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Copyright battle often exists over historic speeches

"I have a dream that one day on the red hills of Georgia the sons of former slaves and the sons of former slave owners will be able to sit down together at the table of brotherhood. I have a dream that one day even the state of Mississippi, a state sweltering with the heat of injustice, sweltering with the heat of oppression, will be transformed into an oasis of freedom and justice. I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."

These words were spoken by Martin Luther King Jr. on Aug. 28, 1963, from the steps of the Lincoln Memorial in Washington, D.C. They were spoken to a crowd estimated to be 200,000 and were broadcast live on television and radio to millions. It is edifying to hear again his stirring eloquence, with its poetic phrasing and rhythm, and its historical, biblical, constitutional and Shakespearian allusions, exhorting an end to discrimination and segregation. You can hear an audio recording of King's entire 17-minute "I Have a Dream" speech at archive.org/details/MLKDream. You can also find the full text of the speech on the Internet, but chances are, if you are searching for a video of the entire speech on the Internet, you may find a notice such as this one from history.com: "We are unable to offer the full 'I Have a Dream' speech, the rights to which are controlled by the Estate of Martin Luther King Jr."

This raises a sensitive issue. The "I Have a Dream" speech is protected by a copyright, which King held in his lifetime and is now held by his estate. People assume that a speech of such immense historical and cultural significance must be part of the public domain and free for anyone to use in any way. But that is not the case. Like any author, King was entitled to claim copyright in his original works of authorship. He had, and his estate continues to have, the same rights as any copyright holder to control the reproduction and distribution of his works in the manner allowed by the copyright laws.

In fact, the protectability of King's speech has been upheld in some interesting copyright litigation. Efforts of



Inside IP Law

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third parties to profit off King's speech began shortly after he made the famous oration. Within weeks of the March on Washington, a company called Mister Maestro began selling a recording of the speech to the public. King brought suit for an injunction in federal court in New York in October 1963. *King v. Mister Maestro, Inc.*, 224 F. Supp. 101.

Mister Maestro argued that the presentation of the speech to an enormous audience, both live and via broadcast, and the distribution of advance copies to the press without a copyright notice, caused the speech to enter the public domain. These acts, according to Mister Maestro, constituted a "general publication" of the speech without having properly secured federal copyright. Under the strict and formalistic provisions of the now superseded 1909 Copyright Act, a general publication of a work without a copyright notice was the death knell for copyright in the work.

The court rejected this defense, citing a longstanding principle of copyright law that a public performance is not a publication, no matter how large the audience. Thus, compliance with the formalities required to secure federal copyright was not necessary.

Nor did the distribution of copies to the press corps forfeit copyright protection. The court held that copyright is not lost if the distribution of the work is merely a "limited publication" rather than a "general publication." Distribution to a limited group of people for a specific purpose does not constitute a general

publication where there has been no permission to further distribute the work to the general public. The court issued an injunction.

The issues raised in *Mister Maestro* seemed settled for the next 30 years. In the mid-'90s, however, CBS created a documentary series titled "The 20th Century." The segment about the March on Washington contained extensive footage of the speech. CBS had not sought the estate's permission and refused to pay royalties. The estate sued for copyright infringement in federal court in Atlanta. The litigation, more than three decades after *Mister Maestro*, involved the very same factual and legal issues. In a surprising decision, the district court in Atlanta reached the opposite conclusion. It held that because of the "overwhelmingly public nature of the speech and the fervent intentions of the March organizers to draw press attention," the ordinary protection granted to public performances should not apply. It granted summary judgment in favor of CBS.

On appeal, the 11th U.S. Circuit Court of Appeals reversed, finding that CBS had not sufficiently established that King's delivery of the speech constituted a general publication. The court relied heavily on prior copyright law jurisprudence, concluding "A performance, no matter how broad the audience, is not a publication." *Estate of King v. CBS*, 194 F.3d 1211 (1999).

Both *Mister Maestro* and *CBS* deal with the narrow issue of compliance with copyright formalities from a bygone era. They don't address the larger issue of whether an author can assert copyright over a work that is part of our national heritage. There is nothing in the copyright law that says a private citizen who authors such a work cannot claim copyright.

These personal property rights will, of course, be tempered by the fair use doctrine. See, *Time v. Bernard Geis*, 293 F. Supp. 130 (1968) (use of images from the Zapruder film of Kennedy's assassination was a fair use). Beyond the limiting principles of fair use, the King estate will continue to hold the right to exercise control over commercial use of what many consider to be the best American speech of the 20th century.