

Question MPT-1 – July 2021 – Selected Answer 1

Memorandum

To: Hon. Joann Gordon

From: Examinee

Date: July 27, 2021

Re: Winston v. Franklin T-Shirts Inc., Case No. 21-CV-0530

Question Presented

Plaintiff Naomi Winston owns a copyright in a photograph of Jim Barrows, a recent political candidate for mayor. Defendant Franklin T-Shirts Inc. ("Franklin") used this photograph on T-Shirts during the campaign. Winston sued Franklin alleging copyright violation, and Franklin defended itself on the ground of fair use. The parties agree that absent a finding of fair use, Franklin infringed upon the copyright.

Brief Answer

Only one factor weighs against finding fair use--amount and substantiality of the use. But even this factor is weak in this case because the entire photograph was needed. Given it's political purpose and unique importance to the citizens of Franklin, the use should be considered fair use.

Analysis

Fair use is an affirmative defense when the use in question would otherwise constitute infringement. *Brant v. Holt* (D. Fr. 1998). Here, Winston, as the owner of the copyright, had the "exclusive right" to reproduce, distribute, display publicly, and prepare derivative works of the original photograph. 17 U.S.C. § 106. Thus, Franklin must show that the act falls under 17 U.S.C. § 107 of the Copyright Act to qualify for fair use protection. *Id.* As a preliminary matter, the use must be used for criticism, comment, or new reporting (among other possible uses). § 107; *Brant*. Franklin will be sure to argue that this use is a comment on the political issue of Barrows's suitability for the office of mayor. The T-Shirts are a comment because they use the photo to make a statement that is distinct from the copyrighted work alone.

Once a use has qualified under the introductory language of § 107, the Copyright Act requires a "fact specific" analysis of the four factors in § 107. *Brant*. The four factors are "purpose and character of use," "the nature of the copyrighted work," "the amount and substantiality of the portion used," and the "effect of the use on the

potential market for and value of the work." See *Kalvan v. Funch Broadcasting* (D. Fr. 2017); 17 U.S.C. § 107.

I. The political purpose and transformative character of Franklin's use of the photograph weighs in favor of fair use.

This factor looks to the purpose and character of the use, such as whether it "is of a commercial nature or is for nonprofit educational purposes." § 107(1). Franklin is a for profit business that solely focuses on commercial activities. However, the specific work here was sold at cost and produced no profit because Franklin's owner opposed Barrows's election and wanted to promote that message further rather than make a profit, an argument Franklin will make. Winston will surely argue that even if the t-shirts themselves were not sold at a profit, their production by a t-shirt company would enhance the visibility and profitability of Franklin's business, thus making it a commercial use. The parties agree that 2,000 t-shirts were sold and that the t-shirts featured in publicity. Franklin will argue that only supporters of Barrows's opponents bought the shirts, potentially alienating a large portion of its consumer base. But even if the purpose were commercial, that purpose can be undercut by where the proceeds go (here, none). *Allen v. Rossi* (D. Fr. 2015). In *Allen v. Rossi*, the plaintiff sold a collage for a profit, but directed all of the proceeds to noncommercial educational purposes. *Id.* The court concluded that the donation of the proceeds weighed in favor of fair use despite the commercial use of the work. Here, the t-shirts were sold for non profit and any financial benefit to the company is at best indirect.

Further, the use might also be considered to be for a political purpose. In *Brant v. Holt*, a candidate for governor used a copyright-protected song during campaign events and advertisements. The political purpose of the use was noted, and the court reasoned that "uses for political purposes, absent other factors, weigh heavily in favor of fair use." *Brant*. In *Brant*, the factors against fair use were the plethora of options and the lack of specificity in the message conveyed. *Brant* These do not apply here. Winston's photo is the only photo of the arrest (discussed below) and the message conveyed by Franklin is very specific--that Barrows is not fit to be mayor. Winston might argue that as a commercial business, Franklin's use is not like that of a gubernatorial candidate. However, this argument should be rejected because Franklin's owner was politically motivated. Additionally, a for-profit news organization also makes political commentary, but the fact that they are not political candidates does not prevent the protection of fair use. Cf. *Klavan* (citing *Campbell v. Acuff-Rose Music* (U.S. 1994)).

Next, the character of the use looks to the transformative nature of the use compared to the original work. *Allen*. Transformation "is not absolutely necessary," but such

transformation makes other factors (such as commercialism) less significant. *Campbell v. Acuff-Rose Music* (U.S. 1994). To be transformative, the work must be "combined with other creative expression," for a different purpose, and to "make a different social commentary" is transformation. *Allen* (citing *Blanch v. Koons* (2d Cir. 2006)). For example, in *Allen v. Rossi*, a portion of a photograph was taken and combined with other excerpts of photographs to make a statement about endangered animals. Nevertheless, the court concluded that that use went beyond a mere reproduction in a different medium, contrast *Rodgers v. Koons*, (2d Cir. 1992), and transformed the original work.

Winston will likely argue that *Allen* is distinguishable because Franklin use the entire photograph. But *Allen* noted that use of an entire work can be transformative as long as it is "different in character and meaning from the original." *Id.* That is the case here. The original photograph was capturing an event that happened at a fair where a young adult behaved inappropriately. Nothing in the original nature or its use since has made a political statement about that young adult as a grown adult or political figure. Finally, the court in *Klavan* looked to the "significant importance to the populace of Franklin." *Klavan*. In *Klavan*, the work, a video of a city council member assaulting someone with a piece of wood, reflected on character and temperament of someone in public office. Here, the work reflects on the character and temperament of a candidate for mayor. Its importance to the citizens of Franklin further counsels for finding fair use.

Because of its political purpose, the lack of commercial profit, the transformative nature of the use, and the importance to the citizens of Franklin, this factor weighs in favor of finding fair use.

II. The unique and visual nature of the photograph weigh in favor of fair use.

This factor "usually does not significantly figure in most fair use analyses." *Brant*. However, there are a few cases in which the factor can tilt the scales. For example, the following factors weigh in favor of fair use: if a work has previously been published, is informative or scientific in nature, is a visual representation of a newsworthy event, and/or is the only representation of such an event. See *Allen*; *Klavan*. Although it is usually unimportant, this factor can be of "great importance." *Klavan*.

Franklin will likely argue that all of the special factors that make this part of the test important and weigh in favor of fair use apply here. First, the photograph was previously published. Although the first publication was a one-time license for a daily paper, the second use was used in a book that produced 3,500 copies. Second, the picture, although creative enough to qualify for copyright, *Allen*, is more informative

than creative. Winston did not stage the photo, but rather responded to a newsworthy event already happening. Third, the visual representation of the event is more vivid than a t-shirt that merely described the arrest 35 years previous. Fourth, it is the only photograph of the incident, meaning Franklin "cannot turn to any other source for a comparable visual report." Klavan. See also *Time v. Bernard Geis* (S.D.N.Y. 1968) (a pre-Copyright Act case cited approvingly by Klavan).

Because the photograph is unique, informative, published, and visual, this factor weighs in favor of fair use.

III. The use of the entire work and weighs slightly against finding fair use.

This factor considers both the absolute amount of the work used in comparison to the entire work as well as the substantiality of the portion used in a qualitative sense. Brant. Here, the amount and the substantiality weigh against fair use because Franklin used the entire work. Winston will likely argue that this should end the inquiry and that this factor should weigh strongly against fair use--even perhaps dispositive of the fair use issue.

However, Franklin might respond by arguing that Brant acknowledged that in some circumstances the entire work can amount to fair use, such as "when the entire work is necessary for a commentary or a news report." This is arguably one of those cases. The entire photograph was needed to adequately convey the nature and circumstances of Barrows's arrest. If too much would have been clipped out, the photograph would have been incomplete and confusing to viewers. However, the photograph was not clipped at all, and it is unclear how much was necessary to get the message across to viewer. Further, even if it would have been clipped some, leaving the main message would have still resulted in a substantial use of the work.

Because the entire work was arguably necessary, this factor only slightly weighs against fair use.

IV. The effect on the potential market for or value of the work is small and thus weighs slightly in fair use.

In some cases, this factor is of great importance. Brant. This factor is designed to protect the economic interest of the copyright holder. *Id.* The actual harm is important, but a court must also consider the potential market for its use. *Id.* A lack of recent economic use weighs in favor of fair use, and the potential to still market the photograph despite the fair use does as well. Allen; Klavan.

Winston will argue that the use deprived her of the "potential" of capitalizing on the political moment and licensing her photograph. Although there was no evidence of actual harm, either through the reputation hit of her work being used politically or cancellation of license, the potential harm matter as well. Brant. Franklin will argue that it has been 25 years since any money has been paid. Allen (noting that ten years was not very much). And it is further unclear that she could have made money on licenses because of the political and significant impact of the photograph. Cf. Klavan. She also only made \$500 plus \$1,980 (but spread across 73 photographs) on the work so far. It might be unlikely that she would be able to profit further.

Although Franklin might argue that the use of the photograph actually enhanced the value by bringing it to light, this should not be credited. Klavan. It is the holder, not the purported fair user, that determines "what may enhance the work's value." Klavan.

Ultimately, it is unclear how much effect this use has on the market for the work. Even if there is some effect, it is likely to be small. Thus, this factor weighs slightly in favor of fair use.

Conclusion

Because three of the four factors weigh in favor of fair use, and the one favor that weighs against it is only slightly against, Franklin's use should be considered fair use of the photograph.

Question MPT-1 – July 2021 – Selected Answer 2

MEMORANDUM

TO: Hon. Joann Gordon

FROM: Examinee

DATE: July 27, 2021

RE: *Winston v. Franklin T-Shirts, Inc.*, Case No. 21-CV-0530 MSJ Analysis

I. Introduction

You asked me to prepare a memorandum analyzing the possible fair use claim that you will consider in ruling on the defendant's impending motion for summary judgment under the federal copyright statute, 17 U.S.C. § 107. After reviewing and analyzing each of the four factors and the relevant authority, I found that the weight of the evidence favors granting the motion for summary judgment for the defense, assuming there are no surprises from the facts of the case, which is discussed below.

II. Discussion & Analysis

Under 17 U.S.C. §106, subject to sections 107 to 122, which specify limitations on rights, the owner of copyright under the act has the exclusive right to do many things, including to reproduce copyrighted records..... One of the exceptions to this statute is fair use, which is codified in 17 U.S.C. § 107. Under § 107, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified in that section, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright.

The court uses four factors to determine whether the use is fair use, including: (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. Furthermore, the fact that the work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. Fair use is an affirmative defense to copyright infringement. (*Brant v. Holt*). The analysis of the use in this matter is broken down by each of these factors, as described below.

A. The First Factor, Purpose and Character Use, Weighs in the Defendant's Favor Because the Defendant Utilized the Photograph for a Specific Political Purposed & Transformed the Photograph in its 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." 17 U.S.C. §107(1).

In the case of *Brant v. Holt*, this court held that defendant Kent Holt's, then a candidate for governor, use of Plaintiff Barbara Brant's song during his campaign rallies and advertisement was not of a commercial nature or for nonprofit educational uses. Instead, the court found that the use of the song was for a political purpose, and that the use of the song was not purely used for political discourse, which would weigh heavily for fair use. Further, he was not using the song to make a specific comment on his political agenda, which would factor in favor of fair use. Rather, the use of the entire song that conveyed an uplifting message could have been interchanged with any other generic song that conveyed an uplifting message. The court found that this factor weighed against a finding of fair use.

Here, the plaintiff, Naomi Winston, would probably argue that the use of the photograph was not used for a proper purpose, but rather for an improper commercial use, as the defendant, Franklin T-Shirts, Inc., utilized a copy of the photograph Naomi took of Barrows and reproduced it on a T-Shirt for profit, which Franklin T-Shirts sold for \$4.00 a piece. However, the defendant will likely argue that though the use of the T-Shirt was commercial, that commercial use does not always bar finding fair use on this factor. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). The defense would argue that the main purpose of the use was political in nature and was of significant importance to the populace in Franklin City, like the reproduction of a videographer's video in *Klavan v. Finch Broadcasting Co*, because it showed something about the mayoral candidate Burrows' character and temperament. The defense will also likely argue that the song was used to make a specific comment on their political agenda, rather than utilizing the work generally as part of their campaign, like a feel-good song in *Brant v. Holt*. The defense will further argue that the owner of the company is active in Riverside politics and was a strong supporter of Barrow's opponent, so the commercial use of the photograph was incidental to the political discourse use of the photograph.

Furthermore, the decision of whether or not this factor is satisfied often turns on whether or not the use of the work was transformative in nature. The Supreme Court has held that, while 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. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). In *Allen v Rossi*, Rossi clipped out a portion of a picture that the plaintiff took and juxtaposed it along with other animals that are endangered. The court held that by taking only part of the photo and using it to comment on a social issue, that Rossi transformed the original aspect of the photo. The court also distinguished that simply reproducing the copyrighted work, even in another medium, is not the "transformation" that would justify fair use. *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992). Furthermore, using an element of 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. *Blanch v. Koons*, 467 F.3d 244 (2d Cir 2006).

The plaintiff will likely argue that the work as not transformative in nature because the defendant reproduced the copy of the photograph out of the book in its entirety. Plaintiff will argue that even though the defendant moved the photograph from the book and moved it to another medium, that the defendant did not transform the photograph enough to justify fair use. On the other hand, the defendant will argue that the defendant did transform the photograph enough because it added social commentary - including "Arrested & Convicted" and "BARROWS IS A

HYPOCRITE!" to the T-Shirt. The additional social commentary is likely enough to constitute fair use.

Because the use of the photograph on the t-shirt was for a specific political purpose in political discourse, and did transform the work of the plaintiff by adding socially-relevant commentary to the shirt, this factor weighs in favor of fair use for the defendant.

B. The Second Factor, Nature of the Copyrighted Work, Weighs in Favor of the Defense Because the Photograph was Previously Published and There is no other Depiction of the Event.

This factor usually does not significantly figure in most fair use analyses. However, it can be of importance and turns on whether or not the work has been published (*Klavan v. Finch Broadcasting*). In the *Finch* case, the defendant aired a section of a video that the plaintiff captured of a fight that broke out between a counsel man and another man while she was leaving a party. The court held that the fact that the video was unpublished by the time it got to the defendant's TV station weighed against fair use, because the creator and copyright owner should have the right to first divulge the work to the public in the manner she desires. (*Klavan v. Finch Broadcasting*). The court's analysis went further, and their decision on this factor turned on two matters: (a) that the video was a visual record of a significant newsworthy event, and so is more vivid and revealing than a mere description would be; and (b) more significantly, that it is the only visual record of the significant newsworthy event, and the defendant could not turn to another source for a comparable visual report.

Here, the defendant will argue that this factor weighs in their favor because the picture was already previously published in the book *Franklin in the 1980s -- A Pictorial History*, unlike the video that was published in the *Finch* case. Therefore, the plaintiff got her chance to divulge the work to the public in the manner she desires. The defendant will also likely argue that the T-Shirt depicted a significant newsworthy event, the arrest of the mayoral candidate, and that the picture is the only visual record of the newsworthy event, because the plaintiff was the only professional photographer on the scene that day, and that the impact of the T-Shirt would not be as vivid without the use of the photograph.

The plaintiff will likely argue that although the photograph was already published, she did not have the chance to determine whether or not to utilize the photograph for a political purpose. She would also argue that the arrest was not a newsworthy event, because although it may be probative to the mayoral candidate's character in 1985, it is

not probative to his character as a successful businessman in 2020. This argument is further supported by the fact that Burrows owned up to the arrest on his own when he said during a news conference "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."

Although the plaintiff has a valid point about the use of the photograph not being newsworthy, this factor also weighs in favor of the defense because the photograph was previously published and it is the only record of the event.

C. The Third Factor, Amount and Substantiality of Use, Weighs in Favor of the Plaintiff because the use was the whole photograph and was substantial.

This factor requires the court to analyze both the "quantitative" (amount) and qualitative ("substantiality") of the work. (*Brant v. Holt*). There are circumstances where the use of the entire work can amount to fair use (e.g. when necessary for a commentary or a news report).

Here, the defense utilized the entire photograph for the T-Shirt, which amounts to the entire quantitative amount of the photo. The defense will likely argue that the use of the entire photograph on the shirt was necessary for commentary. However, this factor overwhelmingly favors the plaintiff.

D. The Fourth Factor, The Effect on Potential Market or Value

The fourth factor, which some cases have said is of great importance, is the effect of the use on the market for, or value of, the copyrighted work. This includes not merely actual harm, but also of harm to the "potential market for value of the copyrighted work." (*Brant v. Holt*).

The plaintiff will likely argue that the use of the photograph is detrimental to her future potential market use of the photograph. However, the defense will argue that this does not weigh in the plaintiff's favor because she has not received any revenues from uses of the photograph since 1995, which is almost 20 years ago. The defense may argue that the use of the photograph actually enhances its market value, as in *Klavan*, because it brought the photograph back to the forefront of people's minds and creating a market for it. However, it is for the copyright owner, not the user, to determine what may enhance the work's value. *Klavan*. However, there does not seem to be a future market for the photograph, and the picture has not been used for profit in a while. Therefore, this factor weighs in favor of the defense.

III. Conclusion

After reviewing the four factors, all but the third, which is the amount and substantiality of the use, weigh in favor of the defense. This should help guide you in determining whether or not to grant the motion for summary judgement.

Question MPT-1 – July 2021 – Selected Answer 3

**Chambers of the Hon. Joann Gordon
United States District Court for the District of Franklin**

120 N. Henry Street
Centralia, Franklin 33705

MEMORANDUM

To: Hon. Joann Gordon

From: Applicant

Date: July 27, 2021

Re: *Winston v. Franklin T-Shirt Inc., Case No. 21-CV-0530*

Jim Barrows (Barrows) is running for Mayor and those that oppose his campaign, including Franklin T-Shirt Inc., have been using an image of Barrow captured and copyrighted by Naomi Winston (Winston) in 1985 of him being arrested for disorderly conduct at the Franklin Fun Fair where he was joining in a political demonstration. Franklin T-Shirt Inc. (T-Shirt) has turned the image into T-Shirts and have been selling them at cost without the authorization of Winston to use her image. This memo will address a fair use analysis determining if it was permissible for Franklin T-Shirt Inc. to use the image.

Fair Use

The United States Copyright Act 17 U.S.C. § 106 defines the exclusive rights in copyrighted works. Subject to sections 107 to 122 the owner of copyright under this title has the exclusive rights to do and to authorize the rights outlined in section 106. Section 107 provides the factors of a Fair Use analysis. The fair use of a copyrighted work allows the ability to reproduce for criticism, comment, news reporting, teaching, scholarship, or research and will not be deemed an infringement of copyright. To determine fair use, the courts analyze the following factors: (1) the purpose and character of the use, including whether such use is of 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 value of the copyrighted work.

Fair use is an affirmative defense to a claim of copyright infringement. *Brant v. Holt* (Franklin D.C. 1998). In questions finding fair use, the use in question would constitute infringement but § 107 excuses the acts that would otherwise be infringements. *Id.* An analysis of the factors follows to determine if Franklin T-Shirt Inc. infringed on Wintson's copyright.

Purpose and Character of the Use

The first factor requires an analysis of the purpose and character of the use, including whether it is "of commercial nature or ... for nonprofit educational purposes." *Brant*. In *Brant*, Ken Holt was a candidate for governor of the state of Franklin and was using Brant's song "Onward and Upward" in his campaign efforts during live rallies and in television and radio commercials without Brandt's authorization. There, the use was neither commercial or educational, but instead for a political purpose. Holt claimed that his was using the song to promote his political agenda because of its uplifting message and that political discourse is vital to democracy. The court agreed that political discourse is important but that there are many songs that could convey the uplifting message. Thus, there was no need to use "Onward and Upward" and this factor weighed against fair use.

Here, there are similarities to *Brant* because Winston's image is being used for a political message. The difference is that there is no alternative to the image of Barrows captured by Winston to be used for the political purpose. The shirts do not have a commercial purpose because they are being sold at cost by Franklin T-Shirt, Inc.

Another argument T-Shirt may argue is that the use of the Photograph was transformative. The United States Supreme Court has stated that, "Although such transformative use is not absolutely necessary for a finding of fair use, the goal of the 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 grant of breathing space within the confines of copyrights, 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).

In *Allen v. Rossi*, (Franklin D.C. 2015), a graphic artist used a copyrighted photograph of various animals in a collage with 13 other photos to depict the overwhelming way that many species are at risk. There, the court found the United States Supreme

Court's argument on transformative uses persuasive and stated its analysis was crucial for this factor. The court specified that reproducing the copyrighted work in another medium is closer to a copyright owner's right to creating derivative works. *See Rodgers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (reproduction of photograph into three-dimensional sculpture was not fair use). A work is transformative when an element of a copyrighted work is used in combination with other creative expression. *See Blanch v. Koons*, 467 F.3d (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). The court found that the graphic artist's use of the photograph was transformative like in *Blanch* and stated it weighed in favor of fair use.

Here, T-Shirt is going to argue that the use of the photograph on a t-shirt was transformative because of the other elements added to the shirt. T-Shirt only added the words "Arrested & Convicted" in a red stamp over the Photograph and added a caption stating that "BARROWS IS A HYPROCRITE!" Winston will argue this use is closer to the sculpture in *Rodgers* and is more likely a right of Winston to create a derivative work. The transformative aspect is a close call but the artistic elements added by Winston likely make this closer to the collage in *Allen* which weighs this factor in favor of fair use.

Thus, this factor weighs in favor of fair use.

The Nature of the Copyrighted Work

This factor is not always considered in fair use analyses, but is important when determining whether or not the work has been published. *Klavan*.

In *Klavan v. Finch Broadcasting Co.*, a professional videographer happened to capture a video of a fight including a public official on her walk home. She offered to sell the entire video to a local television station for \$5,000 but the network decided to use an eight second clip of the fight without paying her for the video. There, the court said it weighed in favor of fair use because it was a visual record of a significant newsworthy event and, more significantly, because it was the only visual record of the significant newsworthy event. The court illustrated *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968) where the only motion picture capturing the assassination of President Kennedy was deemed fair use because it was the only event of transcendent national importance. The court find the case persuavvie even though it occurred before the creation of the fair use doctrine and ruled the the television station's use of the fight video was fair use.

Here, there are significant parallels with our case because the picture captured by Winston, a professional photographer, was the only pictorial record of the arrest. Due to this, T-Shirt has no other picture to turn to to accomplish the goal of their T-Shirt to deliver a message of local significance. Due to this, the photograph is the only pictorial evidence of the event and that event is a significantly newsworthy event both at the time and because now Barrow is running for Mayor.

Thus, this factor weighs in favor of fair use.

The Amount and Substantiality of Use

The statute requires us to analyze both the quantitative ("amount") and qualitative ("substantiality") use of the work. *Brant*. In *Brandt*, the copyright was used, repeatedly, and without modification. There, the court noted that the entire work can be used when necessary for a commentary of a news report. Here, the photograph is being used, repeatedly, and without modification but it is necessary for a commentary of a news report.

Thus, this factor weighs in favor of fair use.

The Effect on the Potential Market or Value

The fourth factor, which some cases, but not all, have said is of great importance, is the effect of the use on the market for, or value of, the copyrighted work. *Brant*. One of the purposes of copyright is to protect the economic interests of the copyrighted owner. *Id.* This harm does not need to be actual, but also harm of the potential market. *Id.* In *Brant*, the song owner testified that she feared the Song would permanently be identified with Holt and his political views would erode the popularity of the song. There, the court found this testimony compelling and ruled the factor strongly weights against a claim of fair use. Here, Winston may attempt to make a similar argument in testifying that the image would permanently be associated with the opposite of Barrows political positions affecting the potential market of the image in the future. This argument should not be given much weight though because the last time Winston received revenues from the Photograph was in 1995. Prior to that, she had received a one time licensing fee from the Riverside Record, a local newspaper, for \$500 and \$10,000 plus a 7% royalty for the use of the Photograph in a coffee-table book entitled Franklin in the 1980s. Due to this, T-Shirt's use of the image does not have a harm on the actual market of the copyright because she has not received revenues on the copyright since 1995. The only potential market we know of is if T-Shirt had paid her a licensing fee for use of Photograph on the T-Shirt.

Thus, this factor weighs in favor of fair use.

Conclusion

Under this analysis of a fair use defense, all four factors weigh in favor of fair use and you should likely rule in favor of the defendant's motion for summary judgment because there appears to be sufficient evidence and authority available for a valid fair use defense.