduction of photograph into three-dimensional sculpture was not fair use). That type of use simply treads on the copyright owner's right to make derivative works, 17 U.S.C. § 106(2). On the other hand, using an element of a copyrighted work in combination with other creative expression, for a different purpose than the copyright owner's and to make a different social commentary, changes—transforms—the use and argues for fair use. *See Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) (use of a portion of a copyrighted photograph in a collage, which in total made a comment on the materiality of commercialism, constituted fair use). That is what happened here, and we see this factor as favoring fair use.

Factor 2: Nature of the Copyrighted Work

Although photographs are intrinsically creative works (weighing against fair use), the Photo here is arguably more informative than artistic. Further, it has been published, weighing in favor of fair use. And that its artistic merit is limited is reflected by the fact that it has been utilized only once in the 10 years since it was taken. On balance, this factor slightly favors fair use.

Factor 3: Amount and Substantiality of Use

Rossi has used only a small portion of the Photo (“amount”). Further, she has not taken the heart of the Photo, as the depiction of the rhinoceros was but one of many animals in the Photo (“substantiality”). This factor cuts in favor of fair use.

Factor 4: Effect on Value

We see no substantial effect of Rossi’s use on the actual or potential value of the copyrighted work. Allen has sold the rights to the Photo but once, for a mere \$100, and has not made any further sale in 10 years. In addition, no one seeing the collage would, we believe, have the slightest notion that the picture of the rhinoceros came from Allen’s picture. The use would in no way affect any possible market for the Photo in the future. This factor, too, cuts in favor of fair use.

Conclusion

Based on our analysis, we find that Rossi’s use of the Photo was fair use. Summary judgment granted.

Klavan v. Finch Broadcasting Co.

United States District Court for the District of Franklin (2017)

Plaintiff Amanda Klavan is a professional videographer. She has brought this action against Finch Broadcasting Co. (Finch) alleging that Finch's broadcast of a portion of a video she made was unauthorized and hence copyright infringement. Finch has moved for summary judgment, claiming that the broadcast was "fair use."

Facts

The facts are not in dispute. Klavan had just finished making a video for the host of a private party in Franklin City, and was walking home with her camera, when an altercation involving two men occurred in front of her. One of the men was Murray Freed, the Speaker of the Franklin City Council. The dispute became nasty, with profane name-calling on both sides, and Freed took a piece of wood that was lying on the sidewalk and repeatedly struck the other man with it. Klavan captured the whole event on her video camera and owns the copyright in the video. There were no other bystanders, and her video, running 14 minutes, was the only visual record of what transpired. She sent a copy to Finch's local television station, noting that she owned the copyright in the video and offering to license the broadcast of the video for \$5,000. Without responding to her offer, Finch took an eight-second excerpt of the video, showing Freed's assault with the piece of wood, and aired the excerpt in its nightly news broadcast reporting on the incident. Klavan then brought this action for copyright infringement.

Analysis

Finch's use of the video excerpt, absent any valid defense, would constitute infringement. Finch's only defense is that the use falls within the fair use provision of the Copyright Act, 17 U.S.C. § 107. Hence, we must analyze the facts based on the criteria set forth in that statute.

At the outset, we note that one of the uses, which the statute explicitly states may be fair use, is "news reporting." That is the case here. But our analysis cannot end there; rather, we must look at the four factors that the statute requires of every fair use analysis.

Factor 1: Purpose and Character of the Use

Finch's purpose in using the excerpt of the video was to report the news to its viewers. While the use was commercial—Finch operates the television station for profit—that does not mean that the use cannot be considered fair. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). Here, the news story at issue was one of significant importance to the populace of Franklin

City—it showed something about the Speaker of the City Council that reflected on his character and temperament. Application of the first factor weighs in favor of fair use.

Factor 2: Nature of the Copyrighted Work

Although this factor usually does not figure in most fair use analyses, we believe it is of great importance here. We recognize that one of the frequent applications of this factor turns on whether or not the work has been published. Klavan’s video was unpublished, which weighs against fair use, for the creator and copyright owner should have the right to first divulge the work to the public in the manner she desires. But we note that the last sentence of § 107 states, “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.” Thus, while we must take into account the unpublished nature of the video, that does not end our inquiry.

We believe this factor militates in favor of fair use for two reasons: First, it is a visual record of a significant newsworthy event, and so is more vivid and revealing than a mere description would be. Second, and more significantly, it is the *only* visual record of the significant newsworthy event. Thus, Finch cannot turn to any other source for a comparable visual report. In this regard, we find *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968), instructive. That case involved a book’s use of line drawings made from single frames of the only motion picture capturing the moment of the assassination of President John F. Kennedy, for the purpose of illustrating the author’s theory concerning the assassination. Thus, the case involved the use of the only visual record of an event of transcendent national importance. The court deemed it fair use. Although that case was brought before the current Copyright Act was enacted, at a time when the fair use doctrine was uncodified and entirely judge-made, we find it persuasive.

Factor 3: Amount and Substantiality of the Portion Used

In absolute terms, the amount of the video used by Finch—eight seconds of a 14-minute work—was minimal. The question of the substantiality of the portion used, however, is closer. It might be argued that the most significant portion of the video—the part showing Freed wielding the piece of wood—was used. But there were other portions of the video of similar significance—for example, the argument leading up to the altercation, the profanity-laced back-and-forth, and so on. At best, we see this factor as neutral as far as fair use goes.

Factor 4: Effect of the Use on the Potential Market for and Value of the Work

It could be argued that, should fair use be found, Klavan may lose a potential market for the eight seconds of the video that Finch used. We do not agree. There are many uses of that portion of the video that differ from Finch's use and that could be licensed. Further, there is an untouched market for the entire video, and for other portions of it. We note that Finch argues that its use actually *enhances* the value of the video, by bringing it to the public's attention and, arguably, creating a market for it. We do not agree with or credit this argument in reaching our conclusion. Rather, it is for the copyright owner, not the user, to determine what may enhance the work's value. Nonetheless, for the reasons given above, we find this factor tilts in favor of fair use.

Conclusion

For the reasons given, we find Finch's use to be fair use. Motion for summary judgment granted.

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

Do not include your actual name anywhere in the work product required by the task memorandum.

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