

James C. Adkins, JR. Inns of Court, Copyright Law Presentation January 19, 2017

Overview:

Skits were performed to raise questions involving copyright law. We enlisted the help of Sarah Knight, a partner with Talem IP (professional information at end), to help answer questions posed, and guide us to spot issues involving our own clients.

SKIT ONE:

A CANDIDATE FOR CITY COMMISSION WALKS ONTO A STAGE TO THE TUNE OF *COME TOGETHER* BY THE BEATLES, ALL WAVING AND SMILING, GETTING READY TO GIVE A SPEECH. HE BEGINS HIS SPEECH BY TALKING ABOUT COMING TOGETHER (“of all times, this is a time for America to Come Together....Right Now”), Music plays, AND THEN A PERSON RUNS IN, SHOUTING “STOP, STOP. YOU CAN’T USE THAT SONG. IT’S A VIOLATION OF COPYRIGHT LAW! MY CLIENT, THE ADORABLE PAUL MCCARTNEY, COPYRIGHTED THAT SONG A LONG TIME AGO.”

THEN ANOTHER PERSON RUSHES ONTO THE STAGE, WAVING OTHER PAPERS, AND SHOUTING “NO YOU DIDN’T. MICHAEL JACKSON OWNED THE RIGHTS TO THAT SONG, AND HE’S DEAD, SO NOW ANYBODY CAN USE IT.”

IS THAT TRUE? WHAT HAPPENS TO A COPYRIGHT WHEN A PERSON DIES? CAN ANYONE BUY IT? AND IF SO, WHEN?

THE FIRST GUY DISAGREES, SWEARING THAT HE KNOWS COPYRIGHT LAW, BECAUSE HE LOOKED IT UP IN THE FLORIDA STATUTES. SO THERE IS A STANDOFF. WHO’S RIGHT?

Broadcast Music Inc. v. Prana Hospitality Inc., 158 F. Supp.3d 184

- To prevail on a claim of “Copyright Infringement based on an unauthorized public performance,” a plaintiff must establish:
 1. Originality and authorship
 2. Compliance with all formalities of the Copyright Act
 3. Plaintiff’s ownership of the copyrights at issue
 4. Defendant’s public performance of the musical compositions for profit
 5. Defendant’s lack of authorization for the public performance

SKIT TWO:

A Man running for dog catcher GETS UP TO GIVE A SPEECH, AND IT’S ABOUT TWO MINUTES LONG AFTER SHE FINISHES, A NEWSPAPER REPORTER SAYS, SURREPTITIOUSLY, I HAVE HEARD THAT SPEECH SOMEWHERE BEFORE...I THINK SHE JUST STOLE THAT SPEECH FROM SOMEONE ELSE. WE’LL HAVE TO LOOK INTO THIS, BECAUSE SHE MAY HAVE VIOLATED COPYRIGHT LAW. DID SHE?

Speech: I'm Joe Smith and I want to be your next elected Dog Catcher. I want to start by thanking my speechwriters who did an amazing job writing this speech. I have a dream, that all dogs and cats in our country would have homes (Andy, MLK audio). The only fear the animals will have to fear is fear itself (Andy, FDR audio) I will catch these animals and get them to new homes where they will live in a shining city upon a hill (Andy, Reagan audio). Asking not what their county can do for them, but what they can do for their county (Andy, JFK audio). Read my lips, no new taxes for the animal shelter (Andy, GHWBush audio). And you can count on me to live out my personal life philosophy while serving as your dog catcher which is to Just Do It. (Andy, Nike symbol).

Thank you very much.

SKIT THREE:

A YOUNG PERSON IS IN WHAT APPEARS TO BE A LIBRARY, STANDING AT A COPIER, MAKING COPIES OF A TEXTBOOK. THE LIBRARIAN COMES UP AND ASKS "WHAT ARE YOU DOING?" THE STUDENT REPLIES THAT SHE IS MAKING A COPY OF THE TEXTBOOK, SO SHE WON'T HAVE TO SPEND MONEY ON IT. SHE SAYS SHE IS JUST A POOR STUDENT, AND CAN'T AFFORD TO BUY THE BOOK. THE LIBRARIAN GETS ON THE PHONE, CALLS THE COPS AND REPORTS HER. THE COPS SHOW UP AND CART THE STUDENT OFF TO JAIL.

CAN YOU REALLY GO TO JAIL FOR VIOLATION OF A COPYRIGHT LAW?

WHAT ELSE CAN HAPPEN TO YOU?

Willfulness is the threshold for criminal punishment.

17 U.S. Code 506 - Criminal offenses

(a) Criminal Infringement.—

(1) In general.—Any person who WILLFULLY infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed—

(A)

for purposes of commercial advantage or private financial gain;

(B)

by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000; or

(C)

by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

(2) Evidence.—

For purposes of this subsection, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement of a copyright.

The poor law student will argue that she merely reproduced the (presumably) copyrighted book and that, by itself, is insufficient to establish willfulness. She will argue that there is no evidence of A, B, or C and therefore she is not subject to criminal punishment.

In the event, it can be established through evidence that she used the reproduction for "private financial gain," she is subject to a maximum of 5 years imprisonment pursuant to 17 U.S. Code 2319 which reads:

(b) Any person who commits an offense under section 506(a)(1)(A) of title 17--

(1) shall be imprisoned not more than 5 years, or fined in the amount set forth in this title, or both, if the offense consists of the reproduction or distribution, including by electronic means, during any 180-day period, of at least 10 copies or phonorecords, of 1 or more copyrighted works, which have a total retail value of more than \$2,500;

SKIT FOUR:

TEENAGER SITS AT A COMPUTER, HAPPILY DOWNLOADING A MOVIE WITH THE THREE STOOGES, AND TALKING ABOUT WHAT HE'S DOING WHILE HE DOING IT. THEN HE HAS A DISCUSSION WITH HIMSELF ABOUT WHAT HE SHOULD DO WITH THE MOVIE ONCE HE HAS DOWNLOADED IT. SHOULD HE SEND IT TO ALL HIS FACEBOOK FRIENDS? WILL HE GET IN TROUBLE IF HE DOES? WHAT ABOUT IF HE JUST WATCHES IT WITH HIS FAMILY? IS THAT A PROBLEM? WHAT IS THIS CALLED?

SO, QUESTIONS TO THINK ABOUT:

WHAT IS ACTUALLY PROTECTED BY COPYRIGHT LAW?
DOES IT MATTER IF SOMETHING HAS BEEN PUBLISHED OR NOT?
WHAT ARE THE POSSIBLE PENALTIES FOR COPYRIGHT INFRINGEMENT?
WHAT ABOUT PIRACY? IS THAT DIFFERENT?

Laws and Rules discussed:

301. Preemption with respect to other laws²

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978;

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or

(4) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(8).

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

(e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder.

(f)(1) On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.³

(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(A) any cause of action from undertakings commenced before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990;

(B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art; or

(C) activities violating legal or equitable rights which extend beyond the life of the author.

302. Duration of copyright: Works created on or after January 1, 1978⁴

(a) In General.—Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death.

(b) Joint Works.—In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and 70 years after such last surviving author's death.

(c) Anonymous Works, Pseudonymous Works, and Works Made for Hire.—In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first. If, before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of a registration made for that work under subsections (a) or (d) of section 408, or in the records provided by this subsection, the copyright in the work endures for the term specified by subsection (a) or (b), based on the life of the author or authors whose identity has been revealed. Any person having an interest in the copyright in an anonymous or pseudonymous work may at any time record, in records to be maintained by the Copyright Office for that purpose, a statement identifying one or more authors of the work; the statement shall also identify the person filing it, the nature of that person's interest, the source of the information recorded, and the particular work affected, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation.

(d) Records Relating to Death of Authors.—Any person having an interest in a copyright may at any time record in the Copyright Office a statement of the date of death of the author of the copyrighted work, or a statement that the author is still living on a particular date. The statement shall identify the person filing it, the nature of that person's interest, and the source of the information recorded, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall maintain current records of information relating to the death of authors of copyrighted works, based on such recorded statements and, to the extent the Register considers practicable, on data contained in any of the records of the Copyright Office or in other reference sources.

(e) Presumption as to Author's Death.—After a period of 95 years from the year of first publication of a work, or a period of 120 years from the year of its creation, whichever expires first, any person who obtains from the Copyright Office a certified report that the records provided by subsection (d) disclose nothing to indicate that the author of the work is living, or died less than 70 years before, is entitled to the benefit of a presumption that the author has been dead for at least 70 years. Reliance in good faith upon this presumption shall be a complete defense to any action for infringement under this title.

303. Duration of copyright: Works created but not published or copyrighted before January 1, 1978⁵

(a) Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by [section 302](#). In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047.

(b) The distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of any musical work, dramatic work, or literary work embodied therein.

304. Duration of copyright: Subsisting copyrights⁶

(a) Copyrights in Their First Term on January 1, 1978.—

(1)(A) Any copyright, in the first term of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured.

(B) In the case of—

(i) any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or

(ii) any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of 67 years.

(C) In the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work—

(i) the author of such work, if the author is still living,

(ii) the widow, widower, or children of the author, if the author is not living,

(iii) the author's executors, if such author, widow, widower, or children are not living, or

(iv) the author's next of kin, in the absence of a will of the author, shall be entitled to a renewal and extension of the copyright in such work for a further term of 67 years.

(2)(A) At the expiration of the original term of copyright in a work specified in paragraph (1)(B) of this subsection, the copyright shall endure for a renewed and extended further term of 67 years, which—

(i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in the proprietor of the copyright who is entitled to claim the renewal of copyright at the time the application is made; or

(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in the person or entity that was the proprietor of the copyright as of the last day of the original term of copyright.

(B) At the expiration of the original term of copyright in a work specified in paragraph (1)(C) of this subsection, the copyright shall endure for a renewed and extended further term of 67 years, which—

(i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in any person who is entitled under paragraph (1)(C) to the renewal and extension of the copyright at the time the application is made; or

(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in any person entitled under paragraph (1)(C), as of the last day of the original term of copyright, to the renewal and extension of the copyright.

(3)(A) An application to register a claim to the renewed and extended term of copyright in a work may be made to the Copyright Office—

(i) within 1 year before the expiration of the original term of copyright by any person entitled under paragraph (1)(B) or (C) to such further term of 67 years; and

(ii) at any time during the renewed and extended term by any person in whom such further term vested, under paragraph (2)(A) or (B), or by any successor or assign of such person, if the application is made in the name of such person.

(B) Such an application is not a condition of the renewal and extension of the copyright in a work for a further term of 67 years.

(4)(A) If an application to register a claim to the renewed and extended term of copyright in a work is not made within 1 year before the expiration of the original term of copyright in a work, or if the claim pursuant to such application is not registered, then a derivative work prepared under authority of a grant of a transfer or license of the copyright that is made before the expiration of the original term of copyright may continue to be used under the terms of the grant during the renewed and extended term of copyright without infringing the copyright, except that such use does not extend to the preparation during such renewed and extended term of other derivative works based upon the copyrighted work covered by such grant.

(B) If an application to register a claim to the renewed and extended term of copyright in a work is made within 1 year before its expiration, and the claim is registered, the certificate of such registration shall constitute prima facie evidence as to the validity of the copyright during its renewed and extended term and of the facts stated in the certificate. The evidentiary weight to be accorded the certificates of a registration of a renewed and extended term of copyright made after the end of that 1-year period shall be within the discretion of the court.

(b) Copyrights in Their Renewal Term at the Time of the Effective Date of the Sonny Bono Copyright Term Extension Act⁷—Any copyright still in its renewal term at the time that the Sonny Bono Copyright Term Extension Act becomes effective shall have a copyright term of 95 years from the date copyright was originally secured.⁸

(c) Termination of Transfers and Licenses Covering Extended Renewal Term.—In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated by

subsection (a)(1)(C) of this section, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by a person or persons other than the author, termination of the grant may be effected by the surviving person or persons who executed it. In the case of a grant executed by one or more of the authors of the work, termination of the grant may be effected, to the extent of a particular author's share in the ownership of the renewal copyright, by the author who executed it or, if such author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, as follows:

(A) The widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest.

(B) The author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them.

(C) The rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(D) In the event that the author's widow or widower, children, and grandchildren are not living, the author's executor, administrator, personal representative, or trustee shall own the author's entire termination interest.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later.

(4) The termination shall be effected by serving an advance notice in writing upon the grantee or the grantee's successor in title. In the case of a grant executed by a person or persons other than the author, the notice shall be signed by all of those entitled to terminate the grant under clause (1) of this subsection, or by their duly authorized agents. In the case of a grant executed by one or more of the authors of the work, the notice as to any one author's share shall be signed by that author or his or her duly authorized agent or, if that author is dead, by the number and proportion of the owners of his or her termination interest required under clauses (1) and (2) of this subsection, or by their duly authorized agents.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, or, in the case of a termination under subsection (d), within the five-year period specified by subsection (d)(2), and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(6) In the case of a grant executed by a person or persons other than the author, all rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to all of those entitled to terminate the grant under clause (1) of this subsection. In the case of a grant executed by one or more of the authors of the work, all of a particular author's rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to that author or, if that author is dead, to the persons owning his or her termination interest under clause (2) of this subsection, including those owners who did not join in signing the notice of termination under clause (4) of this subsection. In all cases the reversion of rights is subject to the following limitations:

(A) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(B) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of this subsection.

(C) Where the author's rights revert to two or more persons under clause (2) of this subsection, they shall vest in those persons in the proportionate shares provided by that clause. In such a case, and subject to the provisions of subclause (D) of this clause, a further grant, or agreement to make a further grant, of a particular author's share with respect to any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under this clause, as are required to terminate the grant under clause (2) of this subsection. Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under this subclause, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him or her, that person's legal representatives, legatees, or heirs at law represent him or her for purposes of this subclause.

(D) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the author or any of the persons provided by the first sentence of clause (6) of this subsection, or between the persons provided by subclause (C) of this clause, and the original grantee or such grantee's successor in title, after the notice of termination has been served as provided by clause (4) of this subsection.

(E) Termination of a grant under this subsection affects only those rights covered by the grant that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(F) Unless and until termination is effected under this subsection, the grant, if it does not provide otherwise, continues in effect for the remainder of the extended renewal term.

(d) Termination Rights Provided in Subsection (c) Which Have Expired on or before the Effective Date of the Sonny Bono Copyright Term Extension Act.—In the case of any copyright other than a work made for hire, subsisting in its renewal term on the effective date of the Sonny Bono Copyright Term Extension Act⁹ for which the termination right provided in subsection (c) has expired by such date, where the author or owner of the termination right has not previously exercised such termination right, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated in subsection (a)(1)(C) of this section, other than by will, is subject to termination under the following conditions:

(1) The conditions specified in subsections (c) (1), (2), (4), (5), and (6) of this section apply to terminations of the last 20 years of copyright term as provided by the amendments made by the Sonny Bono Copyright Term Extension Act.

(2) Termination of the grant may be effected at any time during a period of 5 years beginning at the end of 75 years from the date copyright was originally secured.

305. Duration of copyright: Terminal date

All terms of copyright provided by sections 302 through 304 run to the end of the calendar year in which they would otherwise expire.

Sarah Knight

Partner

[Download Sarah Knight's vCard](#)

Sarah Knight, founding partner of Talem IP Law, views education and communication as key elements in her practice, which includes working with universities, research foundations, start-ups, and private and publically traded companies to carry out patent strategies in-line with their corresponding business needs.

A registered patent attorney and member of the Florida bar with a MS and BS in Electrical Engineering, Sarah handles patent preparation and prosecution as well as conducting opinion and diligence work in technology areas spanning from semiconductors to software. Sarah also is involved in counseling clients with respect to patent portfolio generation, management, and strategy for US and international protection.

Sarah is a Guest Lecturer for the Introduction to Electrical Engineering course at the University of Florida and is involved with the University's Department of Electrical & Computer Engineering as a member of the external advisory board. She is also current Vice Chair of the Patent Law Committee of the American Intellectual Property Law Association (AIPLA).

Prior to founding Talem IP Law, Sarah was a partner with Saliwanchik, Lloyd & Eisenschenk PA.

Select Speaking Engagements

Partnering in Patents – Software Partnership at the USPTO, Panel on Functional Language, “Functional Claiming from the Software and Electrical Arts Perspective”, October 21, 2015.

AIPLA Webinar, USPTO Section 101 Guidelines: Part I, February 12, 2015.

AIPLA Webinar, “Alice where are you going?”, December 3, 2014.

UF-OTL Presentation, “Patentable Subject Matter: what you need to know to manage your patent portfolio”, November 6, 2014.

Florida Innovation Hub at UF DECA sponsor event, “Why Should a Cash-poor Startup Protect its IP?” September 19, 2013.

Admissions

Florida

US Patent and Trademark Office

Education

University of Florida College of Law

J.D. cum laude, 2006

– President, Intellectual Property and Technology Law Association, University of Florida

– Chief Research Editor, Journal of Technology Law & Policy

University of Florida

M.S. Electrical Engineering

Specialization in Electronic Circuits and Devices

B.S. Electrical Engineering, 2001

Certificate in Electronics

– President, IEEE Student Chapter, University of Florida

St. Petersburg College

Associate in Arts, 1999

669 F. Supp. 305 (1987)

SOUTHERN NIGHTS MUSIC CO., et al., Plaintiffs,

v.

James C. MOSES, d/b/a The Cabaret, Defendant.

No. CV 86-1254 JMI (Px).

United States District Court, C.D. California.

April 28, 1987.

Lisa Kantor, Quin, Kully and Morrow, Los Angeles, Cal., for plaintiffs.

Virgil J. Butler, Covina, Cal., for defendant.

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

IDEMAN, District Judge.

This matter came regularly before the Honorable James M. Ideman, United States District Judge, for consideration. After full consideration of the moving and responding papers, exhibits and affidavits, the Court hereby makes the following Statement of Uncontroverted Facts and Conclusions of Law.

UNCONTROVERTED FACTS

1. Defendant, James C. Moses, owns and operates the country and western night club "The Cabaret" located at 1846 East Huntington Drive, Duarte, California. The Cabaret presents musical entertainment to its patrons.
2. Plaintiffs, Southern Nights Music Co., et al., are the owners of the copyrights to (1) "Lookin For Love" (2) "Take Me Home Country Road" (3) "Tulsa Time" (4) "I Just Called To Say I Love You".
3. This action is brought on behalf of the plaintiffs by the American Society of Composers, Authors, and Publishers (hereinafter ***306** "ASCAP"). Plaintiffs have an agreement with ASCAP to license the public performance of their copyrighted works on their behalf and to protect them from copyright infringement.
4. On September 18 and 19, 1985, two agents for ASCAP, Ronald DeZure and Barbara Lazar, went to the defendant's nightclub "The Cabaret" and heard (1) "Lookin For Love" (2) "Take Me Home Country Road" (3) "Tulsa Time" (4) "I Just Called To Say I Love You". The songs were performed at The Cabaret for the entertainment of its patrons.
5. The ASCAP informed the defendant that he was playing music which was copyrighted, and that he should purchase a license in order to avoid copyright infringement. Defendant did not purchase a license. The defendant continued to have copyrighted music performed at his establishment. Therefore, plaintiff willfully and knowingly violated the copyright of the plaintiffs.

CONCLUSIONS OF LAW

1. James C. Moses is a copyright infringer pursuant to 17 U.S.C. § 106(4) which states that once a copyright has been validly obtained the owner of the copyright has the exclusive right to perform the copyrighted work. Any person who violates this exclusive right is a copyright infringer. 17 U.S.C. § 106(4).

2. The owner and operator of a place of public entertainment is liable for permitting unlicensed use of musical compositions on his or her premises. *Leigh v. Sakkaris*, No. C-81-1273, 215 USPQ 113, 115 (N.D. Cal.1982) [Available on WESTLAW, DCT database]; *Warner Brothers v. O'Keefe*, 468 F. Supp. 16, 20 (S.D.Iowa 1977).

3. The proprietor is liable for the performance of copyrighted works even if the copyrighted works are performed in direct contravention to the specific instructions of the proprietor. *Leigh v. Sakkaris*, No. C-81-1273, 215 USPQ 113, 115 (N.D. Cal.1982) [Available on WESTLAW, DCT database]. *Warner Brothers v. O'Keefe*, 468 F. Supp. 16, 20 (S.D.Iowa 1977).

4. Lack of knowledge of the groups program or the songs which are copyrighted is not a defense to copyright infringement. "A proprietor should not profit at the expense of song composers by instructing musical groups not to play it and then claiming ignorance of the groups program." *Chess Music v. Sipe*, 442 F. Supp. 1184, 199 USPQ 767 (D.Minn.1977).

5. The failure of ASCAP to provide the defendant with a list of the musical works it has a copyright to is not a defense to copyright infringement. The Court has concluded that "a proprietor should not profit at the expense of song composers by instructing musical groups not to play copyrighted music and by then claiming ignorance of their program. As the only purpose of a list would be to instruct the musicians not to play those pieces listed, production of a list is not a defense to copyright violations." *Leigh v. Sakkaris*, No. C-81-1273, 215 USPQ 113, 115 (N.D. Cal.1982); *Chess Music v. Sipe*, 442 F. Supp. 1184, 199 USPQ 767 (D.Minn.1977).

JUDGMENT

This matter came regularly before the Honorable James M. Ideman, United States District Judge, for consideration. After full consideration of the moving and responding papers, exhibits and affidavits, and the file in the case, IT IS HEREBY ORDERED ADJUDGED AND DECREED as follows:

1. Plaintiffs' Motion for Summary Judgment is GRANTED.
2. The Court, pursuant to 17 U.S.C. § 502(a) Orders the defendant James C. Moses d/b/a "The Cabaret" to cease any performances of copyrighted music without the permission of the copyright owner.
3. The Court, pursuant to 17 U.S.C. § 504, awards the plaintiff damages for copyright infringement in the amount of \$2130.00.
4. The Court, pursuant to 17 U.S.C. § 505, awards the plaintiff \$3,796.00 for attorney's fees, and costs in bringing this lawsuit. Therefore, the defendant is ordered to pay \$5926.00 to the plaintiffs within ***307** thirty days from the date the Court's order is entered.

U.S. Supreme Court
Stewart v. Abend, 495 U.S. 207 (1990)

Stewart v. Abend

No. 88-2102

Argued Jan. 9, 1990

Decided April 24, 1990

495 U.S. 207

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR

THE NINTH CIRCUIT

Syllabus

In 1945, author Cornell Woolrich agreed to assign the motion picture rights to several of his stories, including the one at issue, to petitioners' predecessor in interest. He also agreed to renew the copyrights in the stories at the appropriate time, and to assign the same motion picture rights to the predecessor in interest for the 28-year renewal term provided by the Copyright Act of 1909. The film version of the story in question was produced and distributed in 1954. Woolrich died in 1968 without a surviving spouse or child, and before he could obtain the rights in the renewal term for petitioners as promised. In 1969, his executor renewed the copyright in the story and assigned the renewal rights to respondent Abend. Apparently in reliance on *Robauer v. Killiam Shows, Inc.*, 551 F.2d 484 (CA2) -- which held that the owner of the copyright in a derivative work may continue to use the existing derivative work according to the original grant from the author of the preexisting work even if the grant of rights in the preexisting work lapsed -- petitioners subsequently rereleased and publicly exhibited the film. Abend filed suit, alleging, among other things, that the rerelease infringed his copyright in the story because petitioners' right to use the story during the renewal term lapsed when Woolrich died. The District Court granted petitioners' motions for summary judgment based on *Robauer* and the "fair use" defense. The Court of Appeals reversed, rejecting the reasoning of *Robauer*. Relying on *Miller Music Corp. v. Charles N. Daniels, Inc.*, [362 U. S. 373](#) -- which held that assignment of renewal rights by an author before the time for renewal arrives cannot defeat the right of the author's statutory successor to the renewal rights if the author dies before the right to renewal accrues -- the court concluded that petitioners received from Woolrich only an expectancy in the renewal rights that never matured, and that his executor, as his statutory successor, was entitled to renew the copyright and to assign it to Abend. The court also determined that petitioners' use of Woolrich's story in their film was not fair use.

Held:

1. The distribution and publication of a derivative work during the copyright renewal term of a preexisting work incorporated into the derivative

work infringes the rights of the owner of the preexisting work where the author of that work agreed to assign the rights in the renewal term to the derivative work's owner, but died before the commencement of the renewal period, and the statutory successor does not assign the right to use the preexisting work to the owner of the derivative work. Pp. [495 U. S. 216-236](#).

(a) The renewal provisions of the 1909 and 1976 Copyright Acts, their legislative history, and the case law interpreting them establish that they were intended both to give the author a second chance to obtain fair remuneration for his creative efforts and to provide his family, or his executors, absent surviving family, with a "new estate" if he died before the renewal period arrived. Under *Miller Music*, although the author may assign all of his exclusive rights in the copyrighted work by assigning the renewal copyright without limitation, the assignee holds nothing if the author dies before commencement of the renewal period. This being the rule with respect to *all* of the renewal rights, it follows, *a fortiori*, that assignees such as petitioners of the right to produce a derivative work or some other portion of the renewal rights also hold nothing but an unfulfilled and unenforceable expectancy if the author dies before the renewal period, unless the assignees secure a transfer of the renewal rights from the author's statutory successor. Pp. [495 U. S. 216-221](#).

(b) Petitioners' contention that any right the owner of rights in the preexisting work might have had to sue for infringement that occurs during the renewal term is extinguished by creation of the new work is not supported by any express provision of the Act nor by the rationale as to the scope of protection achieved in a derivative work, and is contrary to the axiomatic principle that a person may exploit only such copyrighted literary material as he either owns or is licensed to use. Section 7 of the 1909 Act and § 103(b) of the 1976 Act made explicit the well settled rule that the owner of a derivative work receives copyright protection only for the material contributed by him, and to the extent he has obtained a grant of rights in the preexisting work. Pp. [495 U. S. 221-224](#).

(c) Nor is petitioners' position supported by the termination provisions of the 1976 Act, which, for works existing in their original or renewal terms as of January 1, 1978, empowered the author to gain an additional 19 years' copyright protection by terminating any grant of rights at the end of the renewal term, except, under § 304(c)(6)(A), the right to use a derivative work for which the owner of the derivative work has held valid rights in the original and renewal terms. No overarching policy preventing authors of preexisting works from blocking distribution of derivative works may be inferred from § 304(c)(6)(A), which was part of a compromise between competing special interests.

In fact, the plain language of the section indicates that Congress assumed that the owner of the preexisting work continued to possess the right to sue for infringement even after incorporation of that work into the derivative work, since, otherwise, Congress would not have explicitly withdrawn the right to terminate use rights in the limited circumstances contemplated by the section. Pp. [495 U. S. 224-227](#).

(d) Thus, the *Robauer* theory is supported by neither the 1909 nor the 1976 Act. Even if it were, however, the "rule" of that case would make little sense when applied across the derivative works spectrum. For example, although the contribution by the derivative author of a condensed book

might be little as compared. to that of the original author, publication of the book would not infringe the preexisting work under the *Robauer* "rule" even though the derivative author has no license or grant of rights in the preexisting work. In fact, the *Robauer* "rule" is considered to be an interest-balancing approach. Pp. [495 U. S. 227-228](#).

(e) Petitioners' contention that the rule applied here will undermine the Copyright Act's policy of ensuring the dissemination of creative works is better addressed by Congress than the courts. In attempting to fulfill its constitutional mandate to "secur[e] for limited Times to Authors . . . the exclusive Right to their Respective Writings," Congress has created a balance between the artist's right to control the work during the term of the copyright protection and the public's need for access to creative works. Absent an explicit statement of congressional intent that the rights in the renewal term of an owner of a preexisting work are extinguished when his work is incorporated into another work, it is not the role of this Court to alter the delicate balance Congress has labored to achieve. Pp. [495 U. S. 228-230](#).

(f) Section 7 of the 1909 Act -- which provides that derivative works when produced with the consent of the copyright proprietor of the preexisting work

"shall be regarded as new works subject to copyright . . . ; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed . . . ,"

or be construed to affect the copyright status of the original work -- does not, as the dissent contends, give the original author the power to sell the rights to make a derivative work that, upon creation and copyright, would be completely independent of the original work. This assertion is derived from three erroneous premises. First, since the plain meaning of the "force or validity" clause is that the copyright in the "matter employed" -- *i.e.*, the preexisting work when it is incorporated into the derivative work -- is not abrogated by publication of the derivative work, the dissent misreads § 7 when it asserts that only the copyright in the "original work" survives the author's conveyance of derivative rights. Second, the substitution of "publication" for "copyright"

[Page 495 U. S. 210](#)

in the final version of the force or validity clause does not, as the dissent contends, establish that it was the publication of the derivative work, and not the copyright, that was not to "affect . . . any subsisting copyright." Since publication of a work without proper notice sent it into the public domain under the 1909 Act, the language change was necessary to ensure that the publication of a derivative work without proper notice, including smaller portions that had not been previously published and separately copyrighted, would not result in those sections' moving into the public domain. Third, the dissent errs in interpreting § 3 of the 1909 Act -- which provides that a copyright protects all copyrightable component parts of a work and "all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright" -- as indicating, when read with § 7, that the copyright on derivative work extends to both the new material and that "in which the copyright is already subsisting," such that the derivative work proprietor has the right to publish and distribute the entire work absent permission from the owner of the preexisting work. When § 7 states that derivative works "shall be regarded as new works subject to copyright," it simply confirms that § 3's provision that one can obtain copyright in a work, parts of which were already copyrighted, extends to derivative works. More important, § 7's second clause merely

clarifies what might have been otherwise unclear -- that the § 3 principle of preservation of the duration or scope of the subsisting copyright applies to derivative works, and that neither the scope of the copyright in the matter employed nor the duration of the copyright in the derivative work is undermined by publication of the derivative work. Pp. [495 U. S. 230-236](#).

2. Petitioners' unauthorized use of Woolrich's story in their film does not constitute a noninfringing "fair use." The film does not fall into any of the categories of fair use enumerated in 17 U.S.C. § 107; *e.g.*, criticism, comment, news reporting, teaching, scholarship, or research. Nor does it meet any of the nonexclusive criteria that § 107 requires a court to consider. First, since petitioners received \$12 million from the film's rerelease during the renewal term, their use was commercial, rather than educational. Second, the nature of the copyrighted work is fictional and creative, rather than factual. Third, the story was a substantial portion of the film, which expressly used its unique setting, characters, plot, and sequence of events. Fourth, and most important, the record supports the conclusion that rerelease of the film impinged on Abend's ability to market new versions of the story. Pp. [495 U. S. 236-238](#).

863 F.2d 1465 (CA9 1988), affirmed and remanded.

**ESTATE OF MARTIN LUTHER KING v. CBS, INC., 194 F.3d 1211
(11th Cir. 1999)**

**Before ANDERSON, Chief Judge, RONEY, Senior Circuit Judge,
and COOK[n*], Senior District Judge.**

ANDERSON, Chief Judge:

[1] The Estate of Martin Luther King, Jr., Inc. brought this copyright infringement action against CBS, Inc. after CBS produced a video documentary that used, without authorization, portions of civil rights leader Dr. Martin Luther King's [p*1213] famous "I Have a Dream" speech at the March on Washington on August 28, 1963. The district court granted summary judgment to CBS on the ground that Dr. King had engaged in a general publication of the speech, placing it into the public domain. *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 13 F. Supp.2d 1347 (N.D. Ga. 1998). We now reverse.^[n*]

I. FACTS

[2] The facts underlying this case form part of our national heritage and are well-known to many Americans. On the afternoon of August 28, 1963, the Southern Christian Leadership Conference ("SCLC") held the March on Washington ("March") to promote the growing civil rights movement. The events of the day were seen and heard by some 200,000 people gathered at the March, and were broadcast live via radio and television to a nationwide audience of millions of viewers. The highlight of the March was a rousing speech that Dr. Martin Luther King, Jr., the SCLC's founder and president, gave in front of the Lincoln Memorial ("Speech"). The Speech contained the famous utterance, "I have a dream . . .," which became symbolic of the civil rights movement. The SCLC had sought out wide press coverage of the March and the Speech, and these efforts were successful;

the Speech was reported in daily newspapers across the country, was broadcast live on radio and television, and was extensively covered on television and radio subsequent to the live broadcast.

[3] On September 30, 1963, approximately one month after the delivery of the Speech, Dr. King took steps to secure federal copyright protection for the Speech under the Copyright Act of 1909, and a certificate of registration of his claim to copyright was issued by the Copyright Office on October 2, 1963. Almost immediately thereafter, Dr. King filed suit in the Southern District of New York to enjoin the unauthorized sale of recordings of the Speech and won a preliminary injunction on December 13, 1963. *King v. Mister Maestro, Inc.*, 224 F. Supp. 101 (S.D.N.Y. 1963).

[4] For the next twenty years, Dr. King and the Estate enjoyed copyright protection in the Speech and licensed it for a variety of uses, and renewed the copyright when necessary. In 1994, CBS entered into a contract with the Arts & Entertainment Network to produce a historical documentary series entitled "The 20th Century with Mike Wallace." One segment was devoted to "Martin Luther King, Jr. and The March on Washington." That episode contained material filmed by CBS during the March and extensive footage of the Speech (amounting to about 60% of its total content). CBS, however, did not seek the Estate's permission to use the Speech in this manner and refused to pay royalties to the Estate. The instant litigation ensued.

[5] On summary judgment, the district court framed the issue as "whether the public delivery of Dr. King's speech . . . constituted a general publication of the speech so as to place it in the public domain." 13 F. Supp.2d at 1351. After discussing the relevant case law, the district court held that Dr. King's "performance coupled with such wide and unlimited reproduction and dissemination as occurred concomitant to Dr. King's speech during the March on Washington can be seen only as a general publication which thrust the speech into the public domain." *Id.* at 1354.^[11] Thus, the district court granted [p*1214] CBS's motion for summary judgment. The Estate now appeals to this Court.

II. DISCUSSION

[6] We review the district court's grant of summary judgment *de novo*, with all facts and reasonable inferences therefrom reviewed in the light most favorable to the nonmoving party. *Hale v. Tallapoosa County*, 50 F.3d 1579, 1581 (11th Cir. 1995). Summary judgment was due to be granted only if the forecast of evidence before the district court showed that there was no genuine issue as to any material fact and that the moving party, i.e., CBS, was entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

[7] Because of the dates of the critical events, the determinative issues in this case are properly analyzed under the Copyright Act of 1909 ("1909 Act"), rather than the Copyright Act of 1976 ("1976 Act") that is currently in effect. *See Brown v. Tabb*, 714 F.2d 1083, 1091 (11th Cir. 1983) ("[T]he determination whether a work entered the public domain prior to the effective date of the 1976 Act must be made according the copyright law as it existed before that date."). The question is whether Dr. King's attempt to obtain statutory copyright protection on September 30, 1963 was effective, or whether it was a nullity because the Speech had already been forfeited to the public domain via a general publication.^[12]

[8] Under the regime created by the 1909 Act, an author received state common law protection automatically at the time of creation of a work. 1 Melville B. Nimmer & David Nimmer, *Nimmer*

on Copyright ♦ 4.01[B] (1998) [hereinafter *Nimmer*]. This state common law protection persisted until the moment of a general publication.¹⁰³¹ *Silverman v. CBS Inc.*, 632 F. Supp. 1344, 1353 (S.D.N.Y. 1986). When a general publication occurred, the author either forfeited his work to the public domain, *see, e.g., White v. Kimmell*, 193 F.2d 744 (9th Cir.), *cert. denied*, 343 U.S. 957 (1952), or, if he had theretofore complied with federal statutory requirements, converted his common law copyright into a federal statutory copyright. *See Mister Maestro*, 224 F. Supp. at 105 ("The [statutory] copyright may be obtained before publication of such works but as soon as publication occurs there must be compliance with the requirements as to published works."); *see generally* 1 *Nimmer* ♦ 4.01[B].

[9] In order to soften the hardship of the rule that publication destroys common law rights, courts developed a distinction between a "general publication" and a "limited publication." *Brown*, 714 F.2d at 1091 (citing *American Vitagraph, Inc. v. Levy*, 659 F.2d 1023, 1026-27 (9th Cir. 1981)). Only a general publication divested a common law copyright. *Id.* A general publication occurred "when a work was made available to members of the public at large without regard to their identity or what they intended to do with the work." *Id.* (citing *Burke v. National Broadcasting Co.*, 598 F.2d 688, 691 (1st Cir.), *cert. denied*, 444 U.S. 869 (1979)). Conversely, a non-divesting limited publication was one that communicated the contents of a work to a select group and for a limited purpose, and [p*1215] without the right of diffusion, reproduction, distribution or sale. *Id.* (citing *White*, 193 F.2d at 746-47). The issue before us is whether Dr. King's delivery of the Speech was a general publication.

[10] Numerous cases stand for the proposition that the performance of a work is not a general publication. *See, e.g., Ferris v. Frohman*, [223 U.S. 424](#), 433, 32 S.Ct. 263, 265 (1912) ("The public representation of a dramatic composition, not printed and published, does not deprive the owner of his common-law right. . . . [T]he public performance of the play is not an abandonment of it to the public use."); *Nutt v. National Inst. Incorporated for the Improvement of Memory*, 31 F.2d 236, 238 (2d Cir. 1929) ("The author of a literary composition, as a lecture, may profit from public delivery, but that does not constitute the kind of publication which deprives him of the protection of the copyright statute. . . ."); *Mister Maestro*, 224 F. Supp. at 106 ("The copyright statute itself plainly shows that 'oral delivery' of an address is not a dedication to the public."); *McCarthy & Fischer, Inc. v. White*, 259 F. 364, 364 (S.D.N.Y. 1919) (rejecting infringer's argument that "the presentation of the song . . . in vaudeville prior to the date of copyright was a complete dedication to the public," because "[i]t is . . . well settled that the public performance of a dramatic or musical composition is not an abandonment of the composition to the public"); *ColumbiaBroad. Sys., Inc. v. Documentaries Unlimited, Inc.*, 248 N.Y.S.2d 809, 811 (Sup. Ct. 1964) (holding with respect to news anchor's famous announcement of the death of President Kennedy that "[t]he rendering of a performance before the microphone does not constitute an abandonment of ownership or a dedication of it to the public at large"); *cf. American Tobacco Co. v. Werckmeister*, [207 U.S. 284](#), 299, 28 S.Ct. 72, 77 (1907) (no general publication where there is merely "the exhibition of a work of art at a public exhibition"); *Burke*, 598 F.2d at 693 ("Publication did not occur merely because the film was shown to the general public."); *Patterson v. Century Prods., Inc.*, 93 F.3d 489, 492-93 (2d Cir. 1937) (no divestive general publication of motion picture occurred where "the distribution was limited to exhibitions of the picture without charge, no one was given the right to use the copies sent out for any purpose whatsoever," and "[t]he positive films were merely loaned for that purpose which did not permit copying"), *cert. denied*, 303 U.S. 655 (1938); *see generally Nimmer* ♦ 4.08, at 4-43 ("[T]he oral dissemination or performance of a literary, dramatic, or musical work does not constitute a publication of that work.").

[11] It appears from the case law that a general publication occurs only in two situations. First, a general publication occurs if tangible copies of the work are distributed to the general public in such a manner as allows the public to exercise dominion and control over the work. *See Burke*, 598 F.2d at 693 ("The decisive issue was whether [the author's] release of the film itself to [a third party] was, under the circumstances, a general publication."); *Mister Maestro*, 224 F. Supp. at 107 ("A *sine qua non* of publication should be the acquisition by members of the public of a possessory interest in *tangible* copies of the work in question.") (quoting Nimmer, *supra*, 56 Colum. L. Rev. at 197); Nimmer, *supra*, 56 Colum. L. Rev. at 196 ("[E]ven if a performance were regarded as a copy of the work being performed, the act of publication would not occur merely by virtue of viewing the performance since an audience does not thereby gain such dominion over the copy as to warrant the conclusion that the work has been surrendered to the public."). Second, a general publication may occur if the work is exhibited or displayed in such a manner as to permit unrestricted copying by the general public. *See American Tobacco*, 207 U.S. at 300, 28 S.Ct. at 77 ("We do not mean to say that the public exhibition of a painting or statue, where all might see and freely copy it, might not amount to [divestive] publication. . . ."); *Patterson*, 93 F.2d at 492 [p*1216] ("The test of general publication is whether the exhibition of the work to the public is under such conditions as to show dedication without reservation of rights or only the right to view and inspect it without more."); *Letter Edged in Black Press, Inc. v. Public Bldg. Comm'n of Chicago*, 320 F. Supp. 1303, 1311 (N.D. Ill. 1970) (invoking this exception where "there were no restrictions on copying [of a publicly displayed sculpture] and no guards preventing copying" and "every citizen was free to copy the maquette for his own pleasure and camera permits were available to members of the public"). However, the case law indicates that restrictions on copying may be implied, and that express limitations in that regard are deemed unnecessary. *See American Tobacco*, 207 U.S. at 300, 28 S.Ct. at 77 (holding that there is no general publication where artwork is exhibited and "there are bylaws against copies, or where it is *tacitly* understood that no copying shall take place, and the public are admitted . . . on the *implied understanding* that no improper advantage will be taken of the privilege" (emphasis added)); *Burke*, 598 F.2d at 693 (holding that releasing a film to a professor and host of an educational television program, and authorizing him to copy and broadcast same on public television was a limited publication because the grant of permission to use the film contained an *implied* condition against distributing copies of the film to others or using it for other purposes); *Nutt*, 31 F.2d at 238 (lectures were not generally published when delivered because oral delivery is not publication, and "[e]ven where the hearers are allowed to make copies of what was said for their personal use, they cannot later publish for profit that which they had not retained the right to sell").

[12] The case law indicates that distribution to the news media, as opposed to the general public, for the purpose of enabling the reporting of a contemporary newsworthy event, is only a limited publication. For example, in *Public Affairs Assoc., Inc. v. Rickover*, 284 F.2d 262 (D.C. Cir. 1960), *vacated on other grounds*, [369 U.S. 111](#), 82 S.Ct. 580 (1962), the court said that general publication occurs only when there is "a studied effort not only to secure publicity for the contents of the addresses through the channels of information, but to *go beyond customary sources of press or broadcasting* in distributing the addresses to any interested individual." *Id.* at 270 (emphasis added). Although the *Rickover* court ultimately held that a general publication had occurred, it contrasted the "limited use of the addresses by the press for fair comment," i.e., limited publication, with "the unlimited distribution to anyone who was interested," i.e., general publication. *Id.* at 271. *See also Mister Maestro*, 224 F. Supp. at 107 (taking the position that solicitation of news coverage and distribution to the media amounts to only a limited publication); *cf. Documentaries Unlimited, Inc.*, 248 N.Y.S.2d at 810-11 (news anchor's announcement concerning the assassination of President Kennedy was not generally published by

virtue of the broadcast over the radio as newsworthy material). This rule comports with common sense; it does not force an author whose message happens to be newsworthy to choose between obtaining news coverage for his work and preserving his common-law copyright. As the dissenting judge in the *Rickover* case remarked (which remark was entirely consistent with the majority opinion in the case), "[t]here is nothing in the law which would compel this court to deprive the creator of the right to reap financial benefits from these efforts because, at the time of their creation, they had the added virtue of being newsworthy events of immediate public concern." *Rickover*, 284 F.2d at 273 (Washington, J., dissenting).

[13] With the above principles in mind, in the summary judgment posture of this case and on the current state of this record, we are unable to conclude that CBS has demonstrated beyond any genuine issue of material fact that Dr. King, simply through his oral delivery of the [p*1217] Speech, engaged in a general publication making the Speech "available to members of the public at large without regard to their identity or what they intended to do with the work." *Brown*, 714 F.2d at 1091. A performance, no matter how broad the audience, is not a publication; to hold otherwise would be to upset a long line of precedent. This conclusion is not altered by the fact that the Speech was broadcast live to a broad radio and television audience and was the subject of extensive contemporaneous news coverage. We follow the above cited case law indicating that release to the news media for contemporary coverage of a newsworthy event is only a limited publication.^[n4]

[14] Our conclusion finds significant support from *Burke v. National Broadcasting Co., Inc.*, 598 F.2d 688 (1st Cir.), *cert. denied*, 444 U.S. 869 (1979). *Burke* captured on film a highly unusual and dramatic encounter in which a zebra attacked a lioness who had killed the zebra's foal. *Id.* at 689. Grzimek, a professor and a host of an educational television program, wrote *Burke* requesting permission to use the film in his lectures and in the educational television program. *Id.* at 690. *Burke* responded affirmatively, sending Grzimek the film accompanied by a short reply that contained neither express authorization nor express restriction with respect to other possible uses of the film. *Id.* at 690, 693. Grzimek initially used the film only for the stated purposes, but later transmitted a copy of the film to a commercial company specializing in nature films, which in turn sold a production that included the film to NBC. The issue was whether *Burke's* common law copyright was forfeited to the public domain by virtue of the circumstances surrounding his seemingly unconditioned release of the film to Grzimek. In other words, the issue was whether there had been a general publication. The First Circuit held that only a limited publication had occurred, and that *Burke's* common law copyright [p*1218] had not been lost. *Id.* at 694. The court defined a general publication as occurring when a work is made available to the public at large without regard to who they are or what they propose to do with it, *id.* at 691; noted that courts have hesitated to find a general publication which divests a common law copyright, *id.*; and noted the settled law that a mere performance or exhibition of a work is not a general publication. *Id.* Recognizing that a general publication can be found if the public were free to copy the work on exhibit, the First Circuit held that a prohibition on copying can be tacitly understood. *Id.* (citing *American Tobacco*, 207 U.S. at 300). Applying the foregoing principles, the court sustained *Burke's* common law copyright as against NBC. *Id.* at 690, 694. The *Burke* court held that *Burke's* authorization of Grzimek's broadcast of the film on noncommercial television did not result in a general publication. *Id.* at 693 ("Allowing the film to be used for the purposes requested was not a blanket authorization to use it for any purpose, much less to release it to a commercial producer."). The court recognized that *Burke* did not explicitly state that Grzimek could not distribute copies of the film to others, or use it for other purposes, but the court said "such limitations are reasonably to be implied." *Id.*

[15] We believe that the authority granted to the press in the instant case - extensive news coverage including live broadcasts - is analogous to the authority granted in *Burke*. In *Burke*, authority was granted to the host of an educational television program to broadcast on television; in the instant case, authority was granted to the press for extensive news coverage, also including broadcasts on television. In both cases, the authority was granted to a limited group for a limited purpose. In both cases, the restrictions on copying and reproducing were implied. The soundness of our analogy to *Burke* is also supported by the foregoing case law indicating generally that distribution to the news media for the purpose of news coverage is only a limited publication.

[16] The district court held that "the circumstances in this case take the work in question outside the parameters of the 'performance is not a publication' doctrine." 13 F. Supp.2d at 1351. These circumstances included "the overwhelmingly public nature of the speech and the fervent intentions of the March organizers to draw press attention." *Id.* Certainly, the Speech was one of a kind - a unique event in history.^[u5] However, the features that make the Speech unique - e.g., the huge audience and the Speech's significance in terms of newsworthiness and history - are features that, according to the case law, are not significant in the general versus limited publication analysis. With respect to the huge audience, the case law indicates that the general publication issue depends, not on the number of people involved, but rather on the fact that the work is made available to the public without regard to who they are or what they propose to do with it. *See Brown v. Tabb*, 714 F.2d 1088, 1091-92 (11th Cir. 1983). For this proposition, *Brown* cited *Burke*, 598 F.2d at 691 ("[G]eneral publication depends on the author making the work available to those interested, and not on the number of people who actually express an interest."). To the same effect, *see Mister Maestro*, 224 F. Supp. at 106-07 (relying upon the "one or many persons" language in *American Tobacco*, 207 U.S. at 299, and on *Rickover*). In the instant case, the district court acknowledged that "[t]he size of the audience before which a work is performed cannot be the basis for a court's finding that a general publication has occurred." 13 F. Supp.2d at 1352. Page 1219

[17] With respect to the significance of the Speech in terms of newsworthiness and history, the case law again suggests that this feature should not play a substantial role in the analysis. As noted above, the D.C. Circuit in *Rickover* indicated that the wide press distribution of the speeches at issue there would not alone have constituted a general publication. Indeed, *Mister Maestro* so held with respect to the very Speech at issue before us. Also supporting this proposition is the case law above cited to the effect that size of the audience is not significant.

[18] The district court cited *Letter Edged in Black Press, Inc. v. Public Building Commission of Chicago*, 320 F. Supp. 1303 (N.D. Ill. 1970), CBS's best case, in support of its reasoning, *see* 13 F. Supp.2d at 1353-54, and that case warrants some exploration. In *Letter Edged in Black*, the question was whether the city had dedicated a Picasso sculpture (located in front of the Chicago Civic Center) to the public domain by general publication. The city had done the following: it carried out a massive campaign to publicize the monumental sculpture; it placed a maquette (portable model of the sculpture) on exhibition at a local museum; it gave photographs to the public upon request; it arranged for pictures of the sculpture to appear in several magazines of large national circulation; it sold a postcard featuring the sculpture; and it distributed numerous publications and reports containing photographs of the sculpture. *Letter Edged in Black*, 320 F. Supp. at 1306-07. After stating the controlling legal principles with regard to general and limited publication, the *Letter Edged in Black* court stated its view that the cumulation of these various acts by the city equated to general publication. *Id.* at 1309. The court then distinguished *American Tobacco*, [207 U.S. 284](#), 28 S.Ct. 72, the

primary authority that the city cited to support its theory of mere limited publication. In *American Tobacco*, the Supreme Court held that the display of a painting in a gallery did not constitute general publication putting the painting into the public domain. According to the *Letter Edged in Black* court, a cornerstone of *American Tobacco* was the fact that copying of the painting was strictly forbidden and the gallery strictly enforced the anti-copying rules. *Letter Edged in Black*, 320 F. Supp. at 1310. The court held that the facts in *Letter Edged in Black* were distinguishable:

In the case at bar there were no restrictions on copying and no guards preventing copying. Rather every citizen was free to copy the maquette for his own pleasure and camera permits were available to members of the public. At its first public display the press was freely allowed to photograph the maquette and publish these photographs in major newspapers and magazines. Further, officials at this first public showing of the maquette made uncopyrighted pictures of the maquette available on request. Were this activity strictly classified as limited publication, there would no longer be any meaningful distinction between limited and general publication.

[19] *Id.* at 1311 (footnotes omitted).

[20] The district court likened the instant case to *Letter Edged in Black* on the ground that there was a lack of restriction on copying and free allowance of reproduction by the press. However, we do not believe the analogy fits - at least not at this summary judgment stage. Significantly, in *Letter Edged in Black* there were manifestations of the city's intent to distribute generally among the public at large that have no parallels in the evidence we can consider in the instant summary judgment posture. The city gave photographs of the sculpture to the public, not merely the press, upon request. The city commercially sold a postcard featuring the sculpture. Copying was apparently widespread at an exhibit of the sculpture, and the city took no action to curtail copying and photographing by the public. *Letter Edged in Black*, 320 F. Supp. at 1306-07, 1311. At trial, CBS may well produce [p*1220] evidence that brings the instant case on all fours with *Letter Edged in Black*,^[n6] but the present state of the record does not support the analogy; to the contrary, the performance of the Speech in the instant case is more like the exhibition of the painting in the gallery in *American Tobacco*.^[n7]

[21] Because there exist genuine issues of material fact as to whether a general publication occurred, we must reverse the district court's grant of summary judgment for CBS. It would be inappropriate for us to address CBS's other arguments, e.g., fair use and the First Amendment, because the district court did not address them, and because the relevant facts may not yet be fully developed. Of course, we express no opinion on the eventual merits of this litigation. The judgment of the district court is reversed and remanded for further proceedings not inconsistent with this opinion.

[22] REVERSED AND REMANDED.^[n8]