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## Spoiler Alert: When the Supreme Court Ruins Your Brief Problem Mid-Semester

By Margaret Hannon

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Partway through the winter 2019 semester,<sup>1</sup> the Supreme Court ruined my favorite summary judgment brief problem while my students were working on it. I had decided to use the problem despite the Court granting cert and knowing it was just a matter of time before the Court issued its decision. In this Article, I share some of the lessons that I learned about the risks involved in using a brief problem based on a pending Supreme Court case. I conclude that, while I have not typically set out to base a problem on a pending Supreme Court case, doing so has some meaningful benefits, and those benefits outweigh the disadvantages.

I'll start by providing some background about the brief problem I used, which involved a dispute between a broadcasting and entertainment company and one of its former employees over the rights to a song that the employee wrote during the time she was employed by the company. The song was written from the perspective of a person very similar to one of the characters that the employee played on the company's sketch-comedy program. Before performing the song on the show, the employee quit and began performing the song elsewhere. The company sought to register a copyright in the song with the Copyright Office on the grounds that the employee created the song as a work for hire. A few weeks after filing its copyright application and after the employee left the show, the company sued the employee for copyright infringement.

The case raised two issues under federal copyright law. The first was whether the company was entitled to bring an action for copyright infringement

before the Copyright Office acted on the company's copyright application. The Copyright Act requires that a copyright be "registered" as a prerequisite to filing suit for copyright infringement,<sup>2</sup> but the Act doesn't provide a clear definition of "registration."<sup>3</sup> As a result, a circuit split developed, with some circuits finding that registration occurred upon submission of the application materials to the Copyright Office (the "application approach"),<sup>4</sup> and others finding that registration occurred only after the Copyright Office issued a certificate of registration or a denial of registration (the "registration approach").<sup>5</sup>

Assuming that the suit could proceed upon submission of the application to the Copyright Office, the second issue was whether the company owned the copyright to the song under the work for hire doctrine.<sup>6</sup> I teach two sections, so I assigned one section to represent the company (which advocated for the application approach) and the other to represent the employee (who advocated for the registration approach).

Why was this my favorite brief problem? Because it was the Goldilocks of brief problems. So many aspects of the problem were "just right": it had fairly balanced arguments for each side; there was enough authority for students to find but not so much that it would overwhelm them; the statutory

<sup>2</sup> 17 U.S.C. § 411 (2012).

<sup>3</sup> 17 U.S.C. § 101 (2012).

<sup>4</sup> See, e.g., *Cosmetic Ideas, Inc. v. IAC/Interactivecorp*, 606 F.3d 612, 619 (9th Cir. 2010); *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 386-87 (5th Cir. 1984).

<sup>5</sup> See, e.g., *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 856 F.3d 1338, 1341 (11th Cir. 2017), cert. granted 138 S. Ct. 2707 (2018), *aff'd*, 139 S. Ct. 881 (2019); *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1205 (10th Cir. 2005), *abrogated by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010).

<sup>6</sup> See 17 U.S.C. § 201(b) (2012).

<sup>1</sup> Some schools call it the spring semester. In Michigan, we call it the winter semester.

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interpretation issue was accessible to first-year students and wasn’t too dry (even for students not interested in copyright law); the statutory interpretation issue fit nicely with the work for hire issue; students enjoyed working on it;<sup>7</sup> and it was a realistic and significant issue for parties in copyright infringement suits, as confirmed by the Supreme Court granting cert. Indeed, I learned about the issue because it came up in one of my husband’s copyright cases. Finally, the brief problem had sentimental value, as it was the first problem I had ever created from scratch.<sup>8</sup>

In the fall, as I was trying to decide which brief problem to use in the winter semester, I discovered that the Supreme Court had granted cert in *Fourth Estate Public Benefit Corp. v. Wall-Street.com*.<sup>9</sup> The case directly raised the issue of when a copyright is considered registered, making it likely that the Court would resolve the issue.<sup>10</sup> The oral argument was set for January 2019, making it possible that the Court would issue its decision during the semester.<sup>11</sup>

Because it was my favorite brief problem, I decided to take advantage of the last chance to use it before it was ruined. I crossed my fingers that the timing would work out, though

<sup>7</sup> So much so that two of my students wrote and recorded the hypothetical song that was the subject of the dispute.

<sup>8</sup> With the help of an outstanding teaching assistant, David Maas.

<sup>9</sup> 856 F.3d 1338 (11th Cir. 2017), cert. granted, 128 S. Ct. 2707 (2018). In *Fourth Estate*, a news organization sued a news website for copyright infringement of articles that the news organization had previously licensed to the website. *Fourth Estate Pub. Benefit Corp.*, 139 S. Ct. at 887. The license agreement between the parties required the website to remove the news organization’s articles before canceling the license agreement, but the website continued to include the articles on its website after cancellation of the license agreement. The news organization sued the website for copyright infringement, alleging that it had filed applications to register the copyrights for the articles at issue. The district court dismissed the complaint because the Copyright Office had not yet acted on the applications, and the Eleventh Circuit affirmed. *Id.*

<sup>10</sup> In contrast, in a previous case, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), the Court resolved the question of whether registration was a jurisdictional requirement without addressing when registration actually occurred.

<sup>11</sup> “No one knows exactly when a decision will be handed down by the Court in an argued case, nor is there a set time period in which the Justices must reach a decision. However, all cases argued during a Term of Court are decided before the summer recess begins, usually by the end of June.” Supreme Ct. of United States, *Visitor’s Guide to Oral Argument*, Sup. Ct. of U.S., <https://www.supremecourt.gov/visiting/visitorsguidetooralargument.aspx> (last visited Nov. 20, 2019).

I thought that even if it didn’t, it might provide some good teaching moments. As it turned out, the Court issued a unanimous decision in March 2019, after the students had submitted their brief drafts but before they submitted their final briefs or completed their oral arguments. In its decision, the Court unanimously adopted the registration approach, holding that registration occurs only after the Copyright Office registers a copyright or refuses registration.<sup>12</sup>

What did I learn? I’ll start with some of the disadvantages of using the problem, followed by some of the advantages.

#### A. Disadvantages

There were two main disadvantages: the unpredictability of the Court’s decision (as to both timing and substance) and the availability of additional resources that might be overwhelming for the students or provide the students with too much of a head start on the writing process.

The first disadvantage is that the Court’s granting of cert made the semester unpredictable because of the possible timing of the Court’s decision as well as its impact on the pending assignments. I knew that if the decision was issued during the semester, it would affect the students’ work. But I couldn’t predict when during the semester the decision would be issued or what the outcome would be, which made it hard to pinpoint what effect it would have. If the decision was issued before the students completed their briefs and oral argument, I decided that that the best alternative would be to pretend that the decision hadn’t been issued, even if that felt artificial. A mid-semester decision would also likely make what had previously felt like a balanced issue no longer feel that way because there would now be a “right” answer.<sup>13</sup> And that is what happened—the Supreme Court’s decision favored the students representing the employee. Even though we were pretending that the decision hadn’t been issued, it made the students representing the company lose faith in their arguments.

<sup>12</sup> *Fourth Estate Pub. Benefit Corp.*, 139 S. Ct. at 892.

<sup>13</sup> Especially if the decision is 9-0, which it was.

Second, the additional resources arising from the Court granting cert resulted in potentially too much material available to the students. As a result, I spent quite a bit of time thinking about what limitations to place on the resources the students were allowed to consult. Ultimately, I decided to let the students listen to the oral argument and read the oral argument transcript, but I did not permit them to review the parties' briefs.<sup>14</sup> After the Court issued its decision mid-semester, I allowed the students to read the decision but did not require them to do so.

The Court granting cert created additional and easily accessible authority, including the parties' briefs, numerous amicus briefs, and the oral arguments. If I had not imposed limitations on the types of resources available to the students, students who used those authorities in their research process would have had an advantage, particularly if not all students found them. Even if all of the students were aware of the additional authorities, there was a possibility that some students would feel overwhelmed by them or that students would have difficulty prioritizing the authorities worth relying on. I was also concerned about the possibility of the students relying on the parties' briefs or the amicus briefs while they were writing their own briefs. (These risks may exist for any brief problem, and some are pedagogically necessary or acceptable, but the Court's grant exacerbated these risks.)

I have always prohibited students from reviewing briefs in the course of their writing, with the exception of the samples that I provide, because of the difficulty novice writers have distinguishing good briefs from not-so-good ones. In addition, I wanted the students to work through the writing process on their own so that they could gain experience in making the judgment calls required along the way. As I explained to the students, it's hard to unsee a brief—once a writer sees a piece of writing on the same topic; it's hard not to be influenced by it, even if the writer is doing his or her best to avoid copying it.

On the other hand, I allowed students to review the oral argument transcript or listen to the oral argument in spite of my initial instinct to the contrary. I decided that the oral argument might give the students ideas for arguments or strategies (similar to a secondary source), but was less likely to unduly influence the way the students communicated their arguments in their briefs. Given the nature of oral argument, particularly in the Supreme Court, it's harder to use the structure of an oral argument as a basis for a brief. Along the same lines, it was unlikely that students would be able to replicate the arguments made during oral argument in their briefs (or in their own oral arguments) without independently identifying the relevant authorities to support those arguments or without independently thinking about how to articulate those arguments.

Once the Supreme Court issued its decision, I decided to allow the students to read it. First, for fairness reasons—because I hadn't told them ahead of time not to read it (perhaps because I was hoping that I wouldn't have to), I knew that it was possible that students would read about the decision or read the decision itself before I imposed any restriction on it.<sup>15</sup> Second, by the time the Supreme Court issued its decision, the students had already submitted their drafts, which reduced its impact on the students' drafting process. Third, it felt unfair to prevent the students from reading a recently issued Supreme Court case that would more generally be of interest to law students.

## B. Advantages

On a big picture level, the Supreme Court granting of cert—and ultimately, its decision—forced me to adapt, in a good way: I adjusted some of my teaching strategies, revised some of my class materials, and developed a new class session to discuss the parties' briefs and oral arguments. In addition, the granting of cert confirmed

“... I wanted the students to work through the writing process on their own so that they could gain experience in making the judgment calls required along the way.”

<sup>14</sup> I gave them this instruction at least three times: once in the assignment materials; a second time in class, before the students started their preliminary research and before they knew about the granting of cert; and a third time in class, after we discussed the Supreme Court's granting of cert for the first time.

<sup>15</sup> This included some students who were taking Copyright Law as a first-year elective.

“It was fun to think about how the granting of cert would affect the semester, even if it did make the problem and the semester more complicated.”

the significance of the statutory interpretation issue that the students were analyzing, making them more engaged with the problem. Finally, the granting of cert provided valuable teaching moments with respect to the importance of thorough research, and, on a personal level, gave me more confidence in my ability to teach a problem outside of my area of expertise.

It was fun to think about how the granting of cert would affect the semester, even if it did make the problem and the semester more complicated. While the additional planning was time-consuming, it was energizing to approach the semester with a new variable. My sense is that students can tell when a professor is teaching the same thing over and over again, and that they don't like it. When the Supreme Court granted cert, it meant that I couldn't fall back on the “same old thing,” and not only am I okay with that, but I think that many of the changes I made ultimately enriched the students' experience.

For example, after the students completed their oral arguments, their next assignment was a negotiation exercise. I have always connected the negotiation exercise to the brief problem so that the progression of assignments is comparable to practice. I require the students to attempt to settle the parties' dispute, and I give each party a set of confidential instructions. In the confidential memo to the students representing the defendant, I explained that the Supreme Court had issued its decision. In the confidential memo to the students representing the plaintiff, I explained that not only had the Supreme Court issued its decision, but that the Copyright Office had finally issued a registration certificate for the song at issue. This arguably made the copyright registration issue moot.<sup>16</sup> To the extent that the students representing the defendant had previously felt advantaged by the Supreme Court's decision, even though we were pretending that it hadn't happened, the students representing the plaintiffs felt that the Copyright Office's action finally gave them an advantage. And it showed in the negotiations—several of the

teams representing the company reported that they felt that their receipt of the copyright certificate gave them a negotiation advantage, and many of the teams representing the employee conceded ownership shortly after learning that information.

While I did not allow the students to read the parties' briefs, I did promise them that we would review them as a class once the students' briefs were complete. Among other things, we discussed the overall themes of each brief, the organizational strategies used, what was most and least effective in each, what was most surprising about the briefs, and for one of the briefs, its tone. The students were especially engaged during our discussion of the parties' briefs because of their familiarity with the issues. Over the course of the semester, the students had grappled with the same strategic choices as the parties, such as weighing the relative value of the arguments and trying to identify the most persuasive theory of the case. Seeing similar arguments and strategies in the parties' briefs helped validate the students' strategic choices. In a few instances, the students disagreed with the parties' choices, which gave us an opportunity to discuss the basis for those choices.

In addition to the parties' briefs, we discussed portions of the oral arguments, as did another professor who used my brief problem with her students. The students analyzed the judges' reactions and evaluated how the reactions might be used to predict future decisions. This helped the students prepare for oral argument by making them more attuned to their audience's reaction to their arguments. Similarly, with my students, I identified portions of the oral arguments that were referenced in the Court's opinion, which helped reinforce the role and value of oral argument.

The granting of cert also validated the importance and significance of the statutory interpretation issue: it was significant enough for the Supreme Court to address it, which made it more exciting for the students. For example, one student commented that the student “really liked getting to work on a problem that [the Supreme Court] was actively working on.” It “felt like [the student] was actually doing something real as a law student even though obviously our problem was fake.”

<sup>16</sup> Subsequent cases have raised procedural questions about how to proceed when a registration certificate is issued after a complaint has already been filed. See, e.g., *Izmo, Inc. v. Roadster, Inc.*, No. 18-cv-06092-NC, 2019 WL 2359228 (N.D. Cal. June 4, 2019).

The Supreme Court's granting of cert provided a valuable, and hopefully memorable, teaching moment in class when we talked about research strategy and the importance of thorough and up-to-date research.<sup>17</sup> I assigned the problem without disclosing to the students that cert had been granted on the statutory interpretation issue. After asking the students to do some preliminary research, I wanted to make sure that all of them were aware that cert had been granted.<sup>18</sup> We started our class discussion by identifying section 411(a) of the United States Code as the section most relevant to the registration requirement. We then reviewed the Notes of Decision following the statute, where *Fourth Estate* was the first case listed under the topic "Application for registration" with a notation that cert had been granted. The students' reactions made clear that this was new information for some but that others had already discovered that cert had been granted.

The parties' briefs and oral arguments also confirmed my ability to teach a problem outside of my area of expertise. I do not have practice experience in copyright law, and while I was pretty confident in my understanding of the issues and arguments, it was still validating to see that the parties' arguments mirrored the ones that I had emphasized in discussions with the students.

Now that the semester is over, it's time to retire the brief problem—or at least the statutory interpretation portion of it. But even that has some benefits. Now that I will no longer be using it as a brief problem, I can turn my teaching materials into examples and exercises to use in the future when teaching statutory interpretation. Another option would be to convert the non-statutory interpretation portion of the brief problem into a future memo problem.

Would I do it again? As I often say to my students: it depends. I don't think I would design a problem knowing that a Supreme Court decision would be imminent. But with a statutory interpretation problem based on a circuit split, there is always the risk that it will be resolved—either by the Supreme Court or in the applicable jurisdiction.<sup>19</sup> If that happens, even mid-semester, there are numerous positives. Here, even though the timing of the Court's decision and the decision itself were unpredictable, many of the challenges were ones that I could anticipate and plan for, making the Supreme Court's granting of cert more of a positive than a negative. Ultimately, I think it was a memorable and valuable experience for the students.

“Now that I will no longer be using it as a brief problem, I can turn my teaching materials into examples and exercises to use in the future when teaching statutory interpretation.”

<sup>17</sup> The granting of cert also meant that there was enough secondary and primary authority to give students a good starting point for their research and arguments, unlike with less-developed circuit splits.

<sup>18</sup> Another option would have been not to discuss the granting of cert in class until later in the research process, which would potentially have given the more diligent students an advantage. I decided not to wait because I wanted to explicitly reiterate the restriction on reviewing the parties' briefs before students had a chance to review them. I also hoped that it would make the students more excited about the assignment and that it would be helpful information as they moved forward in their research process.

<sup>19</sup> To my chagrin, it is happening again in the October 2019 term, in a case raising a statutory interpretation issue that is the subject of another one of my favorite brief problems. The Court granted cert in *Romag Fasteners, Inc. v. Fossil, Inc.*, No. 18-1233, 2019 WL 1317084 (U.S. June 28, 2019), on whether the Lanham Act requires a showing of willful infringement for a plaintiff to be awarded an infringer's profits in a trademark infringement suit.