FIRST COPYRIGHT PRINCIPLES FOR THE FIRST LADY'S SPEECH

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INTRODUCTION

Who owns the copyright to a speech made by the spouse of the President of the United States?[1] Is it 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 on why one is asking.

I. FIRST TERMS AND HISTORY

As gender neutrality is increasingly recognized, and enacted in professional style manuals and statutes, the title of FLOTUS is likely to change

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‡An earlier version of this article was published in the September 2016 issue of the Illinois State Bar Association newsletter, *Intellectual Property*.

[1] "The life of the law has not been logic; it has been experience . . . ." OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Boston, Little Brown & Co. 1881). 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 inquiries into a First Lady's copyright rights. *See, e.g.*, Maggie Haberman & Michael Barbaro, *How Melania Trump's Speech Veered off Course and Caused an Uproar*, NEW YORK TIMES (July 19, 2016), http://www.nytimes.com/2016/07/20/us/politics/melania-trump-convention-speech.html; Brett Neely, *Trump Speechwriter Accepts Responsibility for Using Michelle Obama's Words*, NPR NOW (July 20, 2016), http://www.npr.org/2016/07/20/486758596/trump-speechwriter-accepts-responsibility-for-using-michelle-obamas-words?utm_campaign=breaking news&utm_term=nprnews; Philip Bump, *Did the Trump Campaign Violate Federal Law by Using a Trump Organization Speechwriter?*, WASHINGTON POST (July 20, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/07/20/did-the-trump-campaign-violate-federal-law-by-using-a-trump-organization-speechwriter/?utm_term=.1d911ab18da5; Tyler Ochoa, *Was Melania Trump's Plagiarism Also Copyright Infringement*, TECHNOLOGY & MARKETING LAW BLOG (July 20, 2016), http://blog.ericgoldman.org/archives/2016/07/was-melania-trumps-plagiarism-also-copyright-infringement-guest-blog-post.htm; David Hochman, *Jon Favreau on Speechwriting, Life After D.C. . . . and Melania Trump*, NEW YORK TIMES (July 1, 2016), http://www.nytimes.com/2016/07/24/fashion/jon-favreau-obama-speechwriter-melania-trump.html?_r=0>.

at some time. Yet First Spouse assumes marriage. What, then, of a divorced or widowed Commander in Chief? What happens with an unmarried President whose best friend speaks on behalf of the Office?.

The Office of the First Lady of the United States (OFLOTUS) is accountable to FLOTUS so that she can 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.[2]

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

Under Rosalyn Carter, for the first time the term "Office of the First Lady" was used. During Nancy Reagan's term, a law was enacted that 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."[3] Hillary Clinton's OFLOUS had a staff of twenty plus fifteen volunteers and interns. Laura Bush had a staff of at least twenty-four; Michelle Obama also had a staff of twenty-four.[4]

II. 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.[5] In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.[6]

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2 See *Office of the First Lady of the United States*, WIKIPEDIA (last edited Oct. 15, 2017), https://en.wikipedia.org/wiki/Office_of_the_First_Lady_of_the_United_States; *The First Ladies*, WHITE HOUSE, https://www.whitehouse.gov/1600/first-ladies (last visited Nov. 13, 2017).

3 Pub. L. No. 95-570, 92 Stat. 2445 (1978).

4 *Michelle Obama's Staff*, FACTCHECK, <https://www.factcheck.org/2009/08/michelle-obamas-staff/https://www.factcheck.org/2009/08/michelle-obamas-staff/> (last visited Jan. 15, 2018).

5 17 U.S.C. § 201(a) (2012).

6 *Id.* § 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.[7]

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

> [T]he legislative 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.[8]

III. 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.[9] Copyright protection under the Copyright Act is not available for any work of the United States Government, but the U.S. Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.[10]

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7 *Id.* § 101.

8 Community for Creative Non-Violence v. Reid, 490 U.S. 730, 748, 750 (1989).

9 17 U.S.C. § 101 (2012).

10 *Id.* § 105.

IV. POLITICAL TASKS AND THE HATCH ACT

Not all tasks performed by federal employees are within the scope of their official duties. Many political activities are explicitly forbidden to many federal employees while they are on duty or on federal property (Hatch Act).[11] The Federal Election Commission publishes a Campaign Guide for Congressional Candidates and Committees (June 2014) revised to incorporate changes due to *Citizens United v. Federal Election Commission.*[12] The Hatch Act is now enforced by the U.S. Office of Special Counsel, an independent federal investigative entity whose prosecutorial authority derives from the Civil Service Reform Act, the Whistleblower Protection Act protection, the Hatch Act, and the Uniformed Services Employment and Reemployment Rights Act.[13]

The 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.[14] The July 19, 1940, amendment extended the Hatch Act of 1939 to certain employees of state and local governments whose positions are primarily paid for by federal funds.[15] It was found to achieve a constitutional balance between fair and effective government and First Amendment rights of employees.[16]

V. INITIAL COPYRIGHT TENTATIVE CONCLUSIONS

FLOTUS is not a paid employee of the federal government.[17] Therefore, she likely personally owns the copyright to non-political copyrightable works she herself creates and fixes in a tangible medium of expression.[18] If FLOTUS completes a substantive draft of a work and then a speechwriter subsequently makes substantial changes, then she likely owns a copyright to her version, and the speechwriter might be the author of the finished work, which is a derivative .[19] If FLOTUS works with a speechwriter concurrently during the development of the work,

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11 Hatch Act Modernization Act of 2012; Pub L 112-230, 126 Stat. 1616.

12 558 U.S. 310 (2010).

13 Pub. L. No. 76-753, 54 Stat. 767 (1940); *see also Hatch Act*, OSC.GOV, https://osc.gov/Pages/WhatWeDo.aspx (last visited Nov. 14, 2017).

14 *Hatch Act of 1939*, WIKIPEDIA (last edited Nov. 2, 2017), http://www.wikipedia.org/wiki/Hatch_Act_of_1939.

15 Act of July 19, 1940, ch. 640, Pub. L. No. 76-753, 54 Stat. 767.

16 *See* Civil Service Comm'n v Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973).

17 *How the First Lady Works*, HOW STUFF WORKS, http://history.howstuffworks.com/historical-figures/first-lady2.htm (last visited Nov. 13, 2017).

18 17 U.S.C § 102 (2012).

19 *Id.* § 106(2).

with both intending their contributions be merged into a unitary whole, then the work might be a joint work.[20]

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 FLOTUS or to the political organization — then the speechwriter's work is not a work for hire, the speechwriter is the author and initial owner of the completed speech. For FLOTUS or the political organization to own the copyright to the completed written speech, the speechwriter would have to assign the copyright.

If FLOTUS's speech were for a symposium, or perhaps a 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.[21] Other fact patterns and legal conclusions invite consideration, such as a speech written by FLOTUS's minor child, extensive ad hoc comments beyond the written script, translations of the speech into other languages, rights outside the United States, and more.

VI. PRACTICAL CONSIDERATIONS[22]

Actual provable damages from political copyright infringements are likely to be both small and difficult to prove. With the news cycle now shrinking shorter than twenty-four hours, an injunction may have little

[20] *Id.* § 101.

[21] *Id.* § 101.

[22] Confusion, deception, and mistake are generally unlawful in marketing campaigns. *See* 14 *id.* § 1125(a) (Lanham Act § 43(a), Pub. L. No. 79–489, 60 Stat. 427 (1946)). Yet confusion, deception, and mistake are typically lawful in political campaigns. U.S. CONST. amends. I, XIV. Still, the First Amendment, as with most rights, is not absolute. Falsely shouting fire in a crowded theater is actionable, as is intentional, malicious defamation. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 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 INTELL. PROP., Oct. 2004, at 1.

non-symbolic value. However, in politics symbols often matter.[23] 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."[24]

As Charles Dickens' *Bleak House,*[25] as its case of *Jarndice v. Jarndice* in the English Court of Chancery epitomizes,[26] legal proceedings often proceed slowly. Politics do not. This is especially true for inappropriate communications the day before an election, when there may not be "time to expose through discussion the falsehood and fallacies."[27]

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.[28] 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.[29] The owner of the copyright to a speech made by the FLOTUS depends, as most legal questions, on the facts of its creation. 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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23 MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS (1967).

24 Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

25 CHARLES DICKENS, BLEAK HOUSE (London, Bradbury & Evans 1853).

26 *See* William B. Stock, *Law Imitates Art:* Jarndyce v. Jarndyce *and Litigation Without End*, N.Y. ST. B.J., Aug. 2017, at 45; *Jardyce v. Jarndyce*, WIKIPEDIA (last edited Nov. 5, 2017), https://en.wikipedia.org/wiki/Jarndyce_and_Jarndyce.

27 *Whitney*, 247 U.S. at 377.

28 Case Act of 2016, H.R. 5757, 114th Cong. (2016).

29 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' authorization and with their explicit, public disapproval. *See, e.g.*, Tolly Wright, Last Week Tonight: *Usher, Sheryl Crow, Cyndi Lauper and Others Sing 'Don't Use Our Song'*, VULTURE (July 25, 2016), http://www.vulture.com/2016/07/usher-last-week-tonight-dont-use-song.html.

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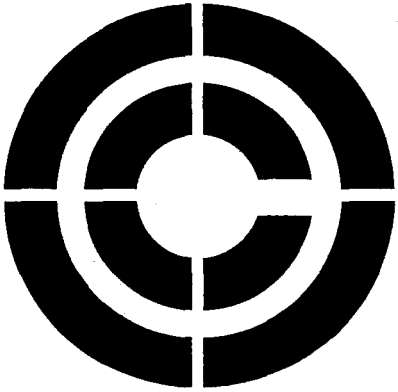

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VOL. 65, No. 1 WINTER 2018