

MPT 1 - Sample Answer # 1

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

July 29, 2015

Bryan Carr
6226 Lake Drive
Franklin City, FR 33244

Dear Bryan,

I am writing to follow up on our phone call from July 24. I was happy to hear from you, but I am sorry it was under the shadow of some difficult circumstances. I hope this letter will answer your questions regarding whether your bank can hold you responsible for the charges to your credit card that your dad made without your permission. I have addressed each purchase your dad made with your credit card.

1. Are you responsible for the total auto repair cost of \$1850 even though you originally allowed your dad to charge the repair understanding only \$1500 would be charged.

Yes, you are responsible for the full cost of the auto repair because you specifically told you dad he could charge the repairs. The extra \$350 in repairs were reasonable and within the scope of the permission you had specifically given.

Under the Federal Truth in Lending Act, you are only responsible to pay a maximum of \$50 for any charges that are incurred from the unauthorized use of your card. 15 U.S.C. § 1643(a)(1). The Act defines "unauthorized use" as "the 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." *Id.* § 1602(o). Essentially, if someone uses your credit card without your permission, you will only be responsible for up to \$50 of their un-permitted charges. However, if someone spends more than they were initially permitted to spend, you may still be responsible for the charges if the person had "implied" or "apparent" authority to make the charge. "Implied authority" generally means that the person you gave permission to make charges is allowed to make charges that are reasonably within the bounds of your actual grant of authority or are necessary to do what it is you asked them to do with the card. *BAK Aviation Systems*, at 14. Ultimately, if someone has actual permission to use the card and uses it in a manner reasonably in bounds of that permission, you will be responsible for the entire charge under the Truth in Lending Act.

With the van repair charge, you gave your dad specific permission to charge the repair to your credit card. Although he had received an initial estimate for repairs of \$1500 and you had based your permission on that amount, the additional \$350 needed to make the repair

was reasonable given your initial grant of permission - when repairs begin, additional problems are often discovered and need to be fixed. Given that you initially told your dad to pay for the entire van repair with your card, the additional costs are within your dad's implied authority to use the card; therefore, you are responsible for the entire amount.

2. Are you responsible for the gas, grocery, and book store purchases that your dad made without your specific permission

Likely yes, you are responsible for the gas, grocery, and book store purchases even though you did not give you dad permission to make those additional purchases. The general authority you provided you dad with in the letter you gave him and the fact that you did not get the card and letter back until later means your dad likely had the apparent authority to make the purchases.

An individual can make purchases on a credit card provided by the credit card holder without the credit card holder's actual permission and, in certain situations, the credit card holder will still be responsible for the charges; this is known as apparent authority. *BAK Aviation*; Rest (3d) Agency § 3.03. The credit card holder will be responsible for charges when the words or actions of the credit card holder cause a store or other third party to reasonably believe that the individual making the purchase has the permission to make the purchase. *Id.* For example, when an airliner gave its chief pilot a credit card and instructed him to purchase fuel for a charter plan only for specific types of flights, a court held the airliner responsible for un-permitted fuel charges even though it had expressly told the pilot to use the card only for certain situations. *BAK*. The court said that pilots were often entrusted with credit cards and the fuel sellers could not have made a distinction between allowed purchase and purchases not allowed.

Additionally, credit card holders have a responsibility to review credit card charges on their accounts and notify a bank promptly of any errors. *Transmutual Insurance*. If a card holder is careless in reviewing his statement, he may be unable to use the Truth in Lending statutes protection.

Here, the grocery, gas, and bookstore charges were all made by your dad without your permission. However, to the gas station, bookstore, and grocery store, it appeared that your dad had the authority to make those charges to your card. The letter you provided him did not contain any limitations to the cards use so these store were reasonable in relying on the letter to accept the card from your dad. The fact that you did not get the card and letter back immediately adds credence to these stores' belief that your dad had the right to use the card. Given that he likely had apparent authority to use your card in the eyes of the stores he was making these purchases with, you will be responsible for the April and May charges for gas, books, and groceries. Additionally, the fact that you did not notice these charges as unauthorized during your initial review of the bills would also weigh against you when seeking to avoid these charges.

3. Are you responsible for the hardware store purchase your dad made after he returned your card and permission letter

Possibly no. The fact that your dad did not have your permission, did not have your credit card or the letter you provided, and the hardware store's carelessness likely means you will not be responsible for the hardware store charge.

As mentioned in my response to question two, it is possible for a person to have apparent authority to use a credit card. However, a person's apparent authority will only protect a seller or bank when they accept the credit card in "good faith and without ordinary negligence." *Transmutual*. For example, a bank that issued a credit card to an employee of a company without checking with the company's general manager, who alone had authority to request issuance of a new card, was considered negligent. *Id.* This carelessness by the bank prevented them from relying on the employee's apparent authority to request the card. *Id.*

Here, the hardware store was likely negligent when its clerk carelessly accepted the credit card name, number, and expiration date from your dad without any questions. The lack of the physical credit card or any indication that he had permission to use the card number should prevent them claiming your dad had the apparent authority to use your card. Even so, it is probably a close call on whether you can prevent bank from collecting under the Truth in Lending act given your previous payment and authorization of your dad's use of the card. However, the size of the purchase rest in your favor.

It might be best for you to see if the items can still be returned to the hardware store for a full refund to avoid any additional issues. In the meantime, I am happy to call the bank directly to see if they will void the charges for the hardware store.

I hope this letter answers your questions. If you have any additional questions, please give me a call.

Sincerest Regards,
Miles Anders

MPT 1 - Sample Answer # 2

July 28, 2015

Dear Bryan:

You have asked me to investigate whether you can be held responsible for payment on the unauthorized purchases made by your father on your Acme State Bank credit card. The Truth in Lending Act limits liability to cardholders for charges made by third parties without actual, implied, or apparent authority 15 U.S.C. §§ 1602(o), 1643. These charges are deemed to be unauthorized, and the cardholder is liable for only up to \$50 of the amount charged on the card if the conditions are met. After investigation into these instances of misuse of your credit card, I have concluded as follows:

Are you responsible for paying the charges made by your father to the auto repair shop.

Yes. Your father was using the card with your actual, or at least implied, authority, and therefore the use for the car repair is authorized, and does not fall under the protection of the Truth in Lending Act

The Truth in Lending Act does not apply if the use of the card by third parties was made with actual, implied, or apparent authority. §1602(o). This authority is determined by agency principals. Under the Restatement (Third) of Agency §2.01, actual authority exists when the agent, here your father, reasonably believes based on the principal's, here your, representations to him that it is desired that he act. Here, it is arguable that your father had your actual authority to charge the purchase because you explicitly told him to use the card to charge the repairs, and gave him your card and the note for the purposes of doing so.

However, if there was not actual authority for this purchase, because the cost was more than expected, there was at least implied authority granted to your father to charge the total cost to your credit card. The Court in *BAK Aviation v. World Airways* (Franklin Ct. App. 2007) stated that implied authority means "actual authority either (1) to do what is necessary, usual, and proper" to accomplish the agent's (your father's) responsibilities, or (2) to act in a way in which the agent (your father) believes the principal (yourself) wants him to act, based upon a reasonable interpretation of the representations made in light of the objectives of the action. Here though the charges to the auto repair shop were \$350 more than what was expected, it is reasonable to believe that your father interpreted your agreement to pay for the repair as implied authority to charge whatever the repair cost. Thus, because there is authority for your father to use your card in this instance, you will not be able to recover for any charges to the auto repair shop.

Are you responsible for paying the charges incurred by your father at the bookstore, the grocery store, and the gas station.

Yes. Though your father did not act under actual or implied authority to make these purchases, he did act under your apparent authority. The use is therefore not unauthorized, and the Truth in Lending Act protection will not extend to these purchases; you will be responsible for making these payments.

According to the Restatement (Third) of Agency §3.03, apparent authority is created when a person represents that another has his authority to act, with legal consequences for the person who makes such representation, and when a third party reasonably believes that the actor is authorized, and the belief is traceable to the representation. Here, this means that, because you gave your father your credit card, with an accompanying note giving him unqualified authorization to use the card, vendors will reasonably believe him to be authorized to use the card, and you will be responsible for the purchases.

Even where there is no actual authority for additional, unauthorized charges on a voluntarily transferred credit card, most courts will not apply the Truth in Lending Act's liability limitations to the card holder, because the voluntary relinquishment for one purpose gave the actor apparent authority, in the vendor's eyes, for the other purchases. *BAK v. World Airways*. If there is notice to vendors that the authorization is limited, apparent authority may not be established. *BAK v. World Airways*. However, here your father had the note, and there were no words of limitations on his authority to use the card. However, if the principal fails to disapprove of the agent's (your father's) acts, he leads the public to believe that the agent possesses the authority to do that act, and the principal, you, are bound. *Farmers Bank v. Wood* (Franklin Ct. App. 1998). Because of this, the bookstore, grocery store, and gas station were not on notice that the charges at their particular establishments were not authorized. A cardholder has a duty to examine his credit card statement promptly, and to use reasonable care to discover unauthorized charges made. *Transmutual Insurance Co. v. Green Oil Co.* (Franklin Ct. App. 2009). Because you did not contest the payments, and paid your credit cards without noticing and contesting the charges at the time, the bank had no notice that the charges were not authorized, and you will be responsible for these payments.

Are you responsible for paying the charges made by your father to the hardware store.

Probably no. There was no actual or implied authority to use your credit card for this purchase, nor was there a good reason to believe there was apparent authority. Further, the charges here were contested before they were paid, so the reasoning of *Transmutual* and *Farmers* does not apply.

The hardware store had no reason to believe that your father had actual, implied, or apparent authority to use the card, as described above. He did not have the card in hand when he made the purchase. He merely had a piece of paper with the card numbers written on it. For apparent authority to be created, there must be a reasonable belief of authority. You can only be bound to pay those who have "incurred liability in good faith and without ordinary negligence." *Transmutual v. Green Oil*. It is likely negligent on the part of the clerk to run a credit card with the account information merely presented to him on a piece of paper. Because of this negligence on the part of the hardware store, there is no real argument that apparent authority existed. Further, because you have not paid the bills, unlike the case with *Transmutual*, you have not been negligent in regards to reporting this charge. Therefore, the 15 U.S.C. §1602(o) test for unauthorized use of a credit card is met, and the Truth in Lending Act's limitation on liability should protect you with regards to this purchase. You should only be liable for \$50 of the \$1200 spent on the power tools.

In summary, I believe that you will be able to claim protection under the Truth in Lending Act for the purchase of the power tools. You will be liable for the minimum amount of \$50. However, you will not receive protection for the purchases made by your father at the bookstore, grocery store, or gas station, as he authority, or at least apparent authority, to make those purchases. If you have any further questions, I'd be happy to explain further.

Best Regards,

Miles Anders

MPT 1 - Sample Answer # 3

Dear Mr. Carr,

You have asked us to review your liability for charges your father made on your credit card during the months of March, April, May, and June of this year. The Federal Truth in Lending Act limits liability of cardholders for unauthorized use of credit cards to \$50 if certain conditions are satisfied. According to Franklin law, we have determined that your liability for these charges is likely as follows:

WAS HENRY'S USE OF THE CARD UNAUTHORIZED?

Henry's use of Bryan's credit card for the March van repairs is probably not unauthorized, which means Bryan is liable for the \$1850 repair charge. Likewise, the use of the credit card in April and May was probably not unauthorized either, and Bryan is liable for the food and gas charge, as well as the charge at the bookstore. However, the use of the credit card number to buy power tools was probably unauthorized, and Bryan is therefore not liable for those charges.

"Unauthorized use" of a credit card is defined in Franklin law as "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.

There was arguably a benefit to Bryan from Henry's use of the credit card, even though the items and services bought were primarily for Henry's own benefit. Bryan gave Henry the card specifically because he wished to help his father out in a difficult time, and it is likely that Bryan gained some form of benefit through helping out his father. There is not a strong argument that there was no benefit to Bryan, so we turn next to whether or not Henry had authority to use Bryan's card.

Whether or not a person is an authorized or unauthorized user depends on agency law, which explains when a person other than the cardholder would have authority to enter into transactions. Actual authority is when the principal, or cardholder (Bryan), directly communicates his consent to particular transactions to the agent, or user (Henry). Implied authority is when the user has actual authority to act in a manner in which the user believes the cardholder wishes him to act, based on the user's reasonable interpretation of the cardholder's objectives.

Henry probably had either actual or implied authority to make the purchase of van repairs. Bryan gave his father the credit card in order to purchase these services specifically. Although Henry had actual authority to purchase an "estimated" \$1500 worth of repairs, that number was only an estimate. Henry had implied authority to spend a little more than the estimate in order to complete the repairs, as long as the amount was reasonable. The actual charge of \$1850 did not differ significantly enough from the estimate that Henry would believe that the charge was outside of the range for which he could use the card.

Henry probably did not have either actual or implied authority for the purchases in April, May, or June. Courts in Franklin have previously determined that the use of a credit card outside of the scope of what the cardholder expressly permitted them to use it for created neither actual nor implied authority. *BAK Aviation Systems, Inc. v. World Airways, Inc.* In

that case, the cardholder expressly told an employee he could use the card for one type of purchase, gas for non-charter flights, and the employee used it for a different purpose, gas for charter flights. The court determined that there was no actual or implied authority because the purchases were not what was allowed by the cardholder. Although Bryan wrote and signed a letter granting Henry express permission to use the card, Henry had actual, specific instructions from Bryan as to what he was permitted to use the card for -- van repairs only. Because the gas, groceries, books, and tools were outside of the range of things Henry actually had permission to use the card for, there was no actual or implied authority.

Even if there is no actual or implied authority, there may still be an agency relationship (and therefore an authorized use of the credit card) if there was apparent authority. Unlike actual and implied authority, apparent authority exists when a third party (a seller) reasonably interprets words or actions by the cardholder to determine that the user was acting with the cardholder's consent. BAK Aviation. Franklin courts have determined that there was apparent authority for an employee to use a credit card given by the employer for uses even outside the scope of actual and implied authority, because the third party seller had no reason to know that the employee was allowed to use the card for non-charter, but not charter, flights. The important factor here is what a seller would know about the user is allowed to buy with the card, not what the user thought. When the cardholder voluntarily gives his card to the user, courts will not limit a cardholder's liability under the Truth in Lending Act, because there is apparent authority. Henry had Bryan's credit card when he purchased the gas, food, and books in April and May. Henry probably had apparent authority here; there was no reason for a seller to know that Henry had permission to use the card for van repairs but not other items such as food and gas. Further, Henry possessed the letter signed by Bryan voluntarily granting Henry permission to use the card, and there were no such limitations stated on the letter. Even if a seller would have inquired into Henry's authority to use the card, the letter would have provided no indication that Henry's authority was limited.

However, Henry's use of the credit card number, without the accompanying card, was probably unauthorized. When Henry made that charge, he was no longer in possession of either the card itself or the letter granting him permission to use it. Henry either knew or should have known at this point that he was not allowed to use the card. Further, he probably did not have apparent authority, because unlike the use of the card for food and gas, the hardware store knew that Henry was not in possession of the card, which should have notified the store that he did not have authority to use the card.

IF USE WAS UNAUTHORIZED, WHAT IS THE LIABILITY?

Even if Henry's use of the card in April and May was unauthorized, the Truth in Lending Act would probably not apply, and Bryan would be liable for the charges anyway. However, the charges for power tools in June probably qualify as unauthorized purchases under the Truth in Lending Act, and Bryan's liability for that purchase would be limited to \$50.

Section 1643 of the Truth in Lending Act limits a cardholder's liability for unauthorized purchases using a credit card to \$50 if certain conditions are met, including a requirement that the unauthorized use must have occurred before the card issuer has been notified that such a use has occurred. Franklin courts have considered negligence on all parties

involved in a transaction when determining whether this section will apply to limit liability for unauthorized credit card charges. *Transmutual Insurance Co. v. Green Oil Co.* In *Transmutual*, an employee of a company opened a credit card without authorization and used the card for three years. The company paid the monthly statements for this period of time, and then disputed the charges when they realized that the card had been opened fraudulently. Although the credit card company was negligent in allowing the employee to open the card, the court said that the company was still liable because they were negligent in not discovering the improper use and in paying the monthly statements for a long period of time.

A court may similarly determine that Bryan was negligent in not discovering the fraudulent charges on the credit card, or that Bryan paying the statements for two months gave him notice of unauthorized purchases, and therefore § 1643 would not limit his liability. However, there is a strong argument that there is a difference in negligently paying monthly bills for three years, as the company in *Transmutual* did, and paying two months' worth of bills for charges that were not unusual in any way. Bryan and Henry shopped at the same places, and upon a glance at the credit card statement, Bryan could reasonably have thought that he made the charges himself, and he therefore did not have clear notice of unauthorized charges. Further, Bryan notified the credit card company as soon as he realized that there were unauthorized charges on his card. Also, the hardware store was probably negligent in accepting a credit card number in lieu of an actual credit card, as the fact that Henry did not have the card in his possession should have put them on notice that something was not right about the transaction. Bryan's liability for the hardware store charges will probably be limited to \$50 under the Truth in Lending Act, because he did not have adequate notice, his negligence in not discovering the charges was minor, and the hardware store itself was negligent in allowing Henry to make the purchase in the first place.

Sincerely,

Miles Anders

MPT 2 - Sample Answer # 1

To: Mr. Al Gurvin

From: Applicant

RE: Review of Your Copyright Infringement Claim

Date: July 28, 2015

Dear Mr. Gurvin:

I have been asked to review your case and issue an opinion on whether or not you should accept the settlement offer from Pro Ball Inc. I recommend that you do take the settlement offer.

1. Enforceable Copyright

In order for you to have a claim for copyright infringement against Pro Ball, it must first be determined that your logo is protectable under copyright. Under 17 USC Section 102, copyrights protect original works of authorship. The distinction between copyrightable and non-copyrightable subject matter was raised in the case of Oakland Arrows Soccer Club v. Cordova. (Cordova). There the court found that a logo for the Oakland Arrows soccer club was not protectable under copyright. The court found that the logo lacked originality and creativity because the logo was a familiar symbol or design with a mere variation in coloring. In coming to this conclusion, the court cited Feist Publications, Inc v. Rural telephone Co. from the United States Supreme Court. There the court held that original means that the work was independently created by the author and that it possesses at least a minimal degree of creativity. The court in Cordova also cited 37 CFR Section 202.1 which covers non-copyrightable materials. Subsection (a) states that familiar symbols or designs are not subject to copyright.

In reviewing your case, it appears that in light of the holding in Cordova, your logo may not be subject to copyright. The logo that you have presented comprises of a hand holding a set of four aces which could be identified as a familiar symbol or design. Monica Dean, the commercial artist and designer for ForwardDesigns stated in an affidavit that there are many versions of this image and that there are several art collections on the internet that are not protected by copyright. If this is true, then any slight variation you make to these public images will not be enough to afford you copyright protection.

2. Copyright Infringement

If it is determined that you have an enforceable copyrighted work, then you must also show copyright infringement. There is a two part test that has been used in the circuit that covers the District of Franklin that was cited in the case Savia v. Malcolm (Malcolm). In order to show infringement under this test, the plaintiff must show: 1) the works are substantially similar; and 2) the alleged infringer had access to the copyrighted work.

From reviewing the fax that you sent to Daniel Luce on September 25, 2014 and the press release, it appears the two images are substantially similar. The outline of the hand is different between the logos, but the logos are otherwise identical. Proving that Pro Ball had access to your logo will also need to be proved. The standard of proof for showing access is quite high. In *Malcolm*, it was determined that the defendant did not have access to the earlier song because it was only available to the public for a short period of time at a single theater and was never later released to the public. In an earlier case on the topic, *Fred Fisher v. Dilingham*, the court found that the defendant was presumed to have access to a song because it was popular at the time. Copying does not have to be intentional (See. *Bright Tunes Music Corp v. Harringtons Music*), the plaintiff just must show the defendant had access to the work.

Here, it will be difficult for you to prove that Pro Ball had access to your logo. The logo was sent to the CEO of the Franklin Sports Authority, not Pro Ball. According to the affidavit of the CEO, the two entities have no affiliation with each other. The CEO also stated that his office is on a different floor than Pro Ball and that he believes he discarded the fax in the trash. Monica Dean, the designer of the team logo swore that she had no contact with Franklin Sports Authority except for when she occasionally met one of her friends. She had never met the CEO that received your logo. These facts, if true, indicate that ForwardDesigns did not have access to your logo. If they are accepted as true by the court, then there has not been any copyright infringement because it will be determined that the Pro Ball logo was created independently.

3. Expected Damages

If you were to litigate the maximum that you would likely recover is \$10,000. As was described to you in the interview with our firm on June 29, 2015, a work does not have to be registered in order to be copyrighted. However, there are benefits to registering a work. First, a work must be registered before a claim can be brought against a potential infringer. It is possible to register the work after the infringement is identified. Second, if a work is not registered at the time the alleged infringement occurred, then the copyright holder is limited to actual damages and the infringer's profits (See 17 USC 412, 504(b)).

According to the press release, there have been no sales to date. Therefore, Pro Ball has not made any profits. You are therefore limited to your actual damages. The test for determining actual damages when there is no track record of sales was illustrated by the court in *Herman v. Nova*. There, the court held that when a person does not have a track record of sales, then evidence can be submitted to show what the person would ordinarily make for the particular type of work. Here, an experienced designer from ForwardDesigns was paid \$10,000 to create the logo. Therefore, the most you will likely make is \$10,000.

4. Conclusion

In conclusion, I would recommend that you take Pro Ball's settlement offer because it will be difficult for you to prove that your logo is copyrightable and that there was copyright infringement. Also the damages that you may recover are not much greater than the settlement offer by Pro Ball and the cost of litigation could exceed the difference.

Thank you for allowing me to review this matter for you. I will await further instructions.

With Best Regards,

Applicant

MPT 2 - Sample Answer # 2

Franklin Arts Law Services

Pro Bono Legal Services for the Franklin Arts Community

224 Beckett Avenue

Franklin City, Franklin 33221

To: Al Gurvin

From: Examinee

Re: Your Copyright Claim Against Franklin Aces

Date: July 28, 2015

Dear Mr. Gurvin,

Eileen Lee, who you spoke to in June about your copyright claim, asked me to send you this letter with our opinions as to your claim. I must stress that, as a pro bono legal service, we can evaluate your claim and offer advice as to settlement offers but we will not be able to represent you should you decide to litigate this claim. We will try to help you secure counsel should you decide to go that route, but our representation of you will end at that point. The following is my assessment of your claim and my recommendation on what you should do with the settlement offer from Franklin Aces. I have tried to be as clear as possible but, as some of the laws in this area are quite technical, if you do not understand anything in this letter feel free to call me at any time. I have also included the names of cases and laws which I used to reach my conclusion should you wish to read those yourself.

Before beginning my assessment, I would like to inform you that we have received a settlement offer from Franklin Aces. They have offered to give you one single season ticket for all of the Franklin Aces home games in a prime location for the team's first season. The retail price of that ticket is \$5,000. Should you decide to accept this offer, you will have to sign a document saying that you will not be able to sue Franklin Aces later for infringement on your design. That choice will ultimately be up to you.

1. The Likelihood of Success Should You Decide to Litigate

Should you decide to reject the settlement offer and proceed to trial there are several things that you will have to show to the court. First you will have to show that the picture you drew is copyrightable. You will then have to show that Franklin Aces infringed your rights. Last, you will have to show what damages are appropriate. I will discuss each of these for you.

a. Is the Design Copyrightable?

Whether or not your design is copyrightable is important because you will not be able to sue Franklin Aces for copyright infringement unless you are able to register your design with the United States Copyright Office. The United States Copyright Office will not register your design unless they determine that it is copyrightable. For something to be copyrightable it must be an "original work of authorship." *Oakland Arrows Soccer Club, Inc. v. Cordova* ("*Cordova*"). It is up to the Copyright Office and, later on appeal, a judge to decide whether your design will fall under that definition. While we can never be sure, we can look at past cases to see what individual judges thought was important in determining if something was copyrightable. For instance, one judge said that to be copyrighted a work of art must "possess some minimal degree of creativity..." *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.* ("*Feist*"). That judge went on to say that the level of creativity needed to satisfy that test is extremely low and even a slight amount will work. *Feist*. What will not satisfy this test is a design that is simply a "familiar symbol or design." §202.1. By way of example, in the *Cordova* case, an artist designed a logo for a soccer club and tried to have it copyrighted. The logo was a triangle with different colors inside it. The Copyright Office and the court said that this was not copyrightable because it was a triangle is a familiar symbol and arranging different colors in it doesn't make it unique enough to be copyrightable.

Here, your design could also fall under the "familiar symbol or design" section of the copyright law as did the design in *Cordova*. You could argue that your depiction of the hand holding the cards, the arrangement of the cards, the fact that only aces were used, and the colors makes it sufficiently unique but a court is not likely to agree. Because playing cards are universally recognized all around the world, as is the particular manner of holding the cards in your design, your design is likely not copyrightable. The arrangement of the cards, the depiction of the hand, and the use of only aces is not likely to rise to the level needed to support a copyright.

b. Did Franklin Aces Infringe on Your Copyright?

If the Copyright Office does decide that your design is copyrightable and allows you to register it with their office, you would then be able to bring suit against Franklin Aces for infringement. To succeed you would have to show two things: 1) your design and the design Franklin Aces used are "substantially similar," and 2) Franklin Aces had access to your design. *Savia v. Malcolm* ("*Savia*").

Your design and the Franklin Aces logo are nearly identical so there isn't likely to be a problem with the first element of this test. However, that will not be enough. You will have to show that Franklin Aces had access to your design. Even if they didn't consciously copy your design, if they had access to it a court could find that they infringed your work. Courts will look to see if there is "plausible evidence" that the alleged infringer had access to the copyrighted work or if the access is based on "mere speculation." *Savia*. Here, a court could find either way. The CEO of Franklin Aces Daniel Luce admits to getting the fax with your design and that fax was logged in his fax machine. However, his office is three floors below the office of the designer there and the designer will testify that she never saw the design nor has she ever talked to Daniel Luce. He will testify that he never talked with

anyone connected to the design team and that he threw your design in the trash immediately after receiving it. The only contact with anyone working on that floor that the designer has had is with one person who does not work in Daniel Luce's office. While a court may find more than "plausible evidence" of access based on the fax being received by the CEO and possibly picked out of the trash by someone involved with the design, it is equally as likely (or even more so) that a court will find that this is not enough evidence to show access.

c. What Damages Could you Win?

If you were able to get a copyright registered and show infringement, the court would then look to see what damages you are owed. We can reasonably predict what damages you could be awarded based on past case law and we can then use that to decide how attractive the settlement offer would be.

Unfortunately, your damages would be limited in this case because you did not register your copyright before the infringement took place. *Herman v. Nova Inc* ("*Herman*"). Your damages will be limited to your actual damages and Franklin Ace's profits from the use of the design. You will not be able to recover attorney's fees and costs from Franklin Aces which is important to consider. When determining actual damages, courts typically look to the artist's track record of payments. As you are a mature artist I will assume that you do not have such a track record. Absent a track record, the court will look to what other people employed in designing logos such as this are paid for their services. Here, the designer responsible for Franklin Ace's logo was paid \$10,000. Determining Franklin Ace's profits from the logo would be exceedingly difficult and further, their press release indicates that it won't be used at all until later in the year. Unless other amounts are turned up through discovery before the trial, your damages are likely to be around \$10,000.

2. My Recommendations

I recommend that you accept the settlement offer. This case would be very difficult to win and winning is not likely. Further, should you win, you will likely only receive around \$10,000. You will also have to undergo the expense of registering your design with the copyright office which likely has some fees associated with it and you will have to hire an attorney to bring the case for you. You will likely have to pay these costs whether or not you win your case. I know that your hope was to get around \$20,000 for the case but that is extremely unlikely under these circumstances.

Given that you are a football fan and a fan of the Franklin Aces and given that in your original fax to the team you indicated that all you wanted for your design was tickets to games, I feel that the offer from Franklin Aces is generous and is likely to be more valuable to you than anything you may receive in filing a claim against Franklin Aces.

Thank you for contacting us with your question. I hope this letter has been informative. While I tried to give you an idea of the strengths and weaknesses of your claim and my opinion as to what you should do, it is still just my opinion. The ultimate decision on what to do is up to you. Again, should you decide to go forward and reject the settlement, we will help you acquire an attorney but that will end our relationship.

Sincerely,
Examinee

MPT 2 - Sample Answer # 3

July 28, 2015

Dear Mr. Gurvin,

Please allow this letter to be Franklin Arts Law Services assessment as to whether you should accept the offer made by ProBall Inc., ("ProBall") the owner of the Franklin Aces football team.

The likelihood of success, as well as the amount of damages recoverable, if any, are both greatly influenced by whether you register your logo with the United States Copyright Office--and if so, whether the logo is copyrightable.

The likelihood of success in litigation depends on whether there is enough originality of authorship in your design to merit copyright protection, and if so, whether ProBall has infringed on your copyright.

A. Whether there is enough originality of authorship in your logo to merit copyright protection.

Registration of a copyright is a prerequisite to bringing suit for copyright infringement. Thus, you will need to submit an application for copyright registration to the Copyright Office in Washington D.C. to bring suit against ProBall. The Copyright office will then determine whether your logo qualifies for copyright protection.

Pursuant to 17 U.S.C. S102, the standard for copyright is that it protects original works of authorship. Original means that "the work was independently created by the author (as opposed to copied from other works), and it possesses at least some minimal degree of creativity." *Oakland Arrows Soccer Club, Inc. v. Cordova* (U.S. DC 1998) *citing Feist Pub.* (U.S. 1991). "The requisite level of creativity is extremely low." *Id.* Section 202.1 provides examples of works that are NOT subject to copyright protection. A logo in the shape of a triangle colored red, white, and blue has been denied copyright protection because it was considered a "familiar symbol" with "mere variation of coloring" pursuant to Section 202.1(a). *Oakland Arrows*.

A hand, without any other features and is a familiar symbol. Cards are also familiar symbols and these facts might present serious challenges to being successful in litigation. While you may have many arguments as to the artistic value of the work and the connections to the team which it conjures up--"copyright law does not reward effort--it rewards original expression of authorship." Additionally, as sworn to by Monica Dean, she saw many versions of your logo on clip art collections on the Internet, none of which were protected by copyright.

Although the threshold for originality is low, there is a strong likelihood that the copyright office may deny your application. Please be advised, that if the application is denied, you would then need to file an internal appeal within the Copyright Office. If that is also denied, your last resort is to bring a mandamus action seeking to compel the Register of Copyrights. As you know, this course of action would be very expensive.

B. It is unlikely that a Court will find that ProBall and Forward Designs Infringed on Your Logo

In the event that your logo is successfully registered with the Copyright office, you will then need to prove that ProBall and Forward Designs ("FD") infringed on your copyright. According to the affidavits provided, this will be a difficult hurdle to overcome. There is no direct evidence of copyright infringement. Therefore a court would need to determine whether there is circumstantial evidence of infringement by applying a two-pronged test:

- (1) Are the works "substantially similar"?
- (2) Did ProBall/FD have access to the copyrighted work?

Savia v. Malcom.

Here, there is no question that the works are substantially similar. Thus, the inquiry will focus on whether ProBall/FD had access to the copyrighted work. If there is no access, there is no copying.

According to the affidavits, Daniel Luce, the recipient of your faxed logo believes that he discarded the logo in the trash. He also affirmed that he had no contact with anyone working for FD. Affiant, Monica Dean also confirmed that she has likewise never met Luce, and furthermore has never had any contact with employees of Franklin Sports Authority (except from a pre-existing friendship with another woman). Both affiants confirmed that they are located on different floors--so physical access, or simply stumbling upon the logo would have been impossible. Ms. Dean swore that she did not recall seeing any sketch of any idea for the logo created by anyone prior to creating her design. Thus, the opportunity for ProBall/FD to gain access to your logo is not only remote, it is nearly impossible and there is no plausible evidence based upon testimony to date, that ProBall/FD had access to your work. Thus, your claim for copyright infringement will likely fail.

2. Your Recovery of Damages Will Include Actual Damages and The Infringer's Profits--If Any

If ProBall/FD is liable to you for copyright infringement, the court will assess your damages. The calculation of damages will depend on whether the infringer (ProBall) takes action after appropriating your logo. *See Herman v. Nova, Inc.* For example, such action would include whether ProBall begins selling merchandise with the logo on it. Since you do not register your logo with the United States Copyright Office before the act of infringement occurred, your damages are limited to your (1) actual damages and (2) the infringer's (ProBall) profits. 17 U.S.C. SS412, 504(b). If ProBall moves forward with merchandising manufacturers (as it plans to per its May 28, 2015 press release), you would be entitled to profits resulting from the infringement. ProBall's profits have the potential to be very large. However, if they design another logo and proceed with another (not substantially similar) logo, then you will not be entitled to any profits from the use of the other logo.

As for your actual damages, because you are an amateur artist, it appears you have no track record of payments for prior work to be used as evidence in determining a proper amount of damages. The evidence in this case shows that ProBall was going to pay FD

\$10,000 for designing the team's logo. Accordingly, it is likely that a court would likewise pay you \$10,000 in actual damages.

CONCLUSION

Because it is unlikely that you will succeed on the merits of establishing a protectable copyright, and an infringement of that copyright, I would strongly suggest that you take the offer from ProBall. As you are most likely aware, the costs associated with litigating a copyright matter can be very expensive. It is possible that you would have to assert an appeal with the Copyright office and if ProBall does not have any actual losses, your damages may be limited to actual damages of approximately \$10,000. Thus, the cost of litigation with attorneys fees would be prohibitive to any recovery you may have.

Additionally, it bears mentioning that in your fax to Daniel Luce, you stated that you wouldn't want anything from the team if they used your logo--except maybe some tickets to games in the new stadium. In light of the factors discussed above, I would strongly encourage you to take the offer from ProBall.

Should you have any questions or further wish to discuss the above, please do not hesitate to contact me.

Very Truly Yours,

Applicant