ILLINOIS STATE BAR ASSOCIATION™

INTELLECTUAL PROPERTY

The newsletter of the ISBA's Section on Intellectual Property Law

September 2016, vol. 56, no. 2

First copyright principles for the First Lady's speech

By Daniel Kegan

Who owns the copyright to a speech made by the spouse of the President of the United States?[1] The First Lady of the United States (FLOTUS), the President of the United States (POTUS), the federal government, the writers assisting the spouse, the editors of the speech, we the American people, no one? As with most short legal questions, it depends.

First Terms and History

As gender neutrality has been increasingly recognized in recent decades, and enacted in professional style manuals and statutes, at some time the title of FLOTUS is likely to change. But First Spouse assumes marriage. What of a divorced or widowed Commander in Chief. What of an unmarried person with a best friend.

The Office of the First Lady of the United States (OFLOTUS) is accountable to the First Lady of the United States for her to carry out her duties as hostess of the White House, and is also in charge of all social and ceremonial White House events. The OFLOTUS is a White House Office entity, part of the executive Office of the President. <https://www.whitehouse.gov/1600/first-ladies>; <en.wikipedia.org/wiki/Office_of_the_First_Lady_of_the_United_Statesx>.

The first First Lady generally considered to have a staff was Caroline Harrison. Her niece served as social secretary, and the funded staff were a social secretary and an assistant. Grace Coolidge had a social secretary. Eleanor Roosevelt had a staff of two, personal secretary and social secretary. Bess Truman had a personal secretary. Mamie Eisenhower's social secretary headed a small staff. Jackie Kennedy had a staff of 40. Lady Bird Johnson and Pat Nixon each had staff of approximately 30.

Under Rosalyn Carter, for the first time the term "Office of the First Lady" was used. During Nancy Reagan's term, Public Law 95-570 (1978) was enacted, which authorized "assistance and services…to be provided to the spouse of the President in connection with assistance provided by such spouse to the President in the discharge of the President's duties and responsibilities," </legislink.org/us/pl-95-570>. Hillary Clinton's OFLOUS had a staff of 20 and also 15 volunteers and interns. Laura Bush had a staff of at least 24.

Copyright Authorship

Since 1978 in the United States, copyright in a work protected under the Copyright Act vests initially in the author or authors of the work. 17 USC § 201(a). In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of the Copyright Act, and, unless the parties have expressly agreed otherwise

in a written instrument signed by them, owns all of the rights comprised in the copyright. 17 USC § 201(b).

A "work made for hire" is (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities. 17 USC § 101.

As with many statutory words and phrases, the meaning of "employee" is not simply the first definition in a dictionary.

> "[T]he legistative history underscores the clear import of the statutory language: only enumerated categories of commissioned works may be accorded work for hire status." … Transforming a commissioned work into a work by an employee on the basis of the hiring party's right to control, or actual control of, the work is inconsistent with the language, structure, and legislative history of the work for hire provisions. To determine whether a work is for hire under the Act, a court first should ascertain, using principles of general common law of agency, whether the work was prepared by an employee or an independent contractor. After making this determination, the court can apply the appropriate subsection of § 101." *Community for Creative Non-Violence v Reid,* 490 US 730, 105 SCt 2166, 2176 (1989).

Federal Government Works

A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of that person's official duties. 17 USC § 101.

Copyright protection under the Copyright Act is not available for any work of the United States Government, but the US Government is not precluded from rec living and holding copyrights transferred to it by assignment, bequest, or otherwise. 17 USC §105.

Political Tasks and the Hatch Act.

Not all tasks a federal government paid employee does are within the scope of their official duties. Many political activities are explicitly forbidden to many federal employees while on duty or on federal property. (Hatch Act Modernization Act of 2012; Pub L 112-230; </www.congress.gov/112/plaws/publ230/PLAW-112publ230.pdf >.) The Federal Election Commission publishes a Campaign Guide for Congressional Candidates and Committees (June 2014) revised to incorporate changes due to Citizens United v FEC (558 US 310, 130 SCt 876, 2010), <http://www.fec.gov/pdf/candgui.pdf >.

The Hatch Act is now enforced by the US Office of Special Counsel, an independent federal investigative and prosecutorial agency, primarily focused on Civil Service merit system, Whistleblower Protection, the Hatch Act, and the Uniformed Services Employment and Reemployment Rights Employment<osc.gov/Pages/HatchAct.aspx>.

An Act to Prevent Pernicious Political Activities (the Hatch Act of 1939) generally prohibits employees in the executive branch of the federal government, except for the president, vice president, and certain designated high-level executive officials, from engaging in some forms of political activity, <wikipedia.org/wiki/Hatch_Act_of_1939>. The 19July1940 amendment extended the Act to certain employees of state and local governments whose positions are primarily paid for by federal funds. The Hatch Act was found to achieve a Constitutional balance between fair and effective government and First Amendment rights

of employees, *Civil Service Commission v Nat'l Ass'n of Letter Carriers,* 413 US 548 (1973).

Initial Copyright Tentative Conclusions

The First Lady of the United States is not a paid employee of the federal government. "How the First Lady Works,"

<history.howstuffworks.com/historical-figures/first-lady2.htm>.

She likely personally owns the copyright to non-political copyrightable works she herself creates and fixes in a tangible medium of expression. 17 USC §102.

If the First Lady completes a substantive draft of a work and then a speechwriter subsequently makes substantial changes, then the First Lady likely owns a copyright to her version and the speechwriter might be the author of the finished work, a derivative of the First Lady's version. 17 USC §106(2).

If the First Lady works with a speechwriter concurrently during the development of the work, with both intending their contributions be merged into a unitary whole, then the work might be a joint work, 17 USC §101.

If the speechwriter is a full-time employee, whose job scope includes speechwriting and editing, of a political organization—such as the Democratic National Committee, the Republican National Committee, or a Committee to Elect or Reelect—then the political organization, as employer, likely owns the copyright rights of the speechwriter.

If the speechwriter is an ad hoc consultant—to the First Lady or to the political organization—then the speechwriter's work is not a work for hire, the speech writer is the author and initial owner of the completed speech. For the First Lady or the political organization to own the copyright to the completed written speech, the speechwriter could assign the copyright.

If the First Lady's speech were for a symposium, or perhaps convention, with multiple speakers, and a publication results with multiple contributions, each a separate and independent work in themselves, assembled into a collective whole, then the resulting publication could be a "collective work." A work specially ordered or commissioned for use as a contribution to a collective work, may be a work made for hire if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. 17 USC §101.

Other fact patterns, and legal conclusions invite consideration. A speech written by the minor child of the First Lady, extensive ad hoc comments beyond the written script, translations of the speech into other languages, rights outside the United States, and more.

Practical Considerations. Confusion, deception, and mistake are generally unlawful in marketing campaigns. 14 USC § 1125 (a) [Lanham Act § 43(a)]. Yet confusion, deception, and mistake are typically lawful in political campaigns. US Const. Amend. I; US Const. Amend. XIV. Still, the First Amendment, as most rights, is not absolute. Falsely shouting fire in a crowded theater is actionable, as is intentional, malicious defamation. *New York Times Co. v Sullivan*, 376 US 254, 94 Sup. Ct. 2997 (1964); *Gertz v Robert Welch, Inc.*, 418 US 323 (1974) (defamation of private citizen in the public media). Intentional falsification, predicate innuendo, negative advertising, and sovereign immunity claims can be common in some political campaigns, adding more complexity to the legal analysis. Daniel Kegan, "Political Trademarks: Intellectual Property in Politics and Government," 44 *ISBA Intellectual Property,* #1, October 2004.

Actual provable damages from political copyright infringement are likely to be both small and difficult to prove. With the news cycle now shrinking shorter than 24 hours, an injunction may have little non-symbolic value. However, in politics symbols often matter. Murray Edelman, *The Symbolic Uses of Politics,* 1967.

Justice Brandeis suggested "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the

process of education, the remedy to be applied is more speech, not enforced silence," *Whitney v California,* 274 US 357 (1927).

As Charles Dickens' *Bleak House* with its *Jarndice v Jarndice* (English Ct Chancery, 1853) epitomizes, legal proceedings often proceed slowly. Politics don't. Especially for inappropriate communications the day before an election, there may not be "time to expose through discussion the falsehood and fallacies."

The recent proposal to amend the Copyright Act to establish an alternative dispute resolution program for copyright small claims, and related purposes, might partially address political copyright violations. HR 5757, <https://www.congress.gov/bill/114th-congress/house-bill/5757>. The initial text of the bill provides for monetary recovery not to exceed $15,000 per work infringed, maximum damage recovery of $30,000 per proceeding, and attorneys' fees and costs only for bad faith conduct.

Conclusion

The standard intellectual property rules refract when entering the prism of politics.[2] For those concerned with copyright, attention should be paid to the statuses of all contributing writers, their written employment and other contracts, their governmental duties—and equipment used for writing—and the extent the writing or event is political.

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Cited webpages were last visited 19-29 July 2016.

1. The life of the law has not been logic; it has been experience…,"Oliver Wendell Holmes, The Common Law (1880). During the July 2016 Republican National Convention (Cleveland OH), questions arose regarding similarities between a section of Melania Trump's speech and Michelle Obama's 2008 speech at the Democratic National Convention. Although Barack Obama did not become President until January 2009, the July 2016 event prompted this inquiry of a First Lady's copyright rights.

"How Melania Trump's Speech Veered Off course and Caused an Uproar," NY Times, 19July2016, </www.nytimes.com/2016/07/20/us/politics/melania-trump-convention-speech.html>;

"Trump Speechwriter Accepts Responsibility for Using Michelle Obama's Words," NPR Now, 20July2016,

<http://www.npr.org/2016/07/20/486758596/trump-speechwriter-accepts-responsibility-for-using-michelle-obamas-words?utm_campaign=breakingnews&utm_term=nprnews>;

"First Lady Michelle Obama's Fabulous Clothes: Who Pays the Bills?,"

<nydailynews.com/life-style/fashion/lady-fabulous-clothes-pays-bills-article-1.1811323>;

"Did the Trump Campaign Violate Federal Law by Using a Trump Organization Speechwriter?,"

<ww.washingtonpost.com/news/the-fix/wp/2016/07/20/did-the-tru…aign-violate-federal-law-by-using-a-trump-organization-speechwriter/>;

"Jon Favreau on Speechwriting, Life After D.C.… and Melania Trump," NY Times 21July2016,

<nytimes.com/2016/07/24/fashion/jon-favreau-obama-speechwriter-melania-trump.html?_r=0>;

2. Political Music and Copyright. Some public uses of copyrighted music are permitted by ASCAP, BMI, and similar blanket licenses. Repeated use with video on a candidate's website may require a synchronization license, generally more expensive. However, if a distinctive song is repeatedly used as a theme for a political candidate, it may metamorphosize into a trademark. Whatever the legal underpinnings, it has become common for political candidates to choose to use campaign music without the performers' or songwriters' authorization and with their explicit, public disapproval. Eg., "Last Week Tonight: Usher, Sheryl Crow, Cyndi Lauper and Others Sing 'Don't Use Our Song,'" Vulture, 25July2016, <http://www.vulture.com/2016/07/usher-last-week-tonight-dont-use-song.html>.

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