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PRIVILEGED AND CONFIDENTIAL

Mr. Greg Muth
General Manager
Alcoholics Anonymous World Services, Inc.
475 Riverside Drive
New York, NY 10015

FINAL

Re: Alcoholics Anonymous
Our Ref.: 100-506

Dear Mr. Muth:

I am writing to provide you with our opinion on the legal significance of the distribution of four hundred mimeographed copies of a draft of Alcoholics Anonymous (i.e., the Big Book) in the United States prior to April 10, 1939.

Relevant Facts[1]

Alcoholics Anonymous was formally published in April 1939. Between May 1938 and April 1939, Bill Wilson and other AA members decided that the book should be reviewed by a broad range of individuals prior to publication. They arranged for four hundred mimeographed copies of the Alcoholics Anonymous manuscript to be sent to people they knew were concerned with alcoholism. Each copy was stamped "Loan Copy." None of the copies contained a notice of copyright. The purpose of distributing these manuscripts was to solicit comments and suggestions for changes before finalizing Alcoholics Anonymous to be sent to the publisher. We do not know whether a letter accompanied each manuscript, although we assume some

[1] Bill Wilson was the author of Alcoholics Anonymous and the author of Alcoholics Anonymous Comes of Age, which was published in 1957. The facts related here are from Bill Wilson's own account of the prepublication reviews of Alcoholics Anonymous as he related the events in Alcoholics Anonymous Comes of Age.

explanation and a request that the recipient review the manuscript and return it with comments was sent. Otherwise the explanation and request would have been made by telephone, wire or in person.

"Great numbers" of the manuscripts were returned to Bill Wilson, according to his comments in Alcoholics Anonymous Comes of Age. In Bill Wilson's own words:

> Nothing now remained except to prepare the printer's copy of the book. We selected one of the mimeographs, and in Henry's clear handwriting all the corrections were transferred to it. There were few large changes but the small ones were very numerous. The copy was hardly legible and we wondered if the printer would take it, heavily marked up as it was.

Alcoholics Anonymous was published in April 1939 with a proper copyright notice and a Certificate of Copyright Registration was obtained thereafter.

Issue

The issue is whether the distribution of the four hundred mimeographed manuscript copies, stamped "Loan Copy," was a limited or general publication under the 1909 Copyright Act. If it was a limited publication, the distribution did not inject the work into the public domain through publication without notice. If it was a general publication, copyright was lost at that time.

Conclusion

It is our opinion that the distribution of the four hundred "Loan Copy" mimeographs was a limited publication based on the case law defining that concept and distinguishing a limited publication from a general publication.

The Law on Publication

The 1909 Copyright Act is the applicable statute. 1 Melville B. Nimmer, Nimmer on Copyright § 4.01 [B] (1998). Under the 1909 Act, a copyright notice had to appear on a work at publication. 17 U.S.C. §§ 10,19 (1909). If it did not, the work fell into the public domain due to publication without notice. Id.; 2 Nimmer at § 7.02[C][1].

Publication was not defined under the 1909 Act. 1 Nimmer at § 4.04. The definition in the 1976 Copyright Act is considered a codification of the case law that evolved under the 1909 Act.[2] See id. Publication prior to 1976 is often defined as occurring "when by consent of the copyright owner, the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public, or when an authorized offer is made to dispose of the work in any such manner, even if a sale or other such disposition does not in fact occur." Brown v. Tabb, 714 F.2d 1088, 1091 (11th Cir. 1983) (quoting Nimmer).

In order to mitigate the harsh consequences of failing to include a copyright notice, the courts created the doctrine of limited publication. See Nimmer § 4.13 [A]. Under this principle, publication does not occur if it is a publication "which communicates the contents of a manuscript to a definitely selected group and for a limited purpose, without the right of diffusion, reproduction, distribution or sale." Id. The elements of limited publication, then, are: (1) a select group of people, (2) a limited purpose, and (3) no right of sale or distribution. The limitation on the purpose of the publication can be implied or express. American Vitagraph, Inc. v. Levy, 659 F.2d 1023, 1027 (9th Cir. 1981); Burke v. National Broadcasting Co., Inc., 598 F.2d 688, 692 (1st Cir. 1979).

Courts have in the past been called upon to distinguish between limited and general publication, but not that often.[3] "General publication occurs when a work is made available to members of the public at large without regard to who they are or what they propose to do with it." See Burke, 598 F.2d at 691 (citations omitted). The courts look to the copyright claimant's actions, not his intentions, when determining whether a limited or general publication has

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[2] "'Publication' is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication." 17 U.S.C. § 101 (1997).

[3] This is no longer an issue because under amendments to the Copyright Act, effective in 1989, use of a copyright notice became optional. See 17 U.S.C. § 401 (1988). Publication without notice no longer injects a work into the public domain. Id.

occurred. Id. at 692. In general, where any interested person could obtain a copy of the particular work, it was a general publication. Id. In contrast, it was a limited publication where "the general public was [not] free to obtain and use the work." Id.

The preeminent case on limited publication is White v. Kimmell, 193 F.2d 744 (9th Cir. 1952). In that case, a manuscript was prepared by Mr. White based on conversations between his wife and the spirit of a deceased person. Id. at 745. In the fall of 1933, Mr. White prepared sixty or seventy mimeographed copies of the manuscript. Id. About twenty of these were sent to a select group of people with a letter encouraging the recipient, once he/she finished reading the manuscript, to pass on the copy or return it to Mr. White for further distribution. Id. The remaining fifty or forty-five copies were sent in a second mailing, and the same letter was included. Id. Later, a second set of copies was made and distributed to both friends and strangers who requested a copy. Id. At no time was an instruction limiting further distribution imposed. Id.

In 1940, Mrs. Oettinger, who did not know White, contacted White to request a copy of the manuscript. Id. at 1946. No copies were available, but White agreed to allow Oettinger to make mimeographed copies of the manuscript. Id. Once again, no limitations were placed on the distribution of these copies. Id. Oettinger asked and received permission from White to charge individuals for the cost of reproduction. Id. The majority of people to whom the copies were distributed were strangers to White. Id. Many of them were strangers to Oettinger as well. Id.

The trial court's definition of publication was as follows: "a limited publication which communicates the contents of a manuscript to a definitely selected group and for a limited purpose, and without the right of diffusion, reproduction, distribution or sale, is considered a 'limited publication', which does not result in loss of the author's common-law right to his manuscript; but ... the circulation must be restricted both as to persons and purpose, or it cannot be called a private or limited publication." Id. at 746-747.

The Ninth Circuit held that this was a general publication and copyright protection was lost. Id. at 747. Mrs. Oettinger had unlimited freedom to make copies. Id. In many instances, she forwarded copies to complete strangers. Id. Copies were not sent to a select group. Id. Moreover, the court noted that White's "only apparent purpose was to enable any persons interested to obtain a copy of the manuscript." Id. The court concluded that this was too general and broad a purpose to be a limited publication Id.

The Eleventh Circuit took a similar approach in Brown v. Tabb, 714 F.2d 1088 (11th Cir. 1983). H. Jackson Brown, Jr. created and recorded a jingle for an auto dealership which he then sold to the dealer. Id. at 1090. Id. The master recording, which Brown retained, permitted re-recording to substitute the name of the dealership. Id. Brown made two additional tapes from the master recording substituting the names of two other dealerships and sold those tapes to the named dealers. Id. Neither tape could be re-recorded. Id. A former employee of one of these dealerships, however, made an entirely new tape from that dealer's tape by re-recording the music and sound, and substituted his name for his previous employer's name. Id. Brown sued the ex-employee for copyright infringement, and the controlling issue was whether a limited or general publication occurred through the distribution of tapes to the three dealerships. Id.

The court held that this was a general publication. Id. at 1091. Although the court agreed that there was an implied limitation on the sale or distribution of the work because each tape was customized, there was no limited purpose. Id. Each owner of the tape was free to broadcast the tape as often as he wished. Id. Moreover, distribution was not made to a limited group of people. Id. The jingle was available to any dealer who was willing to purchase a copy. Id. at 1092. The three dealers who purchased a copy did not constitute a select group because the tape was available to any other dealer. Id.

Sometimes the question is very close. The Southern District of New York held that a limited publication occurred where advance copies of a speech were distributed to the press. King v. Mister Maestro, Inc., 224 F. Supp. 101 (S.D.N.Y. 1963). Dr. Martin Luther King, Jr. forwarded a copy of his "I Have A Dream Speech" to the press representatives of the organizing

committees. Id. at 103. No copies were made available to the general public, and the court noted that there was not even a suggestion that copies had been made available. Id.

However, another federal district court in Georgia examined these same events and held that a general publication of the famous speech occurred. Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 13 F. Supp.2d 1347 (N.D. Ga. 1998). The Northern District of Georgia looked at the totality of events surrounding the "I Have A Dream Speech." Id. The march organizers encouraged press coverage of the event and wanted wide dissemination of information about it. Id. at 1352. There was live coverage on both network television and radio. Id. No limitations were placed on the filming of the event. Id. In addition, although public performance does not generally constitute publication, the overwhelmingly public nature of the speech contributed to the finding that the publication was general. Id. at 1351.

The court criticized the Southern District of New York's holding in Mister Maestro and noted that additional material was available to the court in Georgia. Id. at 1353. Specifically, the speech was reprinted in the September 1963 Southern Christian Leadership Conference newsletter without a copyright notice, id. at 1348, 1352, and facts may have suggested that the advance text was available to members of the public, id. at 1353.

The Court of Appeals for the District of Columbia, however, held that distribution of 2,000 copies of a song did not constitute a general publication. Hirshon v. United Artists Corp., 243 F.2d 640 (D.C. Cir. 1957). Hirshon and his mother composed the song "London Bells Will Ring Again." Id. at 642. In 1943, his mother obtained a copyright registration for the song under Section 12 of the 1909 Act. Id. at 642, 644. Section 12 provided that an author could apply for copyright registration prior to publication, but, when copies were later reproduced for sale, deposit copies had to be submitted to the Copyright Office. Id. at 644.

Hirshon and his mother entered into a contract with Joseph Carlton in which Carlton received rights to the song for three years. Id. Carlton printed 2,500 copies of the song each stamped "Copyright 1944 by Joseph Carlton." Id. Approximately 2,000 of these copies were distributed to people in the music business. Id. Hirshon sued for infringement, and the relevant issue was whether the 1943 copyright was still valid.

The court distinguished this situation involving perfection of statutory copyright from loss of common law copyright: "it takes more publication to destroy a common-law copyright than to perfect a statutory copyright." Id. at 645. The court then went on to hold that distribution of 2,000 of the song copies did not constitute general publication. Id.

The 2,000 copies were forwarded to "broadcasting stations and professional musicians for 'plugging' purposes," and on each copy Broadcast Music Incorporated was listed as the licensing agent. Id. This type of distribution implied that the recipients could not make any use of the song without contacting the licensing agent. Id. Thus, this was not a general publication which would have invalidated the 1943 copyright registration.

Although this case involved the perfection of statutory copyright and not common-law copyright, the court's analysis is relevant. As the court noted, "it takes more publication to destroy a common-law copyright than to perfect a statutory copyright." Id. at 645. Two thousand copies distributed to a select group of people for a limited purpose with no rights of reproduction or distribution was not enough to constitute a general publication. Thus, the number of copies involved in a limited publication appears to be immaterial.

In Mills Music, Inc. v. Cromwell Music, Inc., 126 F. Supp. 54, the Southern District of New York found a limited publication where a composer of musical compositions made 150-200 mimeographed copies of his work for use by his chorus. Mills Music at 64. The copies prepared for the chorus he directed did not constitute general publication nor did those copies he gave to other choral societies. Id. at 62-64.

Application of the Law to the Facts

The three requirements for limited publication established by the case law appear to have been met in this case.

1. **Select Group of People**

The four hundred copies were sent to individuals known by either Bill Wilson or the other members of Alcoholics Anonymous. The purpose of this distribution was to ensure that the final, published version of Alcoholics Anonymous appealed to a broad range of people. Wilson and the AA members wanted to have the book reviewed and criticized by a select group

of people who would represent every type of person potentially interested in alcoholism. Bill Wilson's commentary in Alcoholics Anonymous Comes of Age supports this position. He said they thought it would be a good idea to "try the book out on our own membership and on every kind and class of person that has anything to do with drunks ... Four hundred mimeographed copies of the book were made and sent to everyone we could think of who might be concerned with the problem of alcoholism."

Unlike the situation in White, Wilson and his colleagues knew all four hundred people to whom the copies were sent. They were hand picked. The recipients represented "every kind and class of person that had anything to do with drunks." These people were equivalent to members of a trade or potential employers. See Nimmer at 4.13 [A], Brewer v. Hustler Magazine Inc., 749 F.2d 527 (9th Cir. 1986) (finding limited publication of a photograph where two hundred business cards bearing the photo were distributed to persons in the advertising industry for employment). No one could reasonably argue that only four hundred people would have been interested in alcoholism in 1938-1939. Manuscripts were not sent to every doctor, religious leader or temperance organization in the United States. A select, representative sample of individuals received copies. See Werckmeister v. American Lithographic Co., 134 F. 321, 325 (2nd Cir. 1904) ("The exhibition or private circulation of the original [book] or of printed copies is not a publication, unless it amounts to a general offer to the public.").[4]

It is well recognized that "[t]he number of persons receiving copies is not determinative; a general publication may be found when only one copy of a work reaches a member of the general public." Brown, 714 F.2d at 1091. The Ninth Circuit has found limited publication where 200 copies of a photograph were distributed. Brewer. The District Court for the District of Columbia held a limited publication occurred when 2,000 copies of a work were distributed. Hirshon. The Southern District for New York found 150-200 copies did not amount to general publication. Millis Music. "[G]eneral publication depends on the author making the work

[4] Although Werckmeister was not decided under the 1909 Copyright Act, courts have cited this case with approval when examining limited publication under the 1909 Act. See Kramer v. Rickover, 17 U.S.P.Q.2d 1427, 1432 (S.D.N.Y. 1990).

available to those interested, and not on the number of people who actually express an interest." Burke, 598 F.2d at 691.

2. Limited Purpose

The manuscripts were sent for a limited purpose. While we do not have a copy of any letter that was included with the mailing of each manuscript, from Wilson's comments in Alcoholics Anonymous Comes of Age there is no doubt the purpose was limited and the recipients knew that or they would not have reviewed, marked up and returned the mimeographs. The "Loan Copy" stamp further makes it clear that the manuscripts were distributed with a limited purpose.[6] The recipients clearly were not to retain the copy. They were to criticize and comment on the manuscript. See Nimmer at 4.13[A] (noting that advance copies to members of the trade for purpose of review or criticism is limited publication); Burnett v. Lambrino, 204 F. Supp. 327 (S.D.N.Y. 1962) (finding limited publication where manuscripts distributed to potential buyers, financial backers and others connected with production of play to arouse interest in possible sale or production). The marked-up manuscripts were to be returned to Bill Wilson. They were not to be copied and forwarded to other people, and they were not to be kept. They were on loan.

Moreover, in Wilson's words,

> By now great numbers of the 400 mimeographs which had been sent out had been returned. The total reaction was very good – indeed it was wonderful. Many helpful suggestions had been made and two of these were critically important.

This further shows that the recipients recognized that the manuscripts were distributed for a limited purpose.

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[6] See also Hirshon, 243 F. 2d at 645 (finding that lack of "Professional" stamped on 2,000 copies of unpublished song did not make distribution general publication). The Second Circuit has held that Hirshon only applies when determining "whether the copyright statute has been complied with ... [not when] forfeiture of common law rights is involved." See Continental Casualty Co. v. Beardsley, 253 F.2d 702, 707 (2nd Cir. 1958).

Moreover, these were mimeographs made in 1938-39, not bound books or the quality of photocopies we have today. They were clearly drafts, not the final published book. Even today it would be difficult to claim an unbound manuscript is a finished, published work. The physical nature of the Loan Copies in 1938 would thus also have limited the purpose of the distribution.

3. **No Right of Sale or Distribution**

Several factors establish this prong of limited publication. One is that the manuscript was stamped "Loan Copy." The stamp told the recipient that the manuscript was Wilson's property and was only on loan. A manuscript on loan is clearly not to be sold or given to someone else. Even without the stamp, however, it was obviously clear to the recipients they were to review and return the manuscript, because that is what "great numbers" of them did.

There is also no evidence of sale or distribution of the mimeographed manuscripts. Again, a large number of them were returned. Furthermore, these were not bound books; they were mimeographs. As noted above, the quality of mimeographing in 1939 was undoubtedly far inferior to today's, and it is unlikely that the mimeographs themselves were suitable for distribution or sale as a book. We do not know what the quality of a mimeograph of a mimeograph was in 1938 or 1939, if that could even be done, but we very much doubt it would have been feasible to make multiple copies of the mimeograph for redistribution even if someone ignored the Loan Copy stamp, or there was no stamp. Absent evidence to the contrary, and based on the implied, if not express, retention of rights, it is reasonable to assume that no copies of the manuscripts were made and distributed or sold.

We hope the foregoing is helpful. Please do not hesitate to call me if there are any questions.

Best regards.

Very truly yours,

Cynthia Clarke Weber

CCW:pls
(ccw/S06opnta:)