

In re Marian Bonner
DRAFTERS' POINT SHEET

In this performance test item, the law firm represents Dr. Nicole Hall, the daughter of the deceased Dr. Marian Bonner. During her lifetime, Dr. Bonner achieved great prominence and gained widespread respect as an educational reformer who was instrumental in combating de facto racial discrimination in the public school system in the state of Franklin. Dr. Bonner bequeathed all her property to Dr. Hall.

When Dr. Bonner died, Celina Miller, Dr. Hall's niece, took charge of packing up Dr. Bonner's belongings. Among her personal effects were two packing boxes labeled "papers," which Celina thought contained assorted classroom projects and student papers that Dr. Bonner had saved up over her years of teaching. Celina stored the boxes in a neighbor's garage. Later, when Celina received an inquiry from people she thought were connected with the school where Dr. Bonner taught, Celina allowed the people who had called to take the boxes.

It turns out that the boxes contained a cache of Dr. Bonner's personal writings, including letters, journals, and drafts of speeches and that the people who were allowed to take the boxes were representatives of a for-profit, private corporation called the Success for Every Child Association (SECA), which runs public schools under contract with the State of Franklin. Dr. Hall recently received an alarming letter from the Franklin Library Association telling her that SECA was planning to exploit Dr. Bonner's writings and name for SECA's commercial advantage and expressing concern that the historical significance of Dr. Bonner's work would be lost if SECA were allowed to go forward with its plans.

Dr. Hall seeks the firm's assistance in stopping SECA from using her mother's writings and name. Her rights arise as the successor in interest to Dr. Bonner's copyright in the written materials and the right of publicity in Dr. Bonner's name. Applicants' task is to draft a letter to SECA's attorney demanding that SECA refrain from making any unauthorized use of the materials and Dr. Bonner's name.

The File contains the instructing memo from the supervising partner, a transcript of an interview with Dr. Hall, the letter from the Franklin Library Association, and a biographical sketch of Dr. Bonner. The Library contains excerpts from the copyright statutes and two cases bearing on the subject.

The following discussion covers all of the points the drafters intended to raise in the problem. Applicants need not cover them all to receive passing or even excellent grades. Grading is entirely within the discretion of the graders in the user jurisdictions.

I. Overview: Applicants' work product should be in the form of a letter to William Drake, SECA's attorney, to persuade him that if SECA goes forward with its proposed actions it will infringe upon Dr. Hall's copyright and the right of publicity in Dr. Bonner's name and expose itself to significant damages. As Dr. Hall's attorney also suggests, the letter should point out to SECA that it could avoid a lot of adverse publicity by refraining from the unauthorized use of the writings.

Applicants are told that the letter should set forth Dr. Hall's position fully and should contain the following components:

- A description of the dispute;
- A *brief* statement of the salient facts;
- Arguments that support Dr. Hall's position concerning the copyright infringement and violation of the right of publicity.

They are specifically told not to concern themselves with the question of how SECA acquired the physical materials, who owns them, whether SECA must return them, and Dr. Hall's potential claims for damages and injunctive relief.

II. Description of the Dispute: This part need be only a short statement informing SECA's attorney what the dispute is and why he is receiving the letter. It might reasonably include the following points:

- An introduction of Dr. Hall, i.e.,
 - she is Dr. Bonner's daughter and
 - Dr. Bonner's successor in interest by virtue of having inherited all of Dr. Bonner's property.
- Dr. Hall recently received information to the effect that SECA acquired boxes containing the personal writings of Dr. Bonner and that SECA intends to use the writings and Dr. Bonner's name to advance SECA's commercial interests.
- The purpose of this letter is to try to avoid litigation and the attendant adverse publicity to SECA, to demand that SECA refrain from all such uses, and to explain the consequences of not refraining.

III. Statement of Facts: In this segment, applicants should set forth the basic facts regarding Dr. Hall's interests and the information she has about SECA and its intentions. These facts can be gleaned from the lawyer's interview with Dr. Hall, the letter from the Library Association, and the biographical summary.

- Dr. Hall inherited all of her mother's property.
 - So far as is known, Dr. Bonner owned all of her writings at the time of her death, i.e.,
 - she had not transferred either the physical papers or the copyrights to anyone else.
 - Thus, ownership of the papers and the copyrights passed to Dr. Hall at Dr. Bonner's death.
- As SECA well knows, Dr. Bonner had worked her entire adult life to develop means of achieving racial integration in the Franklin public schools.
 - One of her principal tenets was that a publicly funded, operated, and controlled school system is essential to the achievement of racial justice and democratic participation.
 - Central to her ideas was the notion that the individual needs of each child required attention.
 - Dr. Bonner was universally recognized and respected for her work and her influence in shaping the national policy debate on public education.
- Dr. Hall recently received a letter from the Franklin Library Association informing her that
 - SECA is a private, for-profit corporation in the business of running public schools under contract with the state of Franklin;
 - SECA has acquired Dr. Bonner's papers consisting of some 300 letters, 50 speeches, and 10 volumes of journals, all in Dr. Bonner's handwriting;
 - SECA intends to identify itself with Dr. Bonner's work by:
 - changing its name to the "Marian Bonner Educational Group."
 - publishing a volume containing excerpts of Dr. Bonner's writings under the name REDISCOVERING MARIAN BONNER'S LEGACY and distributing that volume to state legislators to announce SECA's name change;

- The excerpts will emphasize Dr. Bonner’s notion that attention must be given to the needs of each child.
 - Coincidentally, that goal is SECA’s corporate “signature focus.”
- selling the writings in separate lots to the highest bidders.

IV. Arguments: Applicants must recognize that there are separate issues relating to copyright and the right of publicity, and discuss them both.

A. Copyright: The object of this part of the letter to Drake is to persuade him that Dr. Hall has protectable copyright interests that SECA will violate if it carries out its plans. This task will require applicants to apply the facts to the four factors set out in § 107 of Title 17 of the United States Code, weigh the factors as indicated in the *Campbell* case, and reach a reasoned conclusion as to why SECA’s intended use of the writings is not a “fair use” under the copyright law.

- Dr. Hall has a protectable copyright: The following points should be made on this issue:
- Dr. Bonner’s writings qualify under § 102 as the subject matter of copyright because they are
 - original works of authorship and
 - fixed in a tangible medium of expression, i.e., on paper in her handwriting.
 - As such, they can probably be characterized as “literary works” under § 102.
- Ownership of the copyright and the physical papers are distinct property rights.
 - The copyrights, which are separately transferable, were properly transferred to Dr. Hall by Dr. Bonner’s will. *See* 17 U.S.C. § 201.
 - Thus, even if SECA has lawful possession of the papers themselves, the copyrights remain Dr. Hall’s.
- Accordingly, unless SECA can establish that its intended use of the writings is a “fair use” under § 107, Dr. Hall has the *exclusive* rights under § 106 to
 - reproduce the writings;
 - distribute copies of the writings to the public by sale or other transfer of ownership; and
 - display the writings publicly.

- And, since fair use is an *affirmative defense* to a claim of copyright infringement (*Campbell*), it is clear that it is SECA's burden to prove a fair use.
- Application of the facts to the four factors in § 107 clearly shows that SECA's intended use is not "fair use" and would thus infringe on Dr. Hall's copyright: In this segment, applicants must discuss the four factors and, using the weighing approach the court used in *Campbell*, reach a reasoned conclusion that publishing the excerpts, distributing the volume, and selling off the works would be infringements of Dr. Hall's copyright. The tenor of the letter should be to the effect that, even though it is SECA's burden to establish fair use, Dr. Hall's attorneys will demonstrate that the intended use would not, under any circumstances, constitute fair use.
- **First factor: The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.** There are two concurrent considerations on this point. One is whether the intended use is for commercial gain. The other is whether the work is "transformative."

Commercial Gain:

- SECA's intention to publish a volume of excerpts and distribute it to state legislators to announce SECA's name change is not for nonprofit educational purposes.
- The only reason SECA wants to publish the volume of excerpts is to enhance its image with the state's legislators, who can obviously influence the award of contracts to SECA in its quest to secure a dominant position as a for-profit education provider in Franklin. This is clearly a commercial motive.
- Likewise, SECA's plan to sell off the works in separate lots to the highest bidders is purely commercial in nature.
- Although, standing alone, a commercial motive in using the copyrighted work is not determinative, it is "a separate factor that tends to weigh against a finding of fair use." *Campbell*.

Transformative:

- The commercial use of a copyrighted work can nevertheless be a fair use if it is "transformative."

- A transformative use is one which “adds something new, with a further purpose or different character, altering the [original] with new expression, meaning, or message.” *Campbell*.
- Here, assuming that the Library Association’s description of what SECA intends to do is correct, there is nothing transformative about the volume SECA intends to publish.
 - SECA intends simply to pull selected excerpts out of Dr. Bonner’s writings, print them, and distribute them, presumably without comment, critique, or other editorial embellishment.
 - An applicant might anticipate that SECA could argue that even printing verbatim excerpts and arranging them in such a way as to highlight the author’s differing views or internal contradictions could be found to be transformative and receive extra credit for attempting to refute such an argument.
- Coupling SECA’s purely commercial motive with the non-transformative nature of the use, the purpose and character of the proposed use weigh heavily against a finding of fair use.
- **Second factor: The nature of the copyrighted work.** The inquiry under this factor focuses on a “recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish.” *Campbell*. Just as in *Campbell*, there is not much in the File that sheds light on the application of this factor, but there are *some* facts that might be brought to bear.
 - One important fact is that Dr. Bonner’s works are currently unpublished. *See Campbell*, citing *Harper & Row* (finding that although not determinative, the fact that a work is unpublished is a factor weighing against a finding of fair use).
 - In the interview, Dr. Hall suggests that Dr. Bonner had intended to write another book, presumably drawing on the matters recorded in her papers.

- The Library Association’s letter posits that the papers in SECA’s possession are the only source of information that sheds light on Dr. Bonner’s thought development and evaluation of her own efforts.
 - If Dr. Bonner in fact intended to write another book about why she “tried all her projects, including the ones that had gone wrong” (*see* the interview transcript in the File), her writings are necessarily at the “core of intended copyright protection,” i.e.,
 - the writings would be the source materials for her book, and to allow others to use them would have preempted her next publication.
 - Thus, *any* use without the specific authorization of Dr. Bonner, and now Dr. Hall, would cut to the “core of intended copyright protection” and would militate against a finding of fair use.
- **Third factor: The amount and substantiality of the portion used in relation to the copyrighted work as a whole.** The focus of this factor is whether the parts of the writings that SECA intends to use are reasonable in relation to the copyrighted work as a whole. *Campbell*. This goes both to the relative amount of the work the user intends to use as well as to the substance of the parts that will be copied. Also, this inquiry is not totally separate from the question of whether the parts to be used are verbatim reproductions or transformative.
 - The Library Association letter states that SECA intends to publish a “small volume” of excerpts from Dr. Bonner’s writings that stress the need for attending to each child’s needs.
 - It is clear that SECA intends to merely copy verbatim those excerpts.
 - This plan is calculated to create the perception that SECA’s corporate focus furthers Dr. Bonner’s laudable goals.
 - Although these excerpts constitute a relatively small part of the overall volume of Dr. Bonner’s writings, it is clear that the excerpts deal with a central part of her pedagogical theories.
 - As pointed out in the letter from the Library Association, those excerpts are the parts that are most likely to be important to scholars and the public.

- Coupled with the likelihood that SECA’s publication will have no transformative character, use of the excerpts will not be reasonable in relation to the copyrighted work as a whole.
- Moreover, SECA also intends to eventually sell off the entirety of the work. This action would constitute a wholesale infringement on Dr. Hall’s exclusive right to distribute copies to the public by sale or otherwise. § 106(3). (*See* attorney’s comments regarding right of publication in the interview transcript.)
- Given the central, substantial nature of the excerpts SECA intends to use, this third factor also weighs against a finding of fair use.
- **Fourth factor: The effect of the use upon the potential market for or value of the copyrighted work.** The inquiry here is whether SECA’s intended use would amount to a market replacement such that it would harm the market for the original work. Again, whether the use is transformative or merely reproductive bears on this factor. *Campbell*.
 - There are two “markets” SECA intends to reach: legislators who can influence state contracting, and wealthy collectors who will pay good money for Dr. Bonner’s work.
- Both markets clearly “belong” to Dr. Hall as the successor to her mother’s writing.
 - Dr. Hall herself has an interest in “expanding public understanding and academic research.” Any desire she might have in implementing her mother’s lifelong work would necessarily have to be done through the legislators and the legislative process.
 - SECA’s publication would completely preempt the original presentation of Dr. Bonner’s ideas to the current legislators.
 - Dr. Hall should be entitled to profit from the sale of the contents of the writings.
 - SECA’s plans to sell them would completely preempt that market as well.
- There is another market that would also be destroyed by SECA’s sale of the writings—the academic and scholarly market.

- If the Library Association’s letter is correct, SECA’s sale of the writings to wealthy collectors in separate lots would put them out of the reach of this market.
- Thus, it is plain that SECA’s intended actions, amounting to mere duplication of part or all of the writings, would effectively replace the writings and their value in the relevant markets.
- Conclusion: Weighing all the factors together, it is abundantly clear that SECA’s intended uses of the writings fall far short of fair use and will infringe on Dr. Hall’s copyrights.
 - The letter should demand that SECA refrain from all of its intended uses.
- **B. Right of Publicity:** In this part of the letter, applicants must persuade Drake that SECA will violate Dr. Hall’s right of publicity if it proceeds with its plan to change its name to the “Marian Bonner Educational Group” and, indeed, may already have violated that right by announcing its intention to do so in a press release and news conference. (*See* Library Association’s letter.)
 - The right of publicity is defined as “a celebrity’s right to the exclusive use of his or her name and likeness.” *Martin Luther King, Jr., Center*.
 - That right is recognized in Franklin.
 - The right is violated “by using [the celebrity’s name] in connection with a commercial project other than dissemination of news or articles or biographies.” *Id.*
 - Likewise, the right of publicity is inheritable and survives the death of the celebrity if the exploitation of the celebrity
 - is unauthorized,
 - is for commercial purposes, and
 - would not serve to reward or encourage effort and creativity that serve some other significant public purpose. *Id.*
 - There is no question that Dr. Bonner was a “public figure.” (*See* the biographical summary in the File.)
 - She was preeminent in her field, i.e., “The Great Educator” with a national reputation as an educational reformer.
 - Her book was awarded a prestigious prize.

- She was selected by the *Franklin Daily Times* as Educator of the Year for 15 years.
 - She received the Douglas Foundation's lifetime achievement award.
 - She was a Trustee at the University of Franklin.
 - She has more Franklin public schools named after her than any other individual.
- This celebrity conferred upon Dr. Bonner a right of publicity that descended to Dr. Hall through her mother's will.
 - In Franklin, Dr. Hall is entitled to protect that right against unauthorized commercial use by SECA because
 - her mother's fame arose from purely noncommercial endeavors;
 - SECA's intended use is an attempt at commercial exploitation;
 - SECA's use would not reward Dr. Hall or her mother; in fact, it would deprive Dr. Hall of valuable rights; and
 - the use of Dr. Bonner's name would not serve any significant public purpose other than to advance SECA's own commercial interests.
 - It is immaterial to Dr. Hall's right to enforce the right of publicity that her mother never sought to exploit her own name commercially.
 - Indeed, that is all the more reason to protect the right. *Martin Luther King, Jr., Center*.
 - Further, it is likely that by making the announcement in its press release and news conference that it intended to change its name to the Marian Bonner Educational Group, SECA has already violated Dr. Hall's right of publicity for all of the foregoing reasons.
 - Applicants might note that the announcement, having been made in a press release and news conference, might raise a First Amendment issue.
 - As the court notes in *Martin Luther King, Jr., Center*, there may be an exception if the publication and use of Dr. Bonner's name were entitled to First Amendment protection.

- To make such a case, SECA would have to show that the announcement was for the purpose of disseminating news and not simply designed to advance its own commercial interests.
 - Under the circumstances, it is unlikely that there would be First Amendment protection.
- Conclusion: SECA has already likely violated Dr. Hall's right of publicity and will do so in the future if it carries out its plan to change its name.
 - The letter should demand that SECA refrain from using both Dr. Bonner's name and her writings.
 - It should also urge SECA to cooperate in order to avoid bad publicity. (*See* attorney's comments in interview transcript.)
 - The letter should also set a deadline for a response by SECA in order to avoid further action by Dr. Hall.