July 2015
MPTs and Point Sheets

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Contents

Preface....................ii

Description of the MPT....................ii

Instructions....................iii

MPT-1: ***In re Bryan Carr***

FILE

Memorandum from Miles Anders....................3
Office memorandum re: Opinion letters....................4
Transcript of telephone conversation between Miles Anders and Bryan Carr....................5
Letter from Bryan Carr authorizing credit card use....................8
Credit card statements from Acme State Bank....................9

LIBRARY

Excerpts from Federal Truth in Lending Act, 15 U.S.C. §§ 1602 & 1643....................15
Excerpts from Restatement (Third) of Agency....................16
BAK Aviation Systems, Inc. v. World Airways, Inc., Franklin Court of Appeal (2007)..17
Transmutual Insurance Co. v. Green Oil Co., Franklin Court of Appeal (2009)....................20

MPT-2: ***In re Franklin Aces***

FILE

Memorandum from Eileen Lee, Esq., Executive Director....................25
Article from *Franklin Sports Gazette*....................26
Transcript of interview between Eileen Lee and Al Gurvin....................27
Copy of fax from Al Gurvin to Daniel Luce....................29
Press release announcing new Franklin Aces logo....................29
Letter from José Alvarez....................30
Affidavit of Daniel Luce....................31
Affidavit of Monica Dean....................33

LIBRARY

Oakland Arrows Soccer Club, Inc. v. Cordova, United States District Court for the District of Columbia (1998)....................37
Savia v. Malcolm, United States District Court for the District of Franklin (2003)....................40
Herman v. Nova, Inc., United States District Court for the District of Franklin (2009)......43

MPT Point Sheets

MPT-1: ***In re Bryan Carr***....................47

MPT-2: ***In re Franklin Aces***....................57

Preface

The Multistate Performance Test (MPT) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the items and Point Sheets from the July 2015 MPT. The instructions for the test appear on page iii.

The MPT Point Sheets describe the factual and legal points encompassed within the lawyering tasks to be completed. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions to assist graders in grading the examination by identifying the issues and suggesting the resolution of the problem contemplated by the drafters.

For more information about the MPT, including a list of skills tested, visit the NCBE website at www.ncbex.org.

Description of the MPT

The MPT consists of two 90-minute items and is a component of the Uniform Bar Examination (UBE). It is administered by user jurisdictions as part of the bar examination on the Tuesday before the last Wednesday in February and July of each year. User jurisdictions may select one or both items to include as part of their bar examinations. (Jurisdictions that administer the UBE use two MPTs.)

The materials for each MPT include a File and a Library. The File consists of source documents containing all the facts of the case. The specific assignment the examinee is to complete is described in a memorandum from a supervising attorney. The File might also include transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, or lawyer's notes. Relevant as well as irrelevant facts are included. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or a supervising attorney's version of events may be incomplete or unreliable. Examinees are expected to recognize when facts are inconsistent or missing and are expected to identify potential sources of additional facts.

The Library may contain cases, statutes, regulations, or rules, some of which may not be relevant to the assigned lawyering task. The examinee is expected to extract from the Library the legal principles necessary to analyze the problem and perform the task. The MPT is not a test of substantive law; the Library materials provide sufficient substantive information to complete the task.

The MPT is designed to test an examinee's ability to use fundamental lawyering skills in a realistic situation and complete a task that a beginning lawyer should be able to accomplish. The MPT is not a test of substantive knowledge. Rather, it is designed to evaluate six fundamental skills lawyers are expected to demonstrate regardless of the area of law in which the skills arise. The MPT requires examinees to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints. These skills are tested by requiring examinees to perform one or more of a variety of lawyering tasks. For example, examinees might be instructed to complete any of the following: a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument.

Instructions

The back cover of each test booklet contains the following instructions:

> 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.
>
> This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

July 2015

MPT-1 File:

In re Bryan Carr

Anders, Davis & Waters
Attorneys at Law
6241 Lowell Street
Franklin City, Franklin 33205

To: Examinee
From: Miles Anders
Re: Bryan Carr
Date: July 28, 2015

My friend and former college roommate Bryan Carr has consulted me about a credit card problem he is facing. I offered to help him figure out a strategy for responding.

Bryan's mother died last year. Since then his father, Henry Carr, has become more and more dependent upon Bryan. Several months ago, Henry asked Bryan if Bryan could pay the estimated $1,500 it would take to repair Henry's van. Bryan gave his credit card to Henry and told him that he could charge all the repairs but could not use the card for anything else. Bryan also gave Henry a letter that said Bryan was giving Henry permission to use the card. In the end, the total repair cost was $1,850, which was charged to Bryan's card.

Bryan forgot to get the credit card and letter back from his father, and Henry used the card to buy several things in addition to the auto repairs. Over several months, Henry charged gasoline, groceries, books, and, most recently, power tools to Bryan's account. Bryan always pays the entire balance on his credit cards each month, and he had already paid for the first three months of purchases without noticing Henry's charges. However, earlier this month, Bryan discovered the unauthorized purchases. He promptly contacted the bank that issued the card to dispute the charges. The bank has notified him that he is responsible for all charges.

Bryan would like our advice about his legal obligation to pay the bank for the charges Henry made in March, April, May, and June, as detailed in the statements for these months. Please draft an opinion letter for my signature to Bryan. This letter should advise Bryan of the extent of his liability for each of Henry's purchases. The letter should follow the attached firm guidelines for opinion letters.

Anders, Davis & Waters
Attorneys at Law
6241 Lowell Street
Franklin City, Franklin 33205

OFFICE MEMORANDUM

To: Associates
From: Managing partner
Re: Opinion letters
Date: September 5, 2013

The firm follows these guidelines in preparing opinion letters to clients:

- Identify each issue separately and present each issue in the form of a "yes or no" question. (E.g., Is the client's landlord entitled to apply the security deposit to the back rent owed?)

- Following each issue, provide a concise one- or two-sentence statement which gives a "short answer" to the question.

- Following the short answer, write a more detailed explanation and legal analysis of each issue, incorporating all important facts and providing legal citations. Explain how the relevant legal authorities combined with the facts lead to your conclusions.

- Bear in mind that, in most cases, the client is not a lawyer; avoid using legal jargon. Remember to write in a way that allows the client to follow your reasoning and the logic of your conclusions.

Transcript of telephone conversation between Miles Anders and Bryan Carr
July 24, 2015

Anders: Bryan, I heard your voicemail message. I'm sorry you are having problems, and I'd like to help. Can you tell me what happened?

Carr: Well, you know that my mom died late last year. My dad has been devastated. They were married for 40 years. My mom had always organized and maintained their household and paid all the bills. Now my dad is pretty much at a loss for how to cope. Even though this is a busy season for my landscaping business, I've tried to step in to support him as much as I can, including paying some of his bills. It's been tough keeping up with all that's going on.

Anders: Can you tell me more about your dad's situation? I'm asking because I understand that this has contributed to your current problem.

Carr: About four months ago, my dad came to me after his van broke down. He had gotten a repair estimate for $1,500, and he didn't have the money on hand to pay for the repairs. I decided to help him out and told him I would pay whatever it cost to have his van repaired. I also told my dad it was a loan, but honestly, I was never going to ask him to pay me back. I love my dad and wanted to help him in his time of need.

Anders: How did you give him the money?

Carr: I let him use one of my credit cards. It seemed the easiest thing to do at the time. I had a card that had a zero balance on it. It's with Acme State Bank. When I gave my dad the credit card, I told him that he could charge the van repairs, but I also specifically told him that that was the only purchase or charge he should make on the card.

Anders: Did you do anything else?

Carr: Yes, I wrote a letter that said that my dad was authorized to use my credit card and gave it to him. I think I also wrote the credit card account number and expiration date on the letter. I made a copy of the letter and have it in my desk. I will scan it and email it to you as soon as we get off the phone.

Anders: Did the letter say anything about restricting the purchase specifically to the van repairs?

Carr: No, it didn't.

Anders: Did your dad charge the repairs?

Carr: Yes, my dad used my Acme State Bank card to pay for the van repairs. The final bill was somewhat more than the original estimate. Apparently an additional part was needed, making the total repair cost $1,850. That was $350 more than the original estimate. My dad charged the total amount to my credit card.

Anders: Then what happened?

Carr: With all that was going on in my life, I forgot to get my credit card back from my dad until about six weeks ago. When I finally did, I also got back the letter I'd given him. Unfortunately, I subsequently learned that my dad had already used the card to make additional purchases without ever asking my permission or even telling me. In fact, he even used my account information after returning the card and letter.

Anders: How did you find out about the additional purchases?

Carr: When I was reviewing and preparing to pay my current credit card statement, I noticed a $1,200 charge to Franklin Hardware Store for power tools. I knew I had not made this purchase. I called my dad to see if he knew anything about the power tools purchase.

Anders: What did your dad say?

Carr: He admitted he had used my account number to buy the power tools. He told me he wanted to prove to himself and the rest of the family that he could take care of the house, and he impulsively went to buy some tools to make some household repairs. He said he had written the account information on a piece of paper before returning the credit card and my letter to me.

Because my dad had already returned the credit card and my letter to me before he purchased the tools, he said he merely presented the credit card account name, number, and expiration date to the hardware store clerk. The clerk must have been out of his mind, but he accepted the information my dad presented and charged the tools to my account. My dad feels terrible and has apologized profusely. He is so ashamed of himself.

Anders: Are these the only other charges your dad made?

Carr: I wish. He also admitted that before he returned my card, he had used it to buy gas, groceries, and books over the past few months.

Anders: What did you do after you learned of all these transactions?

Carr: I pulled out my file with my Acme State Bank credit card statements and reviewed my statements for the past several months. Sure enough, upon review, I noticed that during the past four months, in addition to the van repairs, my dad had charged gasoline on two occasions at Friendly Gas, groceries on one occasion at the Corner Market, books at Rendell's Book Store, and most recently, the power tools at the Franklin Hardware Store. I always pay the entire balance on my credit cards on the due date each month. All the gas, grocery, and book charges made by my dad have already been paid in full. I noted this fact by writing "Paid—BC" on each of the past statements. I never noticed these charges before I paid my statements. The truth is, I usually don't review the bills very carefully, and I didn't notice the gas, grocery, and book charges because he and I both shop at the same places. I probably gave each statement a quick glance, if that. However, I have not yet paid the current credit card statement for June with the $1,200 power tools charge.

Anders: Have you contacted the bank or done anything else?

Carr: I called the bank to discuss the problem. They directed me to fill out and send in their form disputing the charges. I did this right away.

Anders: What happened?

Carr: This morning I received a letter from the bank informing me that I was responsible for all the charges. That's when I called your office.

Anders: What would you like to see happen?

Carr: I know my dad did something he shouldn't have done; I told him to return the tools if he still could. But he's a senior citizen and in considerable distress. The various vendors should not have allowed him to use my credit card. I know he had the card in his possession for all but the power tools purchase, but it's still not right for the bank to say I'm responsible. I'd like to know whether the bank can hold me responsible for each of the charges my dad made.

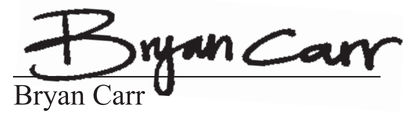
Anders: Bryan, we'll look into this quickly. Meanwhile, please don't pay your credit card statement until you get further advice from us. I'll be back in touch before the current payment due date.

March 12, 2015

To Whom It May Concern:

I, Bryan Carr, give my father, Henry Carr, permission to use my Acme State Bank credit card: account number 474485AC66873641, expiration date 09/2017. If you have any questions, please feel free to call me at 555-654-8965.

Thank you,



Bryan Carr

ACME STATE BANK

P.O. Box 309
Evergreen, Franklin 33800

Billing Statement: March 2015

Bryan Carr
6226 Lake Drive
Franklin City, FR 33244

Account Number 474485AC66873641

New Charges

DATE	DESCRIPTION		AMOUNT
March 16, 2015	Schmidt Auto Repair		$1,850.00
		Total	$1,850.00

Payment Due Date	Minimum Due
April 30, 2015	$55.50

DIRECT ALL INQUIRIES TO
(800) 555-5555

MAKE ALL CHECKS PAYABLE TO
Acme State Bank
P.O. Box 309
Evergreen, FR 33800

THANK YOU FOR YOUR BUSINESS!

PAID—BC April 29, 2015

ACME STATE BANK

P.O. Box 309
Evergreen, Franklin 33800

Billing Statement: April 2015

Bryan Carr
6226 Lake Drive
Franklin City, FR 33244

Account Number 474485AC66873641

April 30, 2015 Payment Received $1,850.00

New Charges

DATE	DESCRIPTION		AMOUNT
April 10, 2015	Friendly Gas Station		$75.00
April 16, 2015	Corner Store		$55.00
April 21, 2015	Friendly Gas Station		$76.50
		Total	$206.50

Payment Due Date	Minimum Due
May 31, 2015	$15.00

DIRECT ALL INQUIRIES TO
(800) 555-5555

MAKE ALL CHECKS PAYABLE TO
Acme State Bank
P.O. Box 309
Evergreen, FR 33800

THANK YOU FOR YOUR BUSINESS!

PAID-BC May 30, 2015

ACME STATE BANK

P.O. Box 309
Evergreen, Franklin 33800

Billing Statement: May 2015

Bryan Carr
6226 Lake Drive
Franklin City, FR 33244

Account Number 474485AC66873641

May 31, 2015	Payment Received	$206.50

New Charges

DATE	DESCRIPTION	AMOUNT
May 16, 2015	Rendell's Book Store	$45.70
	Total	$45.70

Payment Due Date	Minimum Due
June 30, 2015	$15.00

DIRECT ALL INQUIRIES TO
(800) 555-5555

MAKE ALL CHECKS PAYABLE TO
Acme State Bank
P.O. Box 309
Evergreen, FR 33800

THANK YOU FOR YOUR BUSINESS!

PAID-BC June 29, 2015

ACME STATE BANK
P.O. Box 309
Evergreen, Franklin 33800

Billing Statement: June 2015

Bryan Carr
6226 Lake Drive
Franklin City, FR 33244

Account Number 474485AC66873641

June 30, 2015 Payment Received $45.70

New Charges

DATE	DESCRIPTION	AMOUNT
June 21, 2015	Franklin Hardware Store—power tools	$1,200.00
	Total	$1,200.00

Payment Due Date	Minimum Due
July 31, 2015	$36.00

DIRECT ALL INQUIRIES TO
(800) 555-5555

MAKE ALL CHECKS PAYABLE TO
Acme State Bank
P.O. Box 309
Evergreen, FR 33800

THANK YOU FOR YOUR BUSINESS!

July 2015
MPT-1 Library:
In re Bryan Carr

Excerpts from Federal Truth in Lending Act
15 U.S.C. §§ 1602 and 1643

§ 1602 Definitions and rules of construction

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

. . .

(k) The term “credit card” means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

. . .

(o) The term “unauthorized use,” as used in section 1643 of this title, means a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit.

*　　*　　*

§ 1643 Liability of holder of credit card

(a) Limits on liability

(1) A cardholder shall be liable for the unauthorized use of a credit card only if—

(A) the card is an accepted credit card;

(B) the liability is not in excess of $50;

. . .

(E) the unauthorized use occurs before the card issuer has been notified that an unauthorized use of the credit card has occurred or may occur as a result of loss, theft, or otherwise; and

(F) the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it.

. . .

(d) Exclusiveness of liability. Except as provided in this section, a cardholder incurs no liability from the unauthorized use of a credit card.

Excerpts from Restatement (Third) of Agency (2006)

§ 1.01 Agency Defined

Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.

§ 2.01 Actual Authority

An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.

§ 2.03 Apparent Authority

Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.

§ 3.01 Creation of Actual Authority

Actual authority, as defined in § 2.01, is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf.

§ 3.03 Creation of Apparent Authority

Apparent authority, as defined in § 2.03, is created by a person's manifestation that another has authority to act with legal consequences for the person who makes the manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation.

§ 3.11 Termination of Apparent Authority

(1) The termination of actual authority does not by itself end any apparent authority held by an agent.

(2) Apparent authority ends when it is no longer reasonable for the third party with whom an agent deals to believe that the agent continues to act with actual authority.

BAK Aviation Systems, Inc. v. World Airways, Inc.

Franklin Court of Appeal (2007)

In 2005, BAK Aviation Systems, Inc. (BAK), issued a credit card to World Airlines, Inc. (World), to purchase fuel for a corporate jet leased by World from BAK. World designated Ken Swenson, an independent contractor hired by World, as chief pilot of the leased jet and gave him permission to make fuel purchases with the BAK credit card but only in connection with *non-charter* flights involving World executives. However, Swenson used the credit card to charge $89,025 to World in connection with *charter* flights involving non-World customers prior to the cancellation of the credit card in 2006. When World refused to pay, BAK sought recovery in court.

The trial court entered judgment for BAK for the full amount in dispute. The court held that the federal Truth in Lending Act, which limits a cardholder's liability for "unauthorized" uses, did not apply to charges incurred by one to whom the cardholder had voluntarily allowed access for another purpose. World appeals.

The Truth in Lending Act, 15 U.S.C. § 1643(a), places a limit of $50 on the liability of a credit cardholder for charges incurred by an "unauthorized" user. This appeal concerns the applicability of this provision to a card bearer who was given permission by the cardholder to make a limited range of purchases but who subsequently made additional charges on the card. We conclude that Swenson, who incurred the charges, was not an "unauthorized" user within the meaning of § 1643(a) and therefore affirm.

Congress enacted the 1970 Amendments to the Truth in Lending Act in large measure to protect credit cardholders from unauthorized use perpetrated by those able to obtain possession of a card from its original owner. The amendments limit the liability of cardholders for all charges by third parties made without "actual, implied, or apparent authority" and "from which the cardholder receives no benefit." 15 U.S.C. §§ 1602(o), 1643. Where an unauthorized use has occurred, the cardholder can be held liable only up to a limit of $50 for the amount charged on the card, if certain conditions are satisfied. 15 U.S.C. § 1643(a)(1)(B).

By defining "unauthorized use" as that lacking "actual, implied, or apparent authority," Congress intended, and courts have accepted, primary reliance on principles of agency law in determining the liability of cardholders for charges incurred by third-party card bearers. Under the parameters established by Congress, the inquiry into "unauthorized use" properly focuses on whether the user acted as the cardholder's agent in incurring the debt in dispute. A cardholder, as principal, can create actual authority only through manifestations to the user of consent to the particular transactions into which the user has entered. *See* RESTATEMENT (THIRD) OF AGENCY § 3.01.

"Implied authority" has been held to mean actual authority either (1) to do what is necessary, usual, and proper to accomplish or perform an agent's express responsibilities or (2) to act in a manner in which an agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principal's manifestations in light of the principal's objectives and other facts known to the agent. These meanings are not mutually exclusive. Both fall within the definition of actual authority. *See* RESTATEMENT (THIRD) OF AGENCY § 2.02, comment (b).

With respect to the transactions Swenson made in connection with the charter flights, we conclude that no actual or implied authority existed.

Unlike actual or implied authority, however, apparent authority exists entirely apart from the principal's manifestations of consent to the agent. Rather, the cardholder, as principal, creates apparent authority through words or actions that, reasonably interpreted by a third party from whom the card bearer makes purchases, indicate that the card bearer acts with the cardholder's consent. *See* RESTATEMENT (THIRD) OF AGENCY § 3.03.

Though a cardholder's relinquishment of possession of a credit card may create in another the appearance of authority to use the card, the statute clearly precludes a finding of apparent authority where the transfer of the card was without the cardholder's consent, as in cases involving theft, loss, or fraud. However elastic the principle of apparent authority may be in theory, the language of the 1970

Amendments demonstrates Congress's intent that charges incurred as a result of *involuntary* card transfers are to be regarded as unauthorized under §§ 1602(o) and 1643.

Because the Truth in Lending Act provides no guidance as to uses arising from the *voluntary* transfer of credit cards, the general principles of agency law, incorporated by reference in § 1602(o), govern disputes over whether a resulting use was unauthorized. These disputes frequently involve, as in this case, a cardholder's claim that the card bearer was given permission to use a card for only a limited purpose and that subsequent charges exceeded the consent originally given by the cardholder. Acknowledging the absence of actual authority for the additional charges, a majority of courts have declined to apply the Truth in Lending Act to limit the cardholder's liability, reasoning that the cardholder's voluntary relinquishment of the card for one purpose gives the bearer apparent authority to make additional charges. (Citations omitted.)

Nothing about the BAK credit card itself, or the circumstances surrounding the purchases, gave fuel sellers reason to distinguish the authorized fuel purchases Swenson made for the *non-charter* flights from the disputed purchases for the *charter* flights. It was industry custom to entrust credit cards used to make airplane-related purchases to the pilot of the plane. By designating Swenson as the pilot and subsequently giving him the BAK card, World thereby imbued him with more apparent authority than might arise from voluntary relinquishment of a credit card in other contexts. In addition, with World's blessing, Swenson had used the card, which was inscribed with the registration number of the Gulfstream jet, to purchase fuel on non-charter flights for the same plane. The only difference between those uses expressly authorized and those now claimed to be unauthorized—the identity of the passengers—was insufficient to provide notice to those who sold the fuel that Swenson lacked authority for the charter flight purchases.

Here, the disputed charges were not "unauthorized" within the meaning of 15 U.S.C. §§ 1602(o) and 1643(a)(1). Accordingly, BAK was entitled to recover the full value of the charges from World under their credit agreement. The judgment of the trial court is affirmed.

Transmutual Insurance Co. v. Green Oil Co.

Franklin Court of Appeal (2009)

This is an appeal from a holding of the trial court finding against defendant Green Oil Co. and in favor of plaintiff Transmutual Insurance Co. In March 2000, Transmutual obtained a Green Oil credit card for use in its business. Transmutual's office manager, Donna Smith, was responsible for requesting credit cards for Transmutual employees and paying bills. Smith did not have the authority to open new credit accounts for Transmutual; only its general manager had this authority.

On May 16, 2005, Smith made a written request to Green Oil for a GreenPlus credit card. A GreenPlus credit card may be used for purchases of goods and services other than those furnished at gasoline service stations. The GreenPlus application was signed by Smith as office manager. It also contained a signature purporting to be that of Alexander Foster as general manager and secretary-treasurer of Transmutual; however, the trial court determined that Foster's signature was forged by Smith.

During the period from May 2005 until July 2008, Smith wrongfully and fraudulently used the GreenPlus card to obtain goods and services in the amount of $26,376.53. Transmutual paid for these purchases with checks signed by Smith and an authorized officer. During this time, Transmutual employed accounting firms to perform audits, but they did not discover the fraud.

Under the federal Truth in Lending Act, 15 U.S.C. § 1643(a), a cardholder is liable only for a limited amount if certain conditions are met and if the use of the credit card was unauthorized. Accordingly, the initial determination is whether or not the use of the credit card in the case at hand was unauthorized. The federal definition of "unauthorized use" is "a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit." 15 U.S.C. § 1602(o). The test for determining unauthorized use is governed by agency law, and agency law must be used to resolve this issue.

Smith did not have actual or implied authority to request a GreenPlus credit card.

The trial court correctly determined that the principle of apparent authority controls in this case.

Apparent authority is created when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation of the principal. RESTATEMENT (THIRD) OF AGENCY § 3.03. Transmutual is bound by Smith's acts under apparent authority only to third persons who have incurred a liability in good faith and without ordinary negligence. The trial court correctly determined that Green Oil acted negligently by issuing Smith a GreenPlus credit card without independently verifying her authority. Because of Green Oil's negligence, the trial court determined that Green Oil, as the card issuer, could not rely upon Smith's ostensible authority to establish the existence of agency between Smith and Transmutual.

However, the trial court erred in not looking beyond Green Oil's negligence in issuing Smith the card. After receiving the first statement from Green Oil containing the fraudulent charges, Transmutual was negligent in not finding and reporting Smith's fraud. If the person or entity to whom a credit card is issued is careless, that person or entity may be held liable.

The federal Truth in Lending Act does not address whether cardholder negligence removes the statutory liability limit. However, we believe that Transmutual's negligence in not examining its monthly statements from Green Oil removes this case from the statutory limit on cardholder liability.

A cardholder has a duty to examine his credit card statement promptly, using reasonable care to discover unauthorized signatures or alterations. If the card issuer uses reasonable care in generating the statement and if the cardholder fails to examine his statement, the cardholder is precluded from asserting his unauthorized signature against the card issuer after a certain time.

The facts at hand are similar. Green Oil was not negligent in billing Transmutual. If someone at Transmutual other than Smith had examined its statements from Green Oil, he or she would have discovered Smith's fraud. Transmutual had the responsibility to institute internal procedures for the examination of the statements from Green Oil which would have disclosed Smith's

deception. Transmutual had sole power to do so. Transmutual's failure to institute such procedures is the cause of that portion of the embezzlement that occurred following the billing from Green Oil that contained the first evidence of Smith's fraud.

Transmutual's negligence leads us to reexamine whether Smith acquired apparent authority in her use of the GreenPlus card after Transmutual became negligent. In *Farmers Bank v. Wood* (Franklin Ct. App. 1998), we set forth the test to determine whether or not apparent authority exists. The authority must be based upon a principal's conduct which, reasonably interpreted, causes a third person to believe that the agent has authority to act for the principal.

> Thus, if a principal acts or conducts his business, either intentionally or through negligence, or fails to disapprove of the agent's acts or course of action so as to lead the public to believe that his agent possesses authority to act or contract in the name of the principal, the principal is bound by the acts of the agent within the scope of his apparent authority as to persons who have reasonable grounds to believe that the agent has such authority and in good faith deal with him.

Farmers Bank, *supra*.

Green Oil was negligent in issuing Smith the GreenPlus card. However, during Smith's fraudulent use of the card, Green Oil was not negligent. Rather, Transmutual (the cardholder) was negligent in not requiring that someone other than Smith examine its monthly statements. Smith embezzled money from Transmutual for three years through her fraudulent use of the GreenPlus credit card. During this lengthy period of embezzlement, Transmutual always paid its monthly bill to Green Oil.

Transmutual contends that it is not proper for the court to consider the fact that Transmutual paid all the Green Oil credit card charges. That contention is without merit. As a result of Transmutual's acts of paying the charges and its failure to examine its credit card statements so that it could notify Green Oil of the fraud, Transmutual allowed Green Oil to reasonably believe that Smith was authorized to use the credit card.

We conclude under the principles of apparent authority that Transmutual is liable for all of Smith's purchases from the time the credit card was issued.

Reversed.

July 2015
MPT-2 File:
In re Franklin Aces

Franklin Arts Law Services
Pro Bono Legal Services for the Franklin Arts Community
224 Beckett Avenue
Franklin City, Franklin 33221

MEMORANDUM

TO: Examinee
FROM: Eileen Lee, Esq., Executive Director
RE: Al Gurvin
DATE: July 28, 2015

We have agreed to offer legal advice to Al Gurvin concerning a claim he may have against the Franklin Aces professional football team. The relevant materials are attached.

Our engagement by Mr. Gurvin recognizes that, as a pro bono service, we do not have the resources to represent him in litigation. Rather, we have been retained solely to provide legal advice about his potential claim. If he decides to pursue litigation, we will help him find counsel.

Mr. Gurvin has asked for 1) our evaluation of the likelihood of success should he litigate his claim against the team, 2) our assistance in seeking a settlement (we have done so and received an offer), and 3) our recommendation as to whether he should litigate or accept the settlement offer that the team has made.

Please draft a letter to Mr. Gurvin providing your recommendation as to whether he should accept the settlement offer. Your recommendation should factor in your assessment of the likely outcome of litigation, the recovery he might realize should he prevail, his goals in pressing his claim, and any other factors you think relevant. You should fully explain your reasoning as to why he should accept or reject the settlement offer.

Do not separately state the facts, but include the relevant facts in support of your legal analysis and recommendation as to the settlement offer. Remember that Mr. Gurvin is not an attorney. Your letter should explain the law and recommendation in language that, while encompassing a full legal analysis including citations to relevant legal authority, does so in terms a nonlawyer may easily understand.

FRANKLIN SPORTS GAZETTE

REJOICE, FRANKLIN FOOTBALL FANS, THE ACES ARE COMING!

By Ben Jordan January 27, 2014

FRANKLIN CITY, Franklin—Franklin's long and unrequited longing for professional football is about to be satisfied. The Olympia Torches, after years of unsuccessful attempts to get support for a new stadium in Olympia, have announced that, starting in July of 2016, they will relocate to Franklin City.

ProBall Inc., the team owner, says that years of declining attendance in our neighboring state of Olympia—a result (in its view) of an aging, one could even say decrepit, stadium—have made a move imperative. Although many cities around the country sought to win the team, the owner chose Franklin City for several reasons, including the proximity of a good portion of the team's fan base (without a team of their own, many Franklin residents followed the Torches) and—probably more importantly—the financial support of the Franklin State and Franklin City governments to underwrite the construction of a new, state-of-the-art stadium.

That new stadium will be built in the existing Franklin City Sports Complex, run by the Franklin Sports Authority. The Sports Complex currently includes the Omnidome, where Franklin's pro basketball and hockey teams play, and Franklin Memorial Stadium, where the baseball Blue Sox play. The new stadium will be configured for soccer as well as football.

The team has also announced that it will change its name to the Franklin Aces. The new team logo and uniforms, yet to be created, will be announced in due course according to the team owner.

Transcript of Interview between Eileen Lee and Al Gurvin (June 29, 2015)

Lee: Mr. Gurvin, nice to meet you. How may we help you?

Gurvin: They've stolen my design for the new football team's logo, and I need a lawyer.

Lee: Perhaps we'd better start at the beginning. I've read your intake application, and I know you qualify for our pro bono services given your income level, but tell me about yourself and how all this got started, from the beginning.

Gurvin: Okay, sorry, let's see. I work as a janitor at the Franklin Omnidome, the hockey rink and basketball facility used by our pro teams. I got real excited last year when they announced that the Olympia pro football team was moving to Franklin City.

Lee: Why were you so excited? Are you a big football fan?

Gurvin: I'll say—more than a big fan. I'm nuts about football, and I've been rooting for the Torches for years and years. I watch every game on TV, and I'd give my eyeteeth to be able to afford tickets to see games in person.

Lee: What happened after you saw the news reports of the move?

Gurvin: Well, I'm an amateur artist—no real training, but I like to doodle. When they announced that the team was moving, they also announced that it was changing its name to the Franklin Aces. They also said that they didn't yet have a logo or uniform designs. I didn't give it a second thought. But several months later, I started to think about a design and then one day it hit me. I realized that a real good design for a logo would be a hand holding the four aces from a deck of cards, fanned out like you hold cards. So I sketched that design, and it looked pretty good. I showed the sketch to my boss, and he liked it too.

Lee: Who's your boss? What's his position?

Gurvin: Dick Kessler—he's the work crew supervisor at the Omnidome. Anyway, he suggested that I send it to Daniel Luce, the CEO of the Franklin Sports Authority. So I took a drawing of the logo and faxed it to Mr. Luce with a note.

Lee: When did that happen, and what did the note say? Do you have a copy?

Gurvin: It was 10 months ago. Here's a copy of the note, and my original sketch [see attached note and description].

Lee: What happened then?

Gurvin: Nothing—I never heard back from anyone. Then, about a month ago, the team made a big announcement with a press conference and everything at which they announced

the new uniforms and logo, and it was mine, exactly! Here's a copy of their logo and the press release they issued with it, which was in the local newspapers [see attached press release and logo description]. I think they stole it from me, and I should be entitled to something for it—they should pay me something like $20,000.

Lee: Have you registered the copyright in your design with the United States Copyright Office?

Gurvin: No—should I?

Lee: Well, a copyright exists from the moment a work is created, and you don't need any government action to grant it. But registration with the Copyright Office is a good idea for many reasons—for example, for our purposes, should you decide to litigate, you must have registered your claim before you can take the case to court. Even though the infringement you allege has already occurred, you can still register, but let's see what route you wish to pursue. Registration isn't expensive, and it won't hurt to wait to register for a few weeks in any event. Let me look into it. I happen to know José Alvarez, the General Counsel of ProBall Inc., the team owner—he's an old classmate and friend of mine. I'll contact him to see if we can work something out short of litigation, and get back to you.

Gurvin: Okay, great.

Lee: You should understand, Mr. Gurvin, that, while we'll be happy to evaluate your claim and help you seek a quick settlement, we're in no position to represent you if you decide to litigate it. As a pro bono service, we simply don't have the resources to undertake litigation on behalf of any client. So if litigation is ultimately the route you wish to follow, we'll try to help you find counsel, but our representation of you must end at that point.

Gurvin: Sure.

Lee: We'll draft an engagement letter for you to sign. I hope we can help you resolve this.

Copy of Fax from Al Gurvin to Daniel Luce (September 25, 2014)

Dear Mr. Luce: I'm a janitor in the Omnidome, and a big, big football fan. When I read that the Torches were moving to Franklin City, and that the team would become the Aces, I had a great idea for a logo for the team. I made a sketch, and it's attached to this note. I'd be honored if the team would consider and use my logo, and I wouldn't want anything from them if they did, except maybe some tickets to games in the new stadium. Thanks, Al Gurvin

[Actual sketch omitted]

*   *   *

[DESCRIPTION OF GURVIN SKETCH: Mr. Gurvin's sketch consists of an outline of a hand from the wrist up, without any other features, holding four cards fanned out, in order from left to right, the ace of diamonds, ace of clubs, ace of hearts, and ace of spades.]

Press Release Announcing New Franklin Aces Logo

[Franklin City, May 28, 2015] The Franklin Aces football team is delighted to announce its new logo and uniforms. After consideration of many designs, we believe this one will be most appealing to the fans and players. Later this year we will begin discussions with various merchandise manufacturers, and we expect that our fans will be able to purchase their Franklin Aces gear next year.

[Picture of Franklin Aces logo omitted.]

*   *   *

[DESCRIPTION OF NEW FRANKLIN ACES LOGO:
Although the outline of the hand is somewhat different, the Franklin Aces logo presented in the press release is otherwise identical to Mr. Gurvin's sketch.]

ProBall Inc.

José Alvarez, General Counsel
Franklin City Sports Complex, Suite 520
Franklin City, FR 33221

July 24, 2015

Eileen Lee, Esq.
Franklin Arts Law Services
224 Beckett Avenue
Franklin City, FR 33221

Dear Eileen:

Thanks for your phone call of July 7, 2015, explaining Mr. Gurvin's claim. I've looked into the matter, and our conclusion is that your client has no basis for any claim against the team.

First, the design he created, whatever its merits, is not copyrightable subject matter. The images of playing cards are familiar designs and common property containing no original authorship. That being the case, any claim he might have must fail.

Second, even if the design were copyrightable, there is no proof that those who designed the new team logo had any access to it. Thus, even if the designs were identical, there could be no copyright infringement, for without proof of access, any claim must fail. To that end, I have attached affidavits from those involved that summarize testimony that would be given in court.

Even though your client has no basis for any claim, the team's owner, in an effort to avoid unhappy publicity, makes this offer: In return for a release of any claims based on your client's design, ProBall Inc. would give Mr. Gurvin a season ticket for a single seat, in a prime location, to all home games for the team's first season. (The retail price of such a season ticket will be $5,000.) Eileen, we go back a long way, you know I'm good for my word, and I want to be forthright with you—this is the team's final, and only, settlement offer.

With kindest personal regards,

José Alvarez

AFFIDAVIT OF DANIEL LUCE

STATE OF FRANKLIN)
COUNTY OF LINCOLN)

I, Daniel Luce, being duly sworn, depose and say:

1. I am Chief Executive Officer of the Franklin Sports Authority. The Authority is entirely separate from ProBall Inc., the owner of the Franklin Aces football team. The Authority and ProBall Inc. are not under common ownership or affiliated in any way.

2. On September 25, 2014, I received a two-page fax from Al Gurvin, a janitor at the Omnidome facility of the Franklin City Sports Complex. I do not have a copy of the fax, but I know when I received it because I checked the fax log in our office. Although I do not recall the specifics, I remember that the fax had a sketch attached to it, and that Mr. Gurvin wanted the sketch submitted as a possible logo for the Franklin Aces pro football team.

3. I knew that the team had retained ForwardDesigns, a commercial design firm, to design a logo and uniforms for the team. Hence, I did not think any input from the Authority or otherwise was needed. Although I do not remember specifically what I did with the fax, I believe I discarded it in the trash.

4. ProBall was given a suite of offices in the five-story Administrative Building of the Franklin City Sports Complex. Those offices are on the fifth floor. All the Authority's offices, including mine, are on the second floor, as is the fax machine which serves all of the Authority's departments. (The ground floor contains a museum and ticket offices; the third and fourth floors are occupied by the firms holding the parking and food concessions at our facilities.)

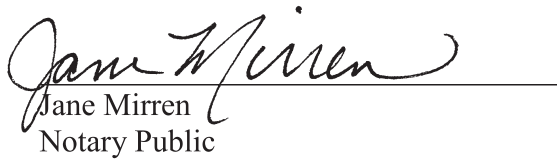
5. Other than occasional greetings while passing in the lobby of our building or sharing rides in the elevator, I have had no contact with anyone working for ForwardDesigns.

6. I and some of my staff meet occasionally with executives of ProBall Inc. to coordinate details concerning the construction and operation of the new football stadium. Other than that, no one from the Franklin Sports Authority has any dealings with representatives of ProBall Inc., the team owner.

Dated July 22, 2015

Daniel Luce

Signed before me on this 22nd day of July, 2015



Jane Mirren
Notary Public

AFFIDAVIT OF MONICA DEAN

STATE OF FRANKLIN)
COUNTY OF LINCOLN)

I, Monica Dean, being duly sworn, depose and say:

1. I am a commercial artist and designer for ForwardDesigns. Our firm was retained in August of 2014 by ProBall Inc. to design a logo and uniforms for the Franklin Aces pro football team. I was the sole designer working on the project. Our firm was paid $10,000 for its services.

2. To facilitate my work on the project, the team gave me an office located in their suite of offices on the fifth floor of the Administrative Building of the Franklin City Sports Complex. I have had no contact with employees of the Franklin Sports Authority, other than with Julie Covington, a personal friend who works in the Authority's transportation office and with whom I occasionally have lunch. I have never met Daniel Luce, the Authority's Chief Executive Officer.

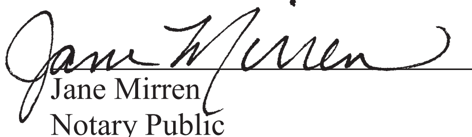
3. As I thought about a logo for the team, one obvious choice was a hand holding the four aces from a deck of cards. I had seen many versions of that image, including many on clip art collections on the Internet, none of which were protected by copyright, and which I used for inspiration. About five months ago, I drew that design, along with about a dozen others, and submitted it to ProBall Inc., who chose it as the new team logo. I alternated the suits of the cards in the design so that they appeared as first a red suit, then a black suit, and I made the last and most visible card the ace of spades, as it is the most striking and familiar card.

4. I do not recall ever seeing any sketch of any idea for the logo created by anyone else prior to creating my design.

Dated July 22, 2015

Monica Dean

Signed before me on this 22nd day of July, 2015



Jane Mirren
Notary Public

July 2015
MPT-2 Library:
In re Franklin Aces

Oakland Arrows Soccer Club, Inc. v. Cordova
United States District Court for the District of Columbia (1998)

The question of the boundary between copyrightable and noncopyrightable subject matter—that is, what types of works are protected by the Copyright Act, and what types of works fall outside its sphere of protection—arises in the context of this petition for a writ of mandamus against Ricardo Cordova, the Register of Copyrights. All such actions against the Register of Copyrights must be brought here in Washington, D.C., as it is the location of the Copyright Office.

The facts are simple and not in dispute: The Oakland Arrows professional soccer club developed a new logo and wished to register it with the United States Copyright Office. While registration is entirely permissive, 17 U.S.C. § 408(a), and the existence of a copyright does not depend on it, registration confers significant benefits to the copyright owner, not the least of which is that it is a prerequisite to bringing a suit for copyright infringement. 17 U.S.C. § 411.

The Arrows' new logo consisted of an oblique triangle, colored red, white, and blue. The Arrows' explanation for the design was threefold: 1) the triangle conjured up an image of an arrowhead; 2) the triangle could be seen to be a stylized letter "A"; 3) the colors evoked the United States flag.

The Arrows submitted an application for copyright registration to the Copyright Office. The Office's procedure is to examine each work for which registration is sought and determine if the work qualifies, in its opinion, for copyright protection. In this case, the Office's examiner concluded that the work did not qualify for protection. There is an internal appeals mechanism within the Office, which the Arrows pursued, but without success. Hence, they bring this mandamus action, seeking to compel the Register of Copyrights to register the work.

We review the question de novo. While we do give deference to the decision of an expert administrative agency, that deference is not necessarily dispositive.

The standard for copyrightability is easily stated: copyright protects original works of authorship. 17 U.S.C. § 102. That standard, however, is not so easily applied. What constitutes authorship? What constitutes originality? The courts have wrestled with

these questions over the years. Justice Holmes, in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903), stated that "[It] is the personal reaction of an individual upon nature . . . . [A] very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright . . ." More recently, Justice O'Connor, in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 345 (1991), stated (internal references and quotations omitted):

> Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity . . . . To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works will make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it may be.

How do we apply these tests to the work at hand? We are assisted, to some degree, by the regulations of the Copyright Office as to the types of works the Office will register. We quote the regulation—which the Office states is based on decades of court decisions—in full, from 37 C.F.R.:

> **§ 202.1 Material not subject to copyright.**
>
> The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained:
>
> (a) Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents;
>
> (b) Ideas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing;
>
> (c) Blank forms, such as time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms and the like, which are designed for recording information and do not in themselves convey information;
>
> (d) Works consisting entirely of information that is common property containing no original authorship, such as, for example: Standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources;
>
> (e) Typeface as typeface.

The Copyright Office, in defending its action, argues that the logo is simply a "familiar symbol or design," with a "mere variation in coloring," as in subsection (a) of

the regulation. While the Arrows make many arguments as to the artistic value of the work, the effort that went into creating it, and the connections to the team which it conjures up, none of those arguments can carry the day. The copyright law does not reward effort—it rewards original expression of authorship. What we have here is a simple multicolored triangle. That is a “familiar symbol,” with “mere variation of coloring.” There is not enough originality of authorship in that design to merit copyright protection. In Justice O’Connor’s words, even the “extremely low” “minimal degree of creativity”—the “creative spark”—is lacking here.

The Arrows’ petition for a writ of mandamus is denied.

Savia v. Malcolm
United States District Court for the District of Franklin (2003)

In this action for copyright infringement, plaintiff Joseph Savia, the composer and copyright owner of the song "Perhaps," claims that defendant Lauren Malcolm copied the melody of his song and used it in her song "Love Tears" without authorization. After extensive discovery, the parties have filed cross-motions for summary judgment. We deny the plaintiff's motion and grant the defendant's motion.

Facts

In 1981, Savia wrote "Perhaps" and was successful in having it placed over the closing credits of the motion picture *The Duchess of Broken Hearts*. The motion picture had only a limited theatrical release, playing in a single "art house" movie theater in Franklin City for a three-week run. A dispute among the producers of the motion picture, for reasons not relevant here, has resulted in no further exploitation of the motion picture, either in theatrical release, in home video format, or on television, cable, the Internet, or otherwise. The motion picture was rated NC-17 by the Motion Picture Association of America because of its sexual content. That rating means that no one under the age of 17 will be admitted to a theater showing the motion picture. "Perhaps" was never commercially recorded, other than for the soundtrack of the motion picture, and no recording of it has ever been released. Savia registered the work with the United States Copyright Office, and there is no dispute about the validity of the copyright in "Perhaps" or that he is the copyright owner.

In 2002, Malcolm, a lifelong resident of Franklin City and a highly successful 25-year-old songwriter, wrote "Love Tears," which was commercially recorded and released by Remnants of Emily, a well-known rock band. The recording achieved great success, ultimately making number one on the *Billboard* "Hot 100" chart for four weeks. The recording has sold over two million copies, and the song has been widely performed and has been used in commercial advertisements. Malcolm, as songwriter, has, through the end of 2002, earned approximately $1.5 million in royalties attributable to the song from these various uses.

The parties each presented expert testimony from musicologists. These expert witnesses

agreed, and the court as finder of fact also finds, that the lyrics of the songs are entirely different, but that the melodies are, if not identical, virtually so.

The Standard for Infringement

It is rare that direct evidence of copyright infringement exists. Therefore, the courts have turned to circumstantial evidence in determining whether one work infringes another. In doing so, the courts in this Circuit have uniformly applied a two-prong test for infringement: 1) Are the works "substantially similar"? 2) Did the alleged infringer have access to the copyrighted work? The reasons for these two standards should be obvious: If the works are not, at the very least, substantially similar, there can be no infringement. And if the alleged infringer had no access to the allegedly infringed work, there could be no possibility of copying. Certainly, the more similar the works, the less evidence of access need be adduced. But plausible evidence of access must always be found.

Two cases are instructive. In *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924), the legendary songwriter Jerome Kern was accused of plagiarizing the bass line from a wildly popular earlier work. Although Kern testified that he did not consciously use the earlier work, the court concluded that Kern, a working songwriter who kept up with current popular music, must have heard it and so had access to it. Kern also argued that the bass line could be found in earlier works which were not protected by copyright; if he had copied from those works, he would not be infringing. But, as Kern could not prove that he was even aware of those works before the lawsuit, his argument failed, and he was found liable for infringement.

In *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976), *aff'd sub nom ABKCO Music Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983), George Harrison (of the Beatles) was accused of plagiarizing the melody of an earlier popular rock and roll song. He testified that he did not consciously copy the earlier song, and the court believed him. Nevertheless, the court concluded that he had access to the earlier song and so had "unconsciously" copied it; he was found liable for infringement.

Analysis

Here, there is no question that the works are virtually identical. Substantial similarity—

indeed, striking similarity—of the melodies is proven. The question is whether Malcolm had access to Savia's song. Can access be plausibly inferred from the evidence? We conclude that it cannot.

As noted, Savia's song was released to the public only in the form of the closing credits of a motion picture, one that had only a limited run in Franklin City. Further, the motion picture had been rated NC-17, meaning that no one under the age of 17 would be admitted to the theater. At the time the motion picture was released, Malcolm was four years old. While we can take judicial notice of the fact that the ratings code is sometimes more honored in the breach than in the observance, we think it implausible that a four-year-old child would be admitted to a theater showing an NC-17–rated movie.

Savia argues that, even so, Malcolm might have had access to "Perhaps" by hearing someone who had seen the motion picture play or sing the song. Without a scintilla of evidence to justify that conclusion, we cannot credit such mere speculation.

Conclusion

We conclude that there is no plausible evidence that Malcolm had access to Savia's work. For that reason, notwithstanding the virtual identity of the melodies of the two songs, we conclude that Malcolm's song was original with her and was not copied from Savia's. We deny Savia's motion for summary judgment and grant Malcolm's motion for summary judgment.

Herman v. Nova, Inc.
United States District Court for the District of Franklin (2009)

In our previous opinion, [citation omitted], Nova, Inc., a motion picture producer, was found liable to Herman for copyright infringement of Herman's unpublished screenplay. We now address the question of damages.

Herman, an amateur author, had, unsolicited, submitted the screenplay to Nova. Nova then used the screenplay as the basis for its own screenplay, from which, it announced, it was going to make a motion picture. It issued a press release announcing its intention to make a motion picture based on its own screenplay; the press release included a synopsis of the screenplay. Herman saw the press release and, before Nova took any further action, successfully sued Nova for copyright infringement.

Because Herman had not registered his copyright in his unpublished screenplay with the United States Copyright Office before the act of infringement occurred, his damages are limited to his actual damages and the infringer's profits. 17 U.S.C. §§ 412, 504(b). Had Herman registered before the infringement, he would have been entitled to statutory damages in lieu of actual damages and profits, and, in the court's discretion, costs, including attorney's fees. Here, as Nova, the infringer, took no action after appropriating Herman's work and realized no gain, direct or indirect, thereafter, there are no profits resulting from the infringement which can be awarded. (The result would be different if, for example, the motion picture had been made and released, but such is not the case here.) The question, then, is what are Herman's actual damages?

As Herman was an amateur author, he had no track record of payments for his work and hence can submit no evidence of his own as to his screenplay's worth. The evidence adduced in discovery, from Nova's records and from third-party witnesses, shows that the range of payment which a motion picture producer like Nova would make for a screenplay of this sort would be between $15,000 and $50,000.

Given the unquestioned infringement that took place, we are disposed to award damages at the upper end of that range. Hence, judgment will be entered in Herman's favor for $50,000.

July 2015
MPT-1 Point Sheet:
In re Bryan Carr

In re Bryan Carr

DRAFTERS' POINT SHEET

In this performance test, examinees are associates at the law firm Anders, Davis & Waters. The firm represents Bryan Carr and is advising him about his potential liability for certain credit card purchases made by his father, Henry Carr, using Bryan's credit card account. There are a number of credit card transactions; the transactions were made under different circumstances and have differing operative facts. Examinees are asked to draft an opinion letter to the client for the partner's signature. In the letter, examinees are to analyze each of the credit card transactions in light of the facts, relevant statutes, and case law to determine the client's responsibility for payment for each charge. Examinees should incorporate key facts into their discussions and should state the reasons and cite the authorities supporting their conclusions.

The File contains the instructional memorandum from the supervising partner, the firm's guidelines for drafting opinion letters, a transcript of the partner's telephone conversation with the client, a copy of a letter the client wrote authorizing his father to use the credit card, and credit card statements for the four months at issue. The Library contains various sections of the federal Truth in Lending Act ("TILA"), excerpts from the Restatement (Third) of Agency, and two cases.

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

I. FORMAT AND OVERVIEW

Examinees' work product should resemble an objective opinion letter to a client. They are told that the client is a former college roommate of the partner and that he is a local businessman. Examinees are instructed that the letter should set out the key facts and issues, analyze and provide citations to the relevant legal authorities, and explain how the facts and law lead to their conclusions. Examinees need not write a separate statement of facts but must use the facts in the File to support their analyses and conclusions. They are told to follow the firm guidelines on opinion letters.

II. FACTUAL BACKGROUND

The firm's client, Bryan Carr, is a friend and former college roommate of Miles Anders, one of the firm's partners. Bryan is a college graduate and owns a landscaping business in Franklin. Bryan has retained the firm to help him with a credit card problem he is having with the bank that issued one of his credit cards, Acme State Bank. The problem revolves around a series of charges made by Bryan's father, Henry Carr, using Bryan's account. Bryan wants the firm's legal advice about his potential liability for each of the charges.

Bryan's mother died last year; since that time his father, Henry Carr, has become more and more dependent upon Bryan. Several months ago, Henry came to Bryan after his van broke down. The repair estimate was $1,500, and Henry did not have the ability to pay. Bryan gave

Henry one of his credit cards that had a zero balance and told Henry that he could charge the van repairs, but Bryan told Henry that the repair bill was the only thing for which he should use the credit card. Bryan also gave his father a note that stated that he was giving his father permission to use his credit card. The note was signed and dated, and it included the account number and the card's expiration date. The note did not limit the use of the credit card to a particular merchant, nor did it indicate an expiration date for the authorization.

Henry Carr did in fact use Bryan's credit card at Schmidt Auto Repair. However, the final bill was $1,850 due to an additional $350 part that was needed. Henry charged the entire $1,850 to Bryan's account. Upon receiving the billing statement with this charge, Bryan paid the statement in full on April 29, 2015.

Over the following months, Bryan's father charged gasoline twice at Friendly Gas Station, groceries at the Corner Store, and books at Rendell's Book Store. At the time of these purchases, Henry Carr still had physical possession of the credit card and Bryan's note; Bryan had forgotten to retrieve them from his father. Bryan did not review his credit card statements carefully and had already paid these gas, grocery, and book charges in full before he called the law firm for advice.

About six weeks ago, Bryan asked his father to return his Acme State Bank credit card and the note that he had written. Henry returned both, but without telling Bryan about the gas, grocery, and book purchases he had made before returning the card. Nor did Henry tell Bryan that he had written down Bryan's account information on a piece of paper that he had retained.

Most recently, Henry Carr purchased power tools at the Franklin Hardware Store using Bryan's account. At the time of this final purchase, Henry no longer had in his possession the actual credit card or the note from Bryan. Instead, he merely presented the hardware store clerk with the account name, number, and expiration date, and the clerk allowed the purchase. The credit card statement for June came, and this time Bryan reviewed the statement and noticed the $1,200 power tools purchase. Knowing that he had not bought any power tools, Bryan asked his father if he knew anything about it. His father confessed that he had purchased the tools and apologized. He also told Bryan about the gas, groceries, and books he had charged. These other charges have already been paid in full; only the Franklin Hardware Store charge remains unpaid.

After talking to his father, Bryan immediately contacted the Acme State Bank, the card issuer, and disputed all the charges. The bank has notified Bryan that it has rejected his position and contends that he is 100 percent responsible for all charges. Bryan would like the law firm's opinion about his legal responsibilities to pay the bank for each of his father's transactions using his credit card.

III. ANALYSIS

The problem requires examinees to analyze three groups of credit card purchases; each of the three groups may involve a different analysis and outcome based on the facts surrounding each purchase.

Overarching Issue:

Does Bryan Carr have liability as a cardholder for the purchases made by his father under the federal Truth in Lending Act? In other words, did Henry Carr have actual, implied, or apparent authority for each of the credit card purchases he made using Bryan's account? If not, were the purchases "unauthorized" within the meaning of § 1602(o) of TILA?

Analysis of Each Group of Charges:

(1) Is Bryan responsible for the Schmidt Auto Repair charge?

Short Answer:

- Bryan Carr is responsible for the entire $1,850 charge from Schmidt Auto Repair. Bryan created *actual* authority for Henry Carr to use his credit card for the first $1,500 and created *implied* authority, which is part of actual authority, for the additional $350.

Facts

- Henry told Bryan that the estimate for his van repairs was $1,500.
- Bryan told Henry that he would pay "whatever it cost" to have Henry's van repaired.
- Bryan gave Henry permission both orally and in writing to use his credit card to pay for Henry's van repairs.
- The total repair cost was $1,850.
- Henry in fact used Bryan's credit card to pay the $1,850 charge.

Analysis

- Congress apparently contemplated, and courts have accepted, primary reliance on principles of agency law in determining the liability of cardholders for charges incurred by third-party card bearers. Under the parameters established by Congress, the inquiry into "unauthorized use" properly focuses on whether the user acted as the cardholder's agent in incurring the debt in dispute. (*BAK Aviation Sys., Inc. v. World Airways, Inc.*)
- Under the facts of this transaction, Bryan did give Henry actual authority. Actual authority is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent may take action on the principal's behalf. Here, Bryan physically gave Henry his credit card, gave him oral permission to use it, and also provided a signed letter stating "I, Bryan Carr, give my father, Henry Carr, permission to use my Acme State Bank credit card . . . ." These actions, taken by Bryan, would allow Henry to reasonably believe that Bryan wished for him to take action on his behalf. Additionally, as stated in *BAK Aviation*, a cardholder, as principal, can create actual authority through manifestations to the user of consent to the particular transactions into which the user has entered. Here, Bryan provided consent to a particular transaction—namely, the Schmidt Auto Repair transaction. As a result, he created actual authority for Henry to act on his behalf.

- Even though the original estimate was for $1,500, Bryan is responsible for the additional $350 under the concept of implied authority. "Implied authority" is often used to mean actual authority either (1) to do what is necessary, usual, and proper to accomplish or perform an agent's express responsibilities or (2) to act in a manner in which an agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principal's manifestations in light of the principal's objectives and other facts known to the agent. These meanings are not mutually exclusive. Both uses of the term *implied* fall within the definition of *actual* authority. *See BAK Aviation*. Here, Henry (as agent) acted in a manner in which he believed Bryan (as principal) wished Henry to act based on Henry's reasonable interpretation of Bryan's statement that he would pay for the total repair costs.

(2) Is Bryan responsible for the charges at Friendly Gas Station, the Corner Market, and Rendell's Book Store?

Short Answer:

- Bryan Carr is responsible for all the gas, grocery, and book transactions because he created *apparent* authority in Henry Carr to use his credit card during the period in which these charges were made.

Facts

- Henry, over a two-month period subsequent to the van repairs, charged various transactions to the Acme State Bank credit card Bryan provided him to use at the auto repair shop. Henry did not have permission from Bryan to use the credit card for these additional transactions. However, Henry still had physical possession of the credit card and the written authorization letter provided by Bryan. Furthermore, Bryan paid the credit card statements for April and May that detailed these purchases in full and apparently did not review the credit card statements carefully to see exactly what had been charged. (Bryan explained in the client interview that he and his father shop at the same stores.) Therefore, Bryan paid the gas, grocery, and book charges without ever noticing that his father must have used his card for them.

Analysis

- Bryan created apparent authority in Henry Carr to use his credit card. Apparent authority is created by a person's manifestation that another has authority to act with legal consequences for the person who makes the manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation. RESTATEMENT (THIRD) OF AGENCY.

- As stated in *BAK Aviation*, the cardholder, as principal, creates apparent authority through words or actions that, reasonably interpreted by a third party from whom the card bearer makes purchases, indicate that the card bearer acts with the cardholder's consent. Here, the

merchants, as the third parties, could have reasonably interpreted that apparent authority was created through Bryan's actions: Bryan provided Henry with his credit card and also provided a written statement that said "I, Bryan Carr, give my father, Henry Carr, permission to use my Acme State Bank credit card . . . ." The written statement did not limit the card's use to a specific transaction or a specific merchant. Therefore, it would be reasonable for any merchant to conclude that Henry had Bryan's authority to use his credit card.

- Because Bryan led the public to believe that Henry had apparent authority, he is bound by Henry's actions. The court in *Transmutual Insurance Co. v. Green Oil Co.* made this clear when it said, "[I]f a principal acts or conducts his business, either intentionally or through negligence, or fails to disapprove of the agent's acts or course of action so as to lead the public to believe that his agent possesses authority to act or contract in the name of the principal, the principal is bound by the acts of the agent within the scope of his apparent authority as to persons who have reasonable grounds to believe that the agent has such authority and in good faith deal with him" (citing *Farmers Bank v. Wood* (Franklin Ct. App. 1998)).

- Moreover, the fact that Bryan voluntarily relinquished his credit card to Henry, even if only for one purpose, gives Henry the apparent authority to make additional charges. This is supported by *BAK Aviation*, in which the court wrote, "[T]he cardholder's voluntary relinquishment of the card for one purpose gives the bearer apparent authority to make additional charges."

- An additional point can be made: Bryan's claim against the bank that the charges were unauthorized transactions is adversely affected by his own negligence. "A cardholder has a duty to examine his credit card statement promptly, using reasonable care to discover unauthorized signatures or alterations. If the card issuer uses reasonable care in generating the statement and if the cardholder fails to examine his statement, the cardholder is precluded from asserting his unauthorized signature against the card issuer after a certain time." *Transmutual Insurance*. Given the facts, it appears that Bryan did not examine his statement using reasonable care to discover unauthorized charges. The alleged unauthorized gas, grocery, and book transactions appear on the second and third of the four credit card statements. These were the only transactions on each statement. Bryan paid the statement balances for April and May, in full, without alleging any unauthorized use. This could lead one to conclude that Bryan did not use reasonable care in examining his statements.

- Some examinees may suggest that Bryan is responsible for only the first $50 of each charge, which would include the entire amount charged at Rendell's Book Store ($45.70). This is incorrect. TILA § 1643(a) refers to liability limits for *unauthorized* use of a credit card. The charges made at the gas station, grocery store, and book store were all authorized charges, made when Henry had apparent authority to use the card. A more perceptive examinee might note the $50 limit in § 1643(a) but correctly state that, since all charges were authorized, the $50 limit does not apply.

(3) Is Bryan responsible for the Franklin Hardware Store charge?

Short Answer:

- Henry did not have actual, implied, or apparent authority for the power tools purchase. Bryan will be responsible only for the first $50 of the Franklin Hardware Store transaction because, under TILA, this was an unauthorized purchase.

Facts

- Bryan took the credit card and authorization letter back from Henry before Henry purchased the power tools at Franklin Hardware. However, without Bryan's knowledge or permission, Henry wrote down the credit card number and other information on a separate sheet of paper.
- Henry purchased power tools at Franklin Hardware by providing only the credit card account name, number, and expiration date to the store clerk—he was no longer in possession of the card or the authorization letter.

Analysis

- When he made the power tools purchase, Henry was in possession of only the credit card number and expiration date, which he had hand-copied on a sheet of paper; he did not possess the card itself. These circumstances should not create apparent authority. As stated in *BAK Aviation*, the cardholder, as principal, creates apparent authority through words or actions that, reasonably interpreted by a third party from whom the card bearer makes purchases, indicate that the card bearer acts with the cardholder's consent. Given that Henry had only a credit card number written on a piece of paper, it would be unreasonable for a third party to interpret Henry's actions as being sanctioned by Bryan. Therefore, under § 3.11 of the Restatement of Agency (Third), Henry's apparent authority to use Bryan's credit card had been terminated.
- Furthermore, the merchant could be seen as being negligent in allowing Henry to use Bryan's credit card, since the only thing Henry possessed was a handwritten account number on a piece of paper.
- The court in *Transmutual* made it clear that a principal would not be held responsible for the actions of an agent if the third party was negligent. "[The principal] is bound by [the agent's] acts under apparent authority only to third persons who have incurred a liability in good faith and without ordinary negligence." *Transmutual*. Here, it was unreasonable for the Franklin Hardware Store clerk to allow Henry to charge a purchase to Bryan's credit card account when Henry did not have possession of the card or the authorization letter. The Franklin Hardware Store did not make the sale "without ordinary negligence."
- As a result of Henry not having apparent authority to use Bryan's credit card when buying the power tools, and because there are no facts to suggest that Bryan gave Henry actual authority or implied authority for this transaction (to the contrary, Bryan had told Henry that the card was to be used only for getting the van repaired), this was an unauthorized use of Bryan's credit card.

- The term “unauthorized use” is defined in § 1602(o) of TILA as “a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit.” Because this is considered an unauthorized use, according to § 1643(a)(1)(B) of TILA, Bryan is responsible for only the first $50 of the unauthorized use of his credit card.

IV. CONCLUSION

Bryan should be informed that he is responsible for payment of the $1,850 van repair and all gasoline, grocery, and book charges because of the actual and/or apparent authority he created in his father, Henry. However, Bryan created no actual or apparent authority regarding the $1,200 charge at Franklin Hardware Store for the power tools, which was therefore an “unauthorized use.” At most, Bryan will be responsible for $50 of the $1,200 charge.

A particularly astute examinee might advise Bryan to get the purchase price of the power tools refunded to his credit card. In addition, one might advise Bryan to pay for the tools even if not legally obligated and work out repayment with his father. This would avoid any potential claim against his father and seems in line with Bryan’s expressed desire to support his father in difficult times. (Examinees were not asked to research or address potential liability Henry might have to Bryan for these purchases.)

July 2015
MPT-2 Point Sheet:
In re Franklin Aces

In re Franklin Aces

DRAFTERS' POINT SHEET

In this performance test, the examinee is employed in the office of Franklin Arts Law Services (FALS), a pro bono provider of legal services for the Franklin arts community. FALS has agreed to provide legal advice to Al Gurvin concerning a claim he may have against ProBall Inc., the owner of the Franklin Aces football team, for copyright infringement resulting from unauthorized use of his design for a team logo.

Mr. Gurvin has asked FALS 1) to evaluate the likelihood of success should he litigate his claim against the team; 2) to assist in seeking a settlement short of litigation (which has been done, resulting in a settlement offer); and 3) to recommend whether he should litigate or accept the settlement offer.

An important aspect of the matter is that FALS is not in a position to represent Mr. Gurvin should he decide to litigate his claim. Hence, FALS and Mr. Gurvin have explicitly agreed that FALS's services will be limited to the above three items, and, should he decide to litigate, FALS will assist in attempting to find litigation counsel for him. Because FALS will not be litigating any claim on Mr. Gurvin's behalf, its assessment of the merits of his claim and recommendation whether or not to settle can be as objective as possible.

The examinee is asked to draft a letter to Mr. Gurvin analyzing his chances of success should he litigate his claim and recommending whether he should litigate or accept the settlement offer. The examinee is given factors to consider in making the recommendation.

Finally, the examinee is cautioned that, as Mr. Gurvin is not an attorney, the draft letter should explain the law and recommendation as to settlement fully, but in language that a non-lawyer can understand.

The File contains 1) the instructional memorandum; 2) an article from the *Franklin Sports Gazette* concerning the relocation of the Olympia Torches football team to Franklin City and the renaming of the team as the Franklin Aces; 3) a transcript of Mr. Gurvin's interview by Eileen Lee, FALS's Executive Director; 4) a copy of the fax and a description of the sketch sent by Mr. Gurvin to Daniel Luce, the Chief Executive Officer of the Franklin Sports Authority, as well as a description of the logo chosen by the team and the team's press release announcing its new logo; 5) a letter from José Alvarez, the team's General Counsel, in response to a telephone call from Ms. Lee, denying liability and making a final settlement offer; 6) an affidavit from Daniel Luce, the CEO of the Franklin Sports Authority; and 7) an affidavit from Monica Dean, the designer of the logo ultimately used by the team. The Library contains 1) *Oakland Arrows Soccer Club, Inc. v. Cordova*, a 1998 District of Columbia federal district court mandamus action; 2) *Savia v. Malcolm*, a 2003 Franklin federal district court case; and 3) *Herman v. Nova, Inc.*, a 2009 Franklin federal district court case.

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

I. FORMAT AND OVERVIEW

The examinee must, first, master the facts as revealed by the items in the File; second, master the law as set forth by the cases; third, analyze the chances of Mr. Gurvin's success in litigation based on the application of the law to the facts; fourth, make a recommendation to Mr. Gurvin as to whether he should accept the settlement offer based on the factors given in Ms. Lee's memorandum; and fifth, explain to Mr. Gurvin the legal analysis and the basis for the recommendation as to settlement in language a nonlawyer can understand.

The examinee should address two issues in his or her legal analysis:

1) Is Mr. Gurvin's design copyrightable? Does it contain the requisite originality of expression to qualify as copyrightable subject matter?

2) Is there sufficient evidence that the team owner, ProBall Inc., or Monica Dean, the designer the team employed, had access to Mr. Gurvin's design? Given that evidence of access is of necessity circumstantial, do the facts support such a conclusion?

Based on the examinee's conclusions as to these issues, he or she must then advise Mr. Gurvin as to the likelihood that he would succeed in litigation. Based on that conclusion, the other facts in the record, and the recovery Mr. Gurvin would receive if he were successful in litigation based on the statute and case law, the examinee must then recommend acceptance or rejection of the settlement offer.

II. DISCUSSION

A. Facts

The article from the *Franklin Sports Gazette* of January 27, 2014, establishes that the Olympia Torches professional football team will relocate to Franklin City, that the state and city governments are building a new stadium for the team in the Franklin City Sports Complex, run by the Franklin Sports Authority, and that the team will change its name to the Franklin Aces. The article also notes that the team's new logo will be announced at some point in the future.

The transcript of Ms. Lee's interview of Mr. Gurvin of June 29, 2015, establishes that he is a rabid football fan of the Olympia Torches. He is a janitor at the Franklin Omnidome (part of the Franklin City Sports Complex) and a self-described "amateur artist." He was really excited to learn that the team was moving to Franklin and would be called the Aces. Several months later, an idea for a team logo came to him and he drew a sketch of a hand holding four playing card aces fanned out and showed it to his supervisor. His supervisor suggested that he fax it to the CEO of the Franklin Sports Authority, which he did with a covering note. He received no response. When the team announced its new logo in May of 2015, it was virtually identical to his sketch. Mr. Gurvin has not registered his design in the United States Copyright Office. The

interview also establishes that he would dearly like to attend pro football games in person and would “give [his] eyeteeth” to do so but cannot afford it.

Mr. Gurvin’s note faxed to the CEO of the Franklin Sports Authority stated that he expected no remuneration should the team use his logo, except “maybe some tickets to games in the new stadium.” After the team disclosed its logo design, Mr. Gurvin (in his interview with Ms. Lee) said he now wanted $20,000 from the team.

The descriptions of Mr. Gurvin’s design and the logo announced by the team indicate that they are indeed virtually identical.

The team’s press release announcing the new logo, issued May 28, 2015, states that merchandise bearing the logo will not be available until sometime in 2016. Hence, at the time Mr. Gurvin is making his claim, the team has realized no revenue attributable to the new logo.

Mr. Alvarez’s response of July 24, 2015, to a telephone call from Ms. Lee in which she set forth Mr. Gurvin’s claim denies any liability because, in the team’s opinion, 1) Mr. Gurvin’s design is not copyrightable and 2) neither anyone at the team nor the logo designer the team employed had access to Mr. Gurvin’s design. The letter contains a “final, and only, settlement offer” of one season ticket to the team’s first season, worth $5,000.

The affidavit of Daniel Luce, CEO of the Franklin Sports Authority, acknowledges receipt of Mr. Gurvin’s fax but states that Luce believes he discarded it in the trash, and implies that he did not show it to anyone at the team. His affidavit states that the team and the Authority are entirely separate entities; that he has had no contact with anyone working for ForwardDesigns, the firm hired by the team to design the new logo; that, while he and his staff have occasional operational meetings with representatives of the team, they have no other contact with them; and that, while the Authority and the team have offices in the same building, they are on different floors.

Monica Dean’s affidavit establishes that in August of 2014—one month before Mr. Gurvin sent his fax—the team engaged her firm to design the new logo, for a fee of $10,000, and that she was the sole designer working on the project. Other than an occasional lunch with a personal friend who works in the Authority’s transportation department, she had no contact with anyone at the Authority. She has never met Mr. Luce, the Authority’s CEO. The logo chosen by the team was one of several she designed and was an “obvious choice” given the team’s name. Her design was inspired by many versions of the image, none of which were protected by copyright. She has no recollection of ever seeing Mr. Gurvin’s design.

B. Legal Analysis of Likelihood of Success in Litigation

Whether Mr. Gurvin can succeed in litigation depends on two questions: 1) Is his design copyrightable? The first case in the Library, *Oakland Arrows Soccer Club, Inc. v. Cordova*, addresses this question. 2) Even if it is, did the team and its designer have access to it? The second case in the Library, *Savia v. Malcolm*, addresses this question.

1. Whether Mr. Gurvin's Design Is Copyrightable Is a Close Call.

The examinee should start by noting that, as stated in *Oakland Arrows*, the standard for copyrightability—what constitutes protectable subject matter under the Copyright Act—is originality of authorship. There, the design for which protection was sought was a simple triangle in three colors. The Copyright Office rejected registration. Quoting a Supreme Court case, the court noted that, while the standard for copyrightability is minimal, there must nevertheless be some "creative spark." The court looked to the Copyright Office's regulation as to material not subject to copyright, based on prior court cases, and noted that "familiar symbols" and "mere variation of coloring" did not make a work copyrightable. The court upheld the Office's determination.

Applying that analysis to the case at hand, the examinee should note that the image of a hand holding playing cards in the form of four fanned-out aces is quite common and could reasonably be considered a "familiar symbol." Because the design is quite commonplace—as Ms. Dean's affidavit notes, there are many comparable images which are not protected by copyright—it could be found not to be copyrightable. But, because this design is more complex than that held not copyrightable in *Oakland Arrows*, there is also a reasonable possibility that it would be found to be copyrightable. Thus, the issue is not free from doubt, and whether Mr. Gurvin would prevail on this point is a toss-up.

2. Proving Access Would Be Difficult.

The examinee should start by noting that, even if Mr. Gurvin's design is copyrightable, there still must be plausible evidence that the designer or the team had access to it for Mr. Gurvin to prevail. As stated in *Savia*, it is rare that direct evidence of infringement is present, and hence circumstantial evidence must be adduced. To do so, two criteria must be met: 1) the works must, at the least, be "substantially similar"—a given in this case; and 2) there must be some proof that the alleged infringer had access to the allegedly infringed work.

Savia dealt with an allegedly infringing musical work. While the melodies of the two works were substantially similar, the proof of access was tenuous. The allegedly infringed work made its only appearance over the closing credits of a motion picture. The movie was rated NC-17, meaning that no one under age 17 would be admitted. The alleged infringer was only four years old when the movie had its very limited release, and it has not been shown in any medium since, nor has the song been recorded. Given this history, the court concluded that there was no reasonably plausible evidence of access; mere speculation would not suffice.

Applying that analysis to the case at hand, the examinee should note that

- Mr. Gurvin's sketch was faxed only to Mr. Luce, the CEO of the Franklin Sports Authority, which is an entirely separate entity from the team and from the design firm the team engaged.
- The offices of the Authority and the team and designer are on different floors of the same building.

- The contact between the Authority and the team and designer was limited, and Ms. Dean (the designer retained by the team) has never met Mr. Luce.
- Mr. Luce specifically recalls receiving the fax and thinking that there was no point in passing it on to the team, and believes that he discarded it in the trash.
- To prove access, Mr. Gurvin would have to speculate that the sketch somehow made its way from Mr. Luce or the trash to Ms. Dean, with no supporting evidence for that assertion. For example, Mr. Gurvin would have to allege 1) either that Mr. Luce gave the sketch to Ms. Covington, who works in the Authority's transportation department, or that she retrieved it from the trash, and 2) that Ms. Covington, a personal friend of Ms. Dean, the designer, gave it to her. Both these allegations are contradicted by the sworn statements of Mr. Luce and Ms. Dean.
- Ms. Dean has sworn that she was specifically inspired by other, similar designs which are not protected by copyright, rather than by Mr. Gurvin's design, which she swears she never saw.

In sum, from these facts, the examinee should conclude that it would be difficult to argue a salient case for access.

C. Mr. Gurvin Should Accept the Settlement Offer.

The examinee should make the following points in making his or her recommendation as to whether to accept the team's settlement offer:

- Given that, to prevail in litigation, Mr. Gurvin would have to succeed on *both* the copyrightability and access analyses, the examinee should reach the conclusion that Mr. Gurvin would have a difficult time winning—even if he prevailed on the issue of copyrightability, which is a toss-up, he would very likely not prevail in proving access.
- Mr. Gurvin had indicated in his fax to the CEO of the Franklin Sports Authority that he would allow the team to use his logo in exchange for tickets to games at the new stadium.
- Mr. Gurvin stated to Ms. Lee, the Executive Director of FALS, that he would "give [his] eyeteeth" to see a game in person.
- In accordance with *Herman v. Nova, Inc.*, even if Mr. Gurvin prevailed in litigation, given that he had not registered his copyright prior to the act of alleged infringement, he would be limited to his actual damages and the infringer's profits.
- Here, as no merchandise has been made or sold with the logo, there are no profits.
- The design firm's fee was $10,000, and, based on *Herman*, this is the maximum Mr. Gurvin could recover.
- The season ticket offered in settlement is worth $5,000.

- Given the $5,000 difference between the value of the settlement ($5,000) and the maximum recoverable damages ($10,000); the time, effort, and expense involved in litigation; and Mr. Gurvin's desired recovery of $20,000, the settlement offer is reasonable.

- Perceptive examinees may note that, as Mr. Gurvin would have to register his design with the Copyright Office before being able to litigate, there is even a likelihood that the Copyright Office would reject the registration (as was the case in *Oakland Arrows*) and thus foreclose any litigation, let alone any possibility of recovery by settlement.

- Perceptive examinees may also note that litigation does have costs, which of necessity must come out of any recovery Mr. Gurvin might realize. They may also note that, because he did not register his work with the Copyright Office before the alleged infringement occurred, he could not recover his attorney's fees. *Herman*.

- The examinee should therefore recommend acceptance of the settlement offer.

III. CONCLUSION

The examinee should, in straightforward language, 1) present the legal analysis of the questions of copyrightability and access, 2) conclude that there is little probability of success on the legal merits should the matter be litigated, and 3) recommend acceptance of the settlement offer and explain that recommendation.

NOTES

NOTES

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