

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-1921-JLK

ARETHA FRANKLIN,

Plaintiff,

v.

ALAN ELLIOTT, D/B/A AL'S RECORDS AND TAPES,

Defendants.

**FIRST AMENDED COMPLAINT FOR A DECLARATORY JUDGMENT AND
PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF**

I. GENERAL ALLEGATIONS

1. This is a lawsuit brought against Alan Elliott by the international recording artist Aretha Franklin to stop the unauthorized release and showing for commercial purposes of a documentary film made of Ms. Franklin's 1972 concert performance at the New Missionary Baptist Church in Los Angeles, California. Ms. Franklin has never given permission for the use of this footage in any commercial or other context and has not authorized the public release of the footage. The footage was taken with the express understanding that it would not be released or used commercially without agreement and consent by Ms. Franklin.

2. Working in connection with the Telluride Film Festival, California resident Alan Elliott, individually and/or by and through his agent WME Entertainment Parent, LLC, attempted on September 4, 5, and 6, 2015 to show a full-length film, titled "Amazing Grace,"

(“the Film”) that consists almost entirely of this concert footage. *See Exhibit 1* (Telluride Film Festival Brochure).

3. Mr. Elliott had also planned to show the Film during the Toronto Film Festival in Canada, beginning September 11, 2015. Other screenings were planned by Mr. Elliott at a Chicago film festival, in Los Angeles and Mill Valley, California.

4. On Friday, September 4, 2015, this Court issued a temporary restraining order barring the Telluride Film Festival from screening the Film. On September 4, 2015, Mr. Elliott, through his counsel, was informed of the Court’s T.R.O. against the Telluride Film Festival, and on September 9, 2015 was given a copy of the transcript from the hearing where the Court explained why the Film should not be shown without Aretha Franklin’s consent.

5. After this Court’s order, the Telluride, Toronto, and Chicago Film Festivals withdrew the Film from their respective schedules.

6. In addition, on September 8, 2015, Mr. Elliott’s counsel agreed via e-mail that Mr. Elliott would not show the Film publicly. *See Exhibit 2* (September 8, 2015 e-mail of Elliott’s counsel, Todd W. Musburger stating, “We fully respect the notion that there will be no public showings. You have my word on that.”).

7. Yet, on Saturday, September 12, 2015, Ms. Franklin’s counsel was informed via press inquiries that Mr. Elliott on that day was holding a screening of the Film in Toronto for commercial purposes for film executives and others. The screening was allegedly attended by film industry executives for the particular purpose of obtaining a distribution agreement for the Film. This screening was done without Ms. Franklin’s permission or knowledge, and was contrary to Mr. Elliott’s counsel’s specific representations. *See Exhibit 3* (Ramin Setoodeh,

“Toronto: Aretha Franklin Doc ‘Amazing Grace’ Holds Secret Screening for Buyers”, *Variety* September 12, 2015).

8. Allowing the Film to be shown publicly or for commercial purposes violates Ms. Franklin’s contractual and statutory rights, her rights to use and control her name and likeness, and represents an invasion of her privacy. It is also in direct and specific violation of the Quitclaim Agreement by which Mr. Elliott obtained certain rights to the original concert footage from Warner Brothers Pictures.

9. The Quitclaim Agreement that Mr. Elliott signed for the Aretha Franklin concert footage contained a specific condition precedent informing Mr. Elliott that any use by him of the footage would require the prior permission of Ms. Franklin:

“Assignee represents, warrant and agrees that in connection with Assignee’s use of the Material, Assignee will obtain all other authorizations, consents and releases and pay all re-use fees and other compensation required by applicable collective bargaining or individual contracts or otherwise required by law. **Assignee specifically understands that Assignee will need to obtain authorization from Aretha Franklin.** Without limiting the foregoing, with respect to any music included in the Material as exhibited, **Assignee will obtain all necessary music synchronization and performance rights (particularly from Ms. Franklin) from the copyright proprietors of such music and such other persons or entities.**”

“Aretha Franklin Concert Footage (1972)” Quitclaim Agreement of December 11, 2007 between Warner Brothers Pictures and Alan Elliott and Al’s Records and Tapes. See **Exhibit 4** (“Quitclaim Agreement”)(emphasis added).

10. Ms. Franklin is an expressed third-party beneficiary of the Quitclaim Agreement between Mr. Elliott and the Assignor.

11. While over the last five years or more Mr. Elliott has attempted to obtain from Ms. Franklin her permission, Ms. Franklin has never given her consent or permission for this

footage to be publicly released or used for commercial purposes. *See Exhibit 5* (Affidavit of Ms. Franklin of September 4, 2015).

12. The album produced from the concert is the best-selling album of Ms. Franklin's fifty-year musical career. The album went "double platinum." Ms. Franklin (along with others) holds a copyright to this album.

13. The concert was filmed with Ms. Franklin's permission with the understanding and agreement that it would not be publicly or commercially released without the consent and agreement of Ms. Franklin.

14. More than 80 percent of the footage of this film is images of Ms. Franklin and Ms. Franklin's performance. *See Exhibit 6* (Declaration of Rhonda Jacobs-Sturges of 8/24/2011).

15. Ms. Franklin previously had to sue Mr. Elliott in 2011 in the Central District of California to enjoin him from releasing the Film. The lawsuit was dismissed after Elliott stated, in his verified answer to the complaint, that he had no intention to release the Film.

16. On information and belief, Mr. Elliott, and/or his agents worked through the Telluride Film Festival to publicly release and display the concert footage, with the ultimate goal to commercially benefit from its distribution, without Ms. Franklin's consent, in violation of her contractual, federal statutory and common law rights.

17. This Court issued a T.R.O. on Friday, September 4, 2015 against the Telluride Film Festival to preserve the status quo.

18. On information and belief, Mr. Elliott continues to publicly assert that he does not require Ms. Franklin's consent or authorization to show or distribute this Film publicly, or to profit from it commercially.

19. On information and belief, Mr. Elliott continues to attempt to schedule public and private screenings of the Film without permission from Ms. Franklin. These screenings are for the express commercial purpose of entering into a distribution deal for the Film.

20. Ms. Franklin is entitled to, and respectfully prays for a declaratory judgment that Mr. Elliott, his agents, employees and all those working in concert with him, be required to get permission/authorization from Ms. Franklin in order to screen, show or project the Film in public or for any intended commercial purposes.

21. Ms. Franklin is entitled to a preliminary and permanent injunction against Mr. Elliott, his agents, employees and all those working in concert with him, barring them from publicly screening, showing or projecting the Film "Amazing Grace," or any footage from the 1972 gospel concert, or using or showing the Film or any such footage for commercial purposes without the permission of Ms. Franklin.

II. THE PARTIES

22. Aretha Franklin is a legendary vocalist and artist of international renown. She has won eighteen Grammy Awards and has been named the ninth greatest singer of all time by Rolling Stone magazine. She is a resident and citizen of Detroit, Michigan.

23. Defendant Alan Elliott, d/b/a Al's Records and Tapes is a California resident and citizen. Elliott purports to be one of the producers of the Film "Amazing Grace," which consists entirely of film footage shot at the 1972 gospel concert.

III. JURISDICTION

24. There is well in excess of \$100,000 in controversy, as the rights to Ms. Franklin's name and likeness are worth millions of dollars.

25. This court has jurisdiction based on federal question jurisdiction under 28 U.S.C. §1331 because this complaint alleges a violation of the federal anti-bootlegging statute – 17 U.S.C. §1101 (1).

26. The court also has jurisdiction based on diversity of citizenship pursuant to 28 U.S.C. 1332(a)(1).

27. This Court has personal jurisdiction over Mr. Elliott because, on information and belief, he acted in concert with the Telluride Film Festival to violate Ms. Franklin's statutory and common law rights by attempting to screen the Film "Amazing Grace" in Colorado.

28. On information and belief, Mr. Elliott traveled to Colorado for the planned screening of the Film in Colorado, and was attempting to generate interest in a distribution deal for the Film while present in Colorado for the Telluride Film Festival.

29. In addition, on information and belief, Mr. Elliott's sales agents from the William Morris Endeavor agency were present in Telluride, Colorado attempting to generate sales or distribution interest in the Film. In this respect, Mr. Elliott, by himself and through his agents, has purposefully directed his actions toward the State of Colorado, has brought his purported property (the footage of "Amazing Grace") to Colorado, and has sufficient minimum contacts with the State of Colorado in relation to the conduct complained of that it is fair and proper, and consistent with due process, for this Court to exercise jurisdiction over him.

IV. ADDITIONAL FACTUAL ALLEGATIONS INCORPORATED BY REFERENCE TO PRIOR 2011 LAWSUIT AND PRIOR 2011 MOTION FOR EMERGENCY INJUNCTIVE RELIEF.

30. None of the facts have materially changed since the last time Ms. Franklin had to sue to protect her contractual rights, her rights of publicity, and rights to her name and likeness in 2011. Those facts can be seen in the Complaint attached as **Exhibit 7** (Verified Complaint in *Franklin v. Elliott*, 2:11-cv-07225-PA-JEM, Central District of California).

31. In that case, after failed negotiations with Ms. Franklin, Mr. Elliott was preparing to publicly release the Film “Amazing Grace” without Ms. Franklin’s consent.

32. The case was dismissed by the court after Mr. Elliott professed to having no intent to proceed with the public commercial release of the Film. *See Exhibit 8* (Answer of Alan Elliott at ¶27 -- denial “to the extent that it alleges that Defendants are proceeding with the release of the unauthorized film ‘Amazing Grace’.”)

33. If Mr. Elliott were to conduct any unauthorized public or commercial showings of the 1972 concert footage, such showings would constitute an invasion of privacy, and exploitation and misappropriation of Ms. Franklin’s name and likeness for commercial and other purposes in violation of California and Colorado common law and federal statutory law.

34. Ms. Franklin further incorporates the factual allegations and exhibits found in the Ex Parte Application for Preliminary Injunction and Associated Exhibits filed on August 31, 2011 in the matter of *Franklin v. Elliott*, 2:11-cv-07225-PA-JEM, attached as **Exhibit 9**.

COUNT ONE:

DECLARATORY JUDGMENT PURSUANT TO 28 U.S.C. §2201

35. Ms. Franklin adopts by reference the prior allegations.

36. There is a present existing controversy between Ms. Franklin and Mr. Elliott.

37. Mr. Elliott apparently believes that he is entitled to show, distribute, and profit from the footage of Ms. Franklin’s 1972 gospel concert without obtaining permission or authorization from Ms. Franklin.

38. Pursuant to contract, state common law, and federal statute, Ms. Franklin has the right to control the use of her name and likeness, and the footage of her 1972 gospel concert may not be used by Mr. Elliott without her explicit authorization.

39. Pursuant to Fed. R. Civ. Proc. 57, Ms. Franklin is entitled to a declaration of the rights and other legal relations between herself and Mr. Elliott with respect to the 1972 gospel concert footage and Mr. Elliott’s use of the Film “Amazing Grace.”

40. Pursuant to Rule 57, this Court may order a speedy hearing of this declaratory judgment action and advance the matter on the calendar.

COUNT TWO:

PRELIMINARY AND PERMANENT INJUNCTION

41. Ms. Franklin adopts by reference the prior allegations.

42. Ms. Franklin seeks to enjoin the Defendant Alan Elliott , his agents, employees and all those working in concert with him, from infringing upon her contractual rights, as agreed to and stated in the Quitclaim Agreement, and her right of publicity by proceeding with the unauthorized release of the Film “Amazing Grace.”

43. The usual function of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits.

44. Ms. Franklin has a high probability of success and will be irreparably injured if an injunction is not released.

45. The raw footage has been locked away in the vaults of Warner Brother Studios for nearly forty (40) years. There is no urgency in its immediate release. Conversely, Ms. Franklin will be irreparably injured if the Film is released.

46. In this instance, the status quo is the last uncontested status which preceded the pending controversy. Ms. Franklin therefore seeks to enjoin Defendant Elliott from publicly releasing or using for commercial purposes any film, documentary, movie or concert footage which involves Ms. Franklin's 1972 performance at the New Missionary Baptist Church in Los Angeles, California.

47. Ms. Franklin can and will demonstrate the likelihood that she will prevail on her claim for violation of her contractual rights and rights of publicity against Defendant Elliott. Ms. Franklin faces irreparable harm unless Defendant Elliott is restrained from engaging in the infringing conduct.

48. WHEREFORE, Ms. Franklin requests this Court grant a temporary and permanent restraining order and injunction barring Mr. Elliott, his agents, employees and all those working in concert with him, from publicly releasing or using for commercial purposes of the Film or any footage from Ms. Franklin's 1972 gospel concert.

COUNT THREE: VIOLATION OF COMMON RIGHT TO PUBLICITY
(STATE LAW COUNT)

49. Ms. Franklin adopts by reference all prior allegations.

50. California's law regarding the Right to Publicity is governed by its common law and statutory laws which protect the use of a person's "name, voice ... or likeness" Cal. Civ. Code § 3344(a).

51. California common law recognizes this right of publicity in a person's name, likeness and identity.

52. Colorado similarly recognizes the rights of publicity in a person's name, likeness and identity. The misappropriation of such is a tort. *See Joe Dickerson & Associates v. Dittmar*, 34 P.3d 995 (Colo. 2001).

53. Defendant Elliott, by publicly displaying this Film and footage from the 1972 gospel concert, is using Ms. Franklin's identity or likeness, for commercial gain, without authorization.

54. Not only is Ms. Franklin's identity used in the Film which is being released without authorization, but it was also used in promotional materials as well.

55. If the Film is shown, Defendant Elliott will continue to be advantaged from the appropriation, or more accurately, the misappropriation of Ms. Franklin's name and likeness.

56. Additionally, the advantages that Defendant Elliott has gained and continues to gain exceed those strictly economic in nature and include the commercial advantages of enhancing his professional repute and industry clout which in turn leads to further commercial opportunities and reputational gain for Defendant Elliott.

57. Defendant Elliott is benefiting from the misappropriation of Ms. Franklin's name and likeness in direct and indirect economic ways, as well as in ways not limited to economics at all.

58. Defendant Elliott has attempted for over five (5) years to obtain Ms. Franklin's consent to release the movie or to use her name and likeness in advertising for the Film. The end result is that Defendant Elliott has been unable to obtain any such consent from Ms. Franklin.

59. Use of this footage and other images of Ms. Franklin, without Ms. Franklin's consent, violate her rights of publicity.

WHEREFORE, Ms. Franklin requests this Court grant her the injunctive relief prayed for above together with just and equitable damages in excess of \$75,000, including her attorney fees and costs. Ms. Franklin also requests this Court award punitive and exemplary damages designed to deter similar future misconduct by others.

COUNT FOUR: ANTI-BOOTLEGGING CLAIM
(FEDERAL QUESTION JURISDICTION)

60. Ms. Franklin adopts the prior paragraphs.

61. 17 U.S.C. Sec. 1101(l) provides in pertinent part:

(a) Unauthorized Acts.--Anyone who, without the consent of the performer or performers involved—

(1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation,

(2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance, or

(3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phono record fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States, shall be subject to the remedies provided in sections 502 through 505, to the same extent as an infringer of copyright .

62. Ms. Franklin is the performer of the Film and footage in question.

63. Defendant Elliott has publicly expressed his intent to release or distribute large portions of the content of the Film without Ms. Franklin's consent.

64. The Film in question includes both sounds and images.

65. Defendant Elliott wishes to release the Film of Ms. Franklin's performance commercially to the public at large.

66. Defendant Elliott is therefore in violation of the foregoing statute.

67. Ms. Franklin will be affirmatively harmed if this Film is released.

68. Ms. Franklin has no other recourse other than an application for relief to this Court. Despite a lawsuit in 2011, and this Court's injunction against the Telluride Film Festival, on September 4, 2015, Defendant Elliott continues and persists in using this Film for his own commercial purposes.

WHEREFORE, Ms. Franklin requests this Court grant her the injunctive relief prayed for above together with just and equitable damages in excess of \$75,000, including her attorney fees and costs. Plaintiff also requests this Court award punitive and exemplary damages designed to deter similar future misconduct by others.

COUNT FIVE: VIOLATION OF RIGHT OF PUBLICITY
(STATE LAW COUNT)

69. Ms. Franklin adopts by reference the prior allegations.

70. Several courts have held that a celebrity's property interest in his or her name and likeness is unique, and cannot reasonably be compensated by money damages.

71. Thus, Defendant Elliott's unauthorized use of Ms. Franklin's name, voice and likeness is per se causing irreparable harm.

72. Additionally, Defendant Elliott's disregard to Ms. Franklin's rights of publicity and insistence on releasing the Film without authorization undermines the value of Ms. Franklin's property interest in his or her name or likeness (as a celebrity).

73. The market for the publicity and commercial rights would collapse, and the rights themselves would be rendered valueless without the ability of the law to adequately protect them through injunctions.

74. Punishing violations of publicity rights after the fact through damages cannot effectively enforce the law in this respect to the same degree that issuing an injunction can and often does.

75. By releasing the Film without authorization and using it for commercial purposes, Defendant Elliott will get publicity for himself in a value that exceeds \$75,000.00.

76. WHEREFORE, Ms. Franklin requests this Court grant her the injunctive relief prayed for above together with just and equitable damages in excess of \$75,000, including her attorney fees and costs. Plaintiff also requests this Court award punitive and exemplary damages designed to deter similar future misconduct by others.

COUNT SIX:

BREACH OF CONTRACT—THIRD PARTY BENEFICIARY

77. Ms. Franklin adopts the prior paragraphs.

78. In the Quitclaim Agreement between Warner Brothers Pictures and Defendant Elliott previously outlined in this Amended Complaint, Ms. Franklin's consent was an explicit condition precedent to Defendant Elliott using the film footage that he obtained via the agreement.

79. Ms. Franklin was an express third-party beneficiary of the limiting language in the Quitclaim Agreement between Defendant Elliott and Warner Brothers.

80. Without Ms. Franklin's consent, Defendant Elliott has unilaterally decided the express condition precedent of the Quitclaim Agreement requiring Ms. Franklin's consent is a nullity. Defendant Elliott has decided to release the Film in violation of the terms of the Quitclaim Agreement for his own commercial gain.

81. Ms. Franklin repeatedly has, over the last five (5) years, made it clear to Defendant Elliott that he does not have her consent.

82. As an express third-party beneficiary under this agreement, Ms. Franklin has standing to enforce the Quitclaim Agreement.

83. Defendant Elliott accepted the film footage of the 1972 gospel concert performance, subject to all of the terms and conditions of the Quitclaim Agreement, not those that he selective decided to abide by over time.

84. This Court must enforce the agreement as written. Defendant Elliott needed Ms. Franklin's consent to proceed and never obtained the same.

85. WHEREFORE, Ms. Franklin requests this Court grant her the injunctive relief prayed for above together with just and equitable damages in excess of \$75,000 including her attorney fees and costs.

PRAYER FOR RELIEF

Wherefore, Ms. Franklin asks for a judgment in her favor and the following relief:

- A. A declaratory judgment in favor of Ms. Franklin declaring that Defendant Alan Elliott and anyone acting in concert with Mr. Elliott must obtain authorization from Aretha Franklin prior to any public screening or**

commercial use of either the film *Amazing Grace*, or any of the 1972 gospel concert footage.

- B. A preliminary and permanent injunction barring Defendant Mr. Elliott or anyone acting in concert with Defendant Elliott from publicly showing, screening, releasing or otherwise distributing footage of the Film or any portions of the 1972 gospel concert or using such footage for any commercial purpose (including screenings for the purpose of obtaining distribution deals) without first obtaining express authorization from Ms. Franklin**
- C. An award of damages.**
- D. An award of attorney's fees and costs.**
- E. Such other relief as would be in the interests of justice.**

Dated: September 13, 2015

Respectfully submitted,

s/ N. Reid Neureiter

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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on September 13, 2015, I electronically filed the foregoing **FIRST AMENDED COMPLAINT FOR A DECLARATORY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

- **N. Reid Neureiter**
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s/ Faith Farina for N. Reid Neureiter
