

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-01921-JLK

ARETHA FRANKLIN,

Plaintiff,

vs.

NATIONAL FILM PRESERVE, LTD, a/k/a
TELLURIDE FILM FESTIVAL,

Defendant.

REPORTER'S TRANSCRIPT
Hearing on Motion for Temporary Restraining Order

Proceedings before the HONORABLE JOHN L. KANE, Judge,
United States District Court for the District of Colorado,
commencing at 3:14 p.m., on the 4th day of September, 2015, in
Courtroom A-701, United States Courthouse, Denver, Colorado.

Proceeding Recorded by Mechanical Stenography, Transcription
Produced via Computer by Janet M. Coppock, 901 19th Street,
Room A-257, Denver, Colorado, 80294, (303) 335-2106

APPEARANCES

N. Reid Neureiter of Wheeler Trigg O'Donnell, LLP,
370 17th Street, Suite 4500, Denver, CO 80202-5647, appearing
for the Plaintiff.

Jack Markham Tanner, Cecil E. Morris and
Scott T. Rodgers of Fairfield & Woods, P.C., 1801 California
Street, Suite 2600, Denver, CO 80202-2645, appearing for the
Defendant.

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PROCEEDINGS

THE COURT: This is 15-CV-1921, Aretha Franklin,
plaintiff, versus National Film Preserve, Ltd., also known as
the Telluride Film Festival, defendant. The matter comes
before the Court on a motion for temporary restraining order.

Pursuant to the local rules of this court, we require
counsel to make every effort, plaintiff's counsel to make every
effort to give notice to the other side so that we don't
proceed with an *ex parte* proceeding. Nevertheless, the
temporary restraining order is governed by Rule 65 of the
Federal Rules of Civil Procedure and we will operate on that
basis.

I do note that the defendant has counsel here and
representing them. So are you ready to proceed, Mr. Neureiter?

MR. NEUREITER: Yes, Your Honor.

THE COURT: Go ahead, please.

1 MR. NEUREITER: Your Honor, I, as a matter of
2 procedure, one question is whether you received the late filed
3 additional affidavit.

4 THE COURT: Yes, the affidavit of Aretha Franklin, I
5 did see it and read it. And I have read the other affidavits
6 and the filings that you submitted to me. I have to tell you I
7 have only read them through once.

8 MR. NEUREITER: Reid Neureiter, Wheeler Trigg
9 O'Donnell, on behalf of the plaintiff, Aretha Franklin.

10 We would, if Your Honor pleases, like to call by
11 telephone Ms. Franklin. She is waiting by her phone in Detroit
12 and I have her number. I know I talked with your clerk and she
13 said it may or may not be feasible.

14 THE COURT: Sure. That's fine.

15 MR. NEUREITER: I have her number. It's xxx-xx-xxxx.

16 COURTROOM DEPUTY CLERK: Could you say it again,
17 please?

18 MR. NEUREITER: xxx-xxx-xxxx.

19 THE COURT: You may proceed. She is on the phone.

20 MR. NEUREITER: Ms. Franklin, can you here me? This
21 is Reid Neureiter, your lawyer here in Denver.

22 THE WITNESS: Not very clear. I can hear you, but you
23 are not very clear.

24 MR. NEUREITER: Your Honor, may I approach the phone?

25 THE COURT: Yes, whatever you need. Go ahead.

1 MR. NEUREITER: Ms. Franklin, we are here in the court
2 in front of Judge Kane.

3 THE WITNESS: Yes.

4 MR. NEUREITER: And the Film Festival is represented
5 by counsel and we are going to ask you some questions. You
6 will be under oath, and so what I will ask is for you to raise
7 your right hand and the clerk will swear you in.

8 **(Aretha Franklin was sworn.)**

9 THE WITNESS: Well, just a moment. No one told me
10 that I had to testify this afternoon.

11 MR. NEUREITER: Oh, I am sorry.

12 THE WITNESS: I need to speak with my attorney. No
13 one said I had to testify. You just said that I would be
14 speaking with the judge.

15 MR. NEUREITER: That's right.

16 If I could consult with my client for a moment, Your
17 Honor.

18 THE COURT: Yes.

19 MR. NEUREITER: Thank you.

20 (Brief discussion off the record.)

21 THE WITNESS: Good afternoon, everyone.

22 MR. NEUREITER: Thank you, Ms. Franklin. So I will
23 just for the record ask the clerk to probably clarify the oath
24 that you just took, if Your Honor believes it's necessary.

25 THE COURT: Yes, I do.

1 **(Aretha Franklin was sworn.)**

2 *THE WITNESS:* Yes.

3 *BY MR. NEUREITER:*

4 Q. Ms. Franklin, we are here in Denver and we filed on your
5 behalf a complaint to try and stop a movie down in Telluride.
6 You are aware of that, correct?

7 A. Yes. I became aware of that two days ago.

8 Q. And the movie, as you understand it, has to do with a
9 concert that you performed in in 1972?

10 A. Yes, Amazing Grace.

11 Q. Can you tell the judge a little bit about your
12 participation in that concert and whether you knew whether it
13 was being videotaped or not?

14 A. I believe that we were recording. I was at the piano and
15 much and most of and all of my focus was on what I was going to
16 sing and trying to retain lyrics and so on.

17 Q. You did know that it was being videotaped, though, correct?

18 A. I believe someone was taping it, yes. I believe someone
19 was taping it. It was a very long time ago.

20 Q. Did anybody ever tell you that --

21 A. Of course, I know they were now.

22 Q. Yes. Did anybody ever tell you how that footage would be
23 used?

24 A. No.

25 Q. When did you become aware that this film would be shown at

1 the Telluride Film Festival?

2 A. A few days ago. I either read it somewhere or saw it
3 on-line.

4 Q. And you have been involved or people working for you have
5 been involved in negotiations with a Mr. Elliott; is that true?

6 A. That's what I am told by my former attorney, Arnold Reed,
7 and now by Dykema Gossett and Fred and Sherrie. Yeah, Fred and
8 Sherrie -- Ms. Farrell, that's her name.

9 Q. And without -- could you tell the Judge when you first
10 learned that Mr. Elliott intended to make a film of your
11 concert from 1972?

12 A. A few years back I was told that he had done some work on
13 it or something like that and that he had improved the sound or
14 something like that. And whoever it was I was talking to, I
15 said, "They didn't have to improve anything from what I -- you
16 know, from what we recorded. There was just no reason to
17 improve anything."

18 Q. And did there come a time when Mr. Elliott tried -- asked
19 for your permission or tried to get your authorization to
20 release the film?

21 A. With respect to what my attorney tells me.

22 Q. Well, don't tell us what your attorney told you. Let me
23 ask the question a different way.

24 A. Me personally, no.

25 Q. Did -- was there a time when you had to sue Mr. Elliott

1 before this incident, before here in Denver, but back in
2 California?

3 A. Yes. My attorney, Arnold Reed, did.

4 Q. And why was that?

5 A. To get an injunction to stop that because they were
6 not -- A, they didn't have my approval. That's the first
7 thing. And according to my attorney, that's what we should do
8 and that's -- I agreed with that.

9 Q. And why is it so important?

10 A. Because he was going to use my likeness and use my name to
11 reap financial benefits. And we just -- he simply was not
12 being honorable and he was not being fair the way he was going
13 about things.

14 Q. And you mentioned your name and your likeness.

15 A. Yes.

16 Q. Is that important to you? And if so, could you tell the
17 judge?

18 A. Oh, absolutely, of course, as much as it would be to
19 anyone, of course. For them to show that film and for him to
20 just completely and totally and blatantly ignore me where my
21 name and reputation, my concern, it would be terrible.

22 This is my 55th year in the business, and he is all
23 but fearless. And for him to be able to do that, that would
24 encourage other people in and out of the industry to just come
25 on me the same way, do the same thing and have no respect for

1 me.

2 Q. What we are asking the Judge to do is to stop Mr. Elliott
3 from showing his film at the Telluride Film Festival down in
4 Telluride tonight in just a few hours. Why is that important
5 to you?

6 A. For the same reasons, for the very same reasons.

7 Q. Do you continue to give concerts today, Ms. Franklin?

8 A. I am sorry?

9 Q. Do you continue to perform in concerts today?

10 A. Oh, yes, yes, absolutely.

11 Q. Do you allow people to videotape your concerts?

12 A. No, not without my approval. And that is in my contract.
13 It's in my rider and in my contracts. And for archival
14 purposes on occasion I will let a venue here and there do that,
15 but only with my approval.

16 Q. And do you take steps at your concerts with security or
17 other -- by other means to keep people from videotaping your
18 concerts?

19 A. Yes. I just most recently had to do that.

20 Q. Where was that?

21 A. With -- my security people had to stop a gentleman here in
22 Detroit who was just filming everything that we were doing. I
23 think I was having a private party and he just came in with his
24 camera and just started filming.

25 MR. NEUREITER: Thank you, Ms. Franklin.

Aretha Franklin - Cross

1 The way the procedure works now is me, your lawyer,
2 Reid Neureiter, is going to sit down, and the lawyer for the
3 Film Festival is going to ask you a few questions.

4 *THE WITNESS:* Okay. Good afternoon, Your Honor.

5 *MR. MORRIS:* Good afternoon, Your Honor.

6 If I may, Cecil Morris from the law firm of Fairfield
7 and Woods on behalf of the Film Festival. Also with me this
8 afternoon, Your Honor, is Scott Rodgers and Jack Tanner.

9 *THE WITNESS:* I can't hear you very well, sir.

10 *MR. MORRIS:* Thank you, Your Honor.

11 Ms. Franklin, I was just introducing myself. My name
12 is Cecil Morris. I am an attorney at Fairfield and Woods here
13 in Denver, and I am here with my colleagues, Scott Rodgers and
14 Jack Tanner. We represent the Film Festival.

15 *THE WITNESS:* Good afternoon.

16 **CROSS-EXAMINATION**

17 *BY MR. MORRIS:*

18 Q. I just have a few questions, if I may, to ask.

19 Now, it's your position that you only came to know
20 about the use of the film at the Telluride Film Festival in the
21 past few days?

22 A. Yes.

23 Q. But --

24 A. I'd never heard of Colorado before.

25 Q. Okay. But isn't it true, Ms. Franklin, that you or your

Aretha Franklin - Cross

1 agents have been in discussions with a third party,
2 Mr. Elliott, about potential distribution of that film?

3 A. I have not been in discussions with anyone, sir. My
4 attorney I believe was in discussions with Mr. Elliott's
5 attorney.

6 Q. Okay. And your attorney is your agent for this purpose.

7 And how long has that gone on? Has that been a couple
8 years now?

9 A. With respect to what, to Amazing Grace or Colorado or what?

10 Q. An agreement to distribute the film Amazing Grace.

11 A. With respect to Amazing Grace, I heard lately that it was
12 going to be released in Toronto I guess in the last, what,
13 maybe two, maybe three weeks.

14 Q. Okay. That was two or three weeks ago.

15 But my question, Ms. Franklin, is more general. How
16 long have you had discussions going on through your attorney
17 with Mr. Elliott about promotion and distribution of the film?

18 A. I don't know exactly how long he has been talking to him.

19 Q. But it's more than a year, right?

20 A. Oh, this has come up before. It has come up before, yes.

21 Q. And it's come up more than a year ago, right?

22 A. It has come up maybe -- I am pretty sure it was more than a
23 year, but I understand we had got an injunction and that was
24 the end of it. And he also told me that he got something from
25 Mr. Elliott that he would not do this anymore, he wouldn't try

1 this anymore.

2 Q. Now, isn't it true that you had a dispute with this third
3 party, Mr. Elliott, and you entered into a settlement agreement
4 with him. That was in about 2011; is that right?

5 A. No. I don't know anything about any settlement agreement.
6 We had not settled anything with Mr. Elliott.

7 Q. All right. How did he come to agree not to use your
8 likeness or image or any of your recordings without your
9 consent? Where did that agreement come from?

10 A. How did he what?

11 Q. The agreement --

12 A. Can you say that again?

13 Q. Yes. Where did this agreement come from that you mentioned
14 that Mr. Elliott, the third party, agreed he would not use your
15 likeness or image or the recordings without your consent?
16 Where did that agreement come from?

17 A. I don't know anything about any such agreement where he
18 would not use my likeness.

19 Q. All right. Now, it's your point in terms of not allowing
20 videotaping at your current concerts is that pursuant to your
21 contracts you allow that only with your consent.

22 A. Correct.

23 Q. And it's your position --

24 A. There are occasions where people may tape that I am unaware
25 of, like people with their cellphones, things like that, but

1 nothing other than that. I would not allow it --

2 Q. I understand.

3 A. -- unless I was filming for myself.

4 Q. I understand. We are talking about other folks who might
5 be doing that.

6 A. No.

7 Q. Your point --

8 A. Only cellphones, sir.

9 Q. My question, Ms. Franklin, is it's your position that it's
10 your right to control your image and your recordings; isn't
11 that right?

12 A. That I what?

13 Q. You control your image and your recordings.

14 A. I do the best that I can, but the contracts are what we
15 work on responsibly.

16 Q. Right. And isn't it true that you've entered into
17 contracts with various folks over time as to your various
18 recordings or the right to use those recordings?

19 A. As I have signed agreements with a recording company.

20 Q. Right. That's yes, right?

21 A. As I recorded -- signed agreements with them, with
22 recording companies, yes.

23 Q. And there was an agreement with Atlantic Recording
24 Corporation and Warner Brothers Seven Arts, Inc. that you had;
25 isn't that right?

1 A. There was an agreement with Atlantic and whom?

2 Q. Warner Brothers Seven Arts, Incorporated.

3 A. No, I don't have an agreement with Warner. I had an
4 agreement with Atlantic Records.

5 Q. Do you remember an agreement with them in April of 1968?

6 A. Not particularly. I know around that time I did sign an
7 agreement to record with them either in 1967, I believe it was,
8 '67, not '68, but I am not sure whether it was '67 or '68. It
9 was a long time.

10 Q. I understand. But you did enter into contracts giving
11 people certain rights and certain of your intellectual
12 property, your recordings or image; isn't that true?

13 A. Now, what is that again?

14 Q. You entered into contracts at different points in time that
15 other people could use your image or your recordings; isn't
16 that true?

17 A. No, that is not true, not to my knowledge. I signed a
18 contract, a recording contract to record.

19 MR. MORRIS: Okay. If I may, Your Honor, I have given
20 a copy of the document to opposing counsel and I have a copy
21 for the Court. May I approach -- or with the clerk?

22 THE COURT: Thank you very much. Yes.

23 MR. MORRIS: Your Honor, we, of course, just became
24 aware of this this afternoon, so -- and didn't know that
25 Ms. Franklin was going to be testifying, so no way to get it to

1 her in advance, but we have given it to opposing counsel and
2 talked to opposing counsel about it. We want Your Honor to
3 have it.

4 BY MR. MORRIS:

5 Q. Ms. Franklin, I am going to ask you a few questions about a
6 document. You don't have it there in front of you, I suppose.

7 Do you have any reason to disbelieve that you entered
8 into a contract with Atlantic Recording Corporation on April 1,
9 1968 for the use of your recordings?

10 MR. NEUREITER: Your Honor --

11 A. Do I have any reason to disbelieve it?

12 BY MR. MORRIS:

13 Q. Yes, ma'am.

14 MR. NEUREITER: Your Honor, we would object --

15 A. I signed a recording contract with Atlantic Records in
16 either '67 or '68.

17 MR. NEUREITER: Your Honor, if I may object for a
18 moment.

19 A. That's when I first signed with Atlantic Records, '67 or
20 '68, and I believe it was '67.

21 MR. NEUREITER: Ms. Franklin, hold on one moment. I'm
22 going to make a point to the Court.

23 Your Honor, we would stipulate to the authenticity of
24 this document. We do think it's unfair to ask a woman over the
25 phone about a document. And I think the document speaks for

1 itself and the lawyers can argue about what it means.

2 THE COURT: Sustained.

3 BY MR. MORRIS:

4 Q. Is it possible, Ms. Franklin, that you gave the right to
5 the recording during this period of time covering Amazing
6 Grace, that you contracted to give those rights to Atlantic
7 Recording and Warner Brothers? Is that possible?

8 A. No, no.

9 Q. Not possible.

10 A. Definitely not. I signed an agreement with Atlantic
11 Records.

12 MR. MORRIS: Okay. That's all I have. Thank you very
13 much, Ms. Franklin.

14 THE COURT: Anything else, Mr. Neureiter?

15 MR. NEUREITER: Just a couple questions.

16 **REDIRECT EXAMINATION**

17 BY MR. NEUREITER:

18 Q. Ms. Franklin, one very brief question. Could you remind
19 the Court how old you are?

20 A. Oh, do we have to talk about that?

21 Q. Is 73, 72, is that about right?

22 A. All right. Okay. I am 72.

23 Q. Okay. And you do remember signing a recording contract,
24 correct?

25 A. Yes. I signed two agreements with Atlantic, one in 1967, I

1 am pretty sure it was '67, and one much, much later around,
2 what, '79, maybe, or that's when it was over, in 1979,
3 something like that.

4 Q. And you do not recall ever signing any contract for movies
5 or films or television with either --

6 A. Not to my knowledge, no, definitely not. Not to my
7 knowledge, no.

8 MR. NEUREITER: Thank you. No more questions, Your
9 Honor.

10 A. I signed a recording contract.

11 THE COURT: All right. You can hang up.

12 Thank you very much, Ms. Franklin.

13 MR. NEUREITER: Thank you, Ms. Franklin.

14 THE WITNESS: Thank you. Thank you so much.

15 MR. NEUREITER: That, Your Honor, was going to be the
16 evidentiary part of our presentation. I would hope to make
17 argument now using some of the materials that we have submitted
18 along with our motion.

19 THE COURT: Well, you have the affidavits that are
20 already here. Those are part of the record, yes. You can base
21 your arguments on the affidavits that are on file plus the
22 testimony of Ms. Franklin.

23 MR. NEUREITER: The additional document that we would
24 seek to introduce into evidence would be Franklin TRO
25 Exhibit 2, which is the Telluride brochure.

1 THE COURT: Yes.

2 MR. NEUREITER: We would also seek to introduce
3 Franklin TRO Exhibit 3, which is the Quitclaim Deed from Warner
4 Brothers Pictures to Mr. Elliott.

5 THE COURT: Yes.

6 MR. NEUREITER: Franklin TRO Exhibit 4, which is a
7 letter to Ms. Franklin from Mr. Elliott dated November 12th,
8 2008. And behind that cover letter is a September 10th, 2008
9 proposal to Ms. Franklin, a formal proposed contract to option
10 your rights for the Amazing Grace film project to Ms. Franklin.
11 That's also included in TRO Exhibit 4.

12 THE COURT: Right.

13 MR. NEUREITER: And also I think the Court can take
14 judicial notice of the fact that there was a Central District
15 of California lawsuit filed in 2011 for an injunction. And I
16 think the Court records reflect that that case, there is no --
17 I think it ultimately was dismissed for failure to prosecute.

18 THE COURT: The case was dismissed. And as I read the
19 pleadings, it was because the defendant in the case said that
20 he had no intention of using or releasing for public purposes
21 the film.

22 MR. NEUREITER: That's correct. So I think your
23 recollection is -- matches mine.

24 So at this point we would like to -- I would like to
25 move to the argument. This is a motion for temporary

1 restraining order, preliminary injunction. It is extraordinary
2 relief. We recognize that. The standards that the Court
3 should look to are whether the requested injunction maintains
4 the status quo ante, the likelihood of success on the merits,
5 whether there is irreparable harm and the balancing of the
6 equities.

7 In terms of maintaining the status quo, I think the
8 status quo, although there have been the occasional odd
9 showings of this film, there have not been any broad public
10 showings of this film of the nature of the Telluride Film
11 Festival, which I think is a renowned film festival. It is
12 expected to be shown three times and get wide-spread release.
13 The status quo ante is nondisclosure of this film rather than
14 full public disclosure of the film.

15 In terms of likelihood of success on the merits, we
16 really make two substantive legal claims. The first is
17 invasion of privacy, use of name and likeness for commercial
18 purposes, right to publicity. Those torts are all kind of
19 mixed up, but the standard elements appear to be the
20 unauthorized use of the name or likeness of a person for
21 commercial or other purposes with damage to the person whose
22 likeness is being used caused by the person who is doing the
23 misappropriation.

24 In this case it's clear that the Telluride Film
25 Festival is using the likeness. This would be a distribution

1 of the film that I think everyone concedes is effectively
2 essentially about Aretha Franklin. It is a broadcast of her
3 concert from 1972 at the -- I think it's the Mission Baptist
4 Church in Los Angeles.

5 If you look at the Telluride Film Festival brochure,
6 it's got Amazing Grace right there on the fifth page talking
7 about how in 1972 Aretha Franklin arrived at the New Temple
8 Missionary Baptist Church, big picture of Aretha Franklin.
9 They are using her name and likeness. Whether Telluride Film
10 Festival makes money out of it, it's certainly getting
11 publicity for the -- if not the worldwide premier, certainly
12 the first real public distribution and showing of this film.
13 So I think we have shown the elements necessary there.

14 The only hiccup in this is I believe -- and we got a
15 hint of it from the cross-examination of Mr. Morris -- that
16 there was a contract in 1968. And this was the exhibit that
17 Mr. Morris showed. And it is, in fact, an agreement dated the
18 1st day of April 1968 between Atlantic Recording Corporation,
19 Warner Brothers Seven Arts, Inc. and Aretha Franklin.

20 But if you read the first paragraph, Paragraph A1:
21 The artist hereby grants and company engages the artist's
22 exclusive personal services during the term hereof in
23 connection with the production of phonograph records.

24 That is Paragraph 1A of a 25-page document.

25 Nowhere, nowhere in any of these 25 pages, legal size

1 no less, is there any mention of film, video or movie. There
2 is, and I will be candid, a mention on Page 8, Paragraph A
3 starting at the top, and I think you have to look at Page 7 as
4 well, Paragraph 4 at the bottom of Page 7 that talks about:
5 All recordings hereunder and all derivatives made from,
6 together with the performances embodied thereon, thereon
7 meaning on the recording, shall be entirely the company's
8 property.

9 And then there is this talk on the next page, Page 8,
10 about the right to use and publish and permit others to use and
11 publish the artist's name and likeness and all biographical
12 material concerning the artist to write and publish. And if
13 you read the context of that entire page, it's all in the
14 context of publicizing the artist's phonographic records.
15 There is not a single mention anywhere, and Ms. Franklin is
16 absolutely right, she never signed any contract signing away
17 her rights to her name and likeness.

18 How do we know that? If you look at the Quitclaim
19 Deed, which we -- by which Mr. Elliott -- and this is where he
20 claims to derive all his rights. It's Franklin TRO Exhibit 3.
21 That Quitclaim Deed from Warner Brothers says you get a
22 quitclaim deed to our footage, but "Assignee," that's
23 Mr. Elliott, "specifically understands that Assignee will need
24 to obtain authorization from Aretha Franklin."

25 So the party that signed this 1968 agreement and took

1 the video footage in 2007 when it gives the quitclaim to
2 Mr. Elliott says, hey, we are giving you all we got, but we
3 want you to know we are not -- you have to get authorization
4 from Aretha Franklin. It actually says it twice. Later on it
5 says, "Assignee will obtain all necessary music synchronization
6 and performance rights (particularly from Ms. Franklin) from
7 the copyright proprietors."

8 So if somebody wants to interpret what this 1968
9 document means, I submit that you look to what the same
10 organization said in 2007 when they sold the rights to the
11 footage and they said we -- you need to go to Ms. Franklin to
12 get authorization.

13 How else do we know that that's the correct
14 interpretation? Because of the behavior of Mr. Elliott in
15 negotiating over the years. We heard from Mr. Morris trying to
16 get from Ms. Franklin that they have been negotiating, you
17 know, recognizing his need to get authorization to use this.

18 So in terms of likelihood of success on the merits, we
19 have I believe proved beyond certainly a preponderance of the
20 evidence, but whatever the standard we need to meet to get a
21 preliminary injunction, a likelihood of the invasion of privacy
22 tort.

23 The second one is the anti-bootlegging statute, which
24 this fits clearly within, 1000 -- I think I mistyped it in the
25 complaint, but it's 17 U.S.C. 1101 that is specifically

1 designed to give the performing artist the right to control the
2 distribution of their live performances.

3 And very importantly, that gives the same injunctive
4 rights to an artist that's trying to control their name and
5 likeness in a live concert performance as you would have in a
6 copyright context. So Congress has spoken about the potential
7 for irreparable harm in these contexts. And that's another
8 element of the preliminary injunction, whether there is
9 irreparable harm.

10 I think, you know, in a lot of contexts irreparable
11 harm is like, okay, we did it. If we are wrong, we can pay you
12 later. Aretha Franklin is special. There is probably not a --
13 I would say a celebrity in the United States who spans racial
14 classes, age classes, economic classes over decades. She has
15 been a wonderful artist.

16 And as you heard, she cares about how she is
17 presented. And it would be to her great detriment and to the
18 detriment of the principle that great artists should be able to
19 control their concert performances if this were to be shown
20 without her permission.

21 If you look to the balancing of the equities, you
22 know, there are probably a couple hundred people down in
23 Telluride who are looking forward in three hours to watch this
24 movie. There are a lot of movies being shown in Telluride this
25 week. The Telluride Film Festival should have known based on

1 the prior lawsuit in 2011 that this was going to be a problem.

2 It was publicized that there had been a dispute.

3 Mr. Elliott I think has been fighting publicly trying to get
4 this distributed, has been unable to reach an agreement with
5 Ms. Franklin. And they decided to go ahead without contacting
6 her. Her affidavit says nobody from Telluride ever contacted
7 her. She learned yesterday about this, and I was retained at
8 6:00 p.m. last night. So if there are spelling errors or an
9 occasional typo in the complaint, I apologize.

10 But this has been -- in terms of the balancing of the
11 equities, I would suggest that they weigh strongly in favor of
12 protecting the rights of the artist to control her
13 presentation, her concert performance. And people cannot by
14 *fiat* decide to take that right away from them. And we
15 respectfully pray that the Court enter the requested injunction
16 and bar Telluride from showing the film.

17 I would ask also that any bond that be posted be of a
18 *de minimis* nature because I seriously do not think that the
19 harm to the film festival would be significant in the event the
20 Court erroneously issues the injunction.

21 THE COURT: Mr. Morris?

22 MR. TANNER: Your Honor, I am Jack Tanner. I never
23 know quite how to respond to these TROs. We would like to call
24 a witness by telephone ourselves.

25 THE COURT: You may.

Thomas McGuire - Direct

1 MR. TANNER: Good afternoon, Mr. McGuire. This is
2 Jack Tanner. We are in court before Judge Kane. The clerk is
3 going to swear you in, and then I will have a few questions for
4 you.

5 THE WITNESS: That's fine. I am ready.

6 (Thomas McGuire was sworn.)

7 THE WITNESS: Yes, ma'am.

8 DIRECT EXAMINATION

9 BY MR. TANNER:

10 Q. Good afternoon, Mr. McGuire.

11 Would you briefly describe for the Court what you do
12 for a living.

13 A. I am the head of business affairs for William Morris
14 Endeavors --

15 (Brief discussion off the record.)

16 BY MR. TANNER:

17 Q. We are going to start over after your oath.

18 Would you generally tell the Court what you do for a
19 living.

20 A. Yes, sir. I am the head of business affairs for William
21 Morris Endeavor, a talent agency in Beverly Hills.

22 Q. And are you generally familiar with a film referred to as
23 Amazing Grace which contains some footage of an Aretha Franklin
24 concert from 1972?

25 A. Yes.

1 Q. And can you tell the Court about your familiarity with that
2 film?

3 A. I have been involved in this project since approximately
4 2008 off and on and very involved in preparing to assist the
5 agents here in marketing the movie, particularly tonight.

6 Q. Have you had discussions regarding the showing tonight with
7 a man by the name of Rick Levy?

8 A. Yes, I have, last week.

9 Q. Who is Rick Levy?

10 A. Rick Levy is the general counsel and I believe he is a
11 partner at International Creative Management, ICM, which is
12 also a major talent agency in Beverly Hills.

13 Q. What do you understand is his relationship between ICM and
14 Aretha Franklin?

15 A. Rick on occasion represents Ms. Franklin.

16 Q. Have you had discussions with Mr. Levy regarding the
17 showing of this film in Telluride?

18 A. Yes, I have.

19 Q. And how long -- when did those discussions commence?

20 A. I couldn't tell you exactly, but I believe they were
21 something like two weeks ago, perhaps three weeks ago, but in
22 that range.

23 Q. There has been discussion today before you were on the
24 phone regarding a 1968 contract between Aretha Franklin, Warner
25 Brothers and Atlantic Records. Have you seen that contract?

1 A. Yes, I have. I do not have it in front of me, but I have
2 seen that contract.

3 Q. Do you recall -- you said you have been involved in this
4 project for several years. Do you recall when that contract
5 came to light?

6 A. Yes. It came to light in 2013.

7 Q. Can you describe that a little, expand?

8 A. I believe -- is it Warner Brothers? I don't recall how the
9 contract got to us, to be honest. I do recall, though, that
10 the contract came to Alan Elliott and to Todd Musburger, Alan's
11 personal lawyer, in 2013. I believe it was from Warner
12 Brothers who had found it. And they hadn't hidden it
13 maliciously we didn't think, but they found it and sent it to
14 us.

15 Q. So -- and you believe they found it and sent it to you in
16 2013?

17 A. Correct.

18 Q. So there has been discussion of prior litigation between
19 Ms. Franklin and Mr. Elliott. And you are generally familiar
20 with that litigation?

21 A. Generally, but only recently familiar with that litigation.
22 I was not aware of it, for example, at the time, but I have
23 been made aware of it recently.

24 Q. So let me phrase it this way. At the time of that
25 litigation, was Mr. Elliott to your knowledge aware of this

1 1968 contract?

2 A. He was not.

3 Q. Let's go forward to the showing at Telluride Film Festival
4 tonight. About how many people do you think will be in a
5 position to view this movie?

6 A. My guess is the theater will be fairly full, so I don't
7 know which theater it's screening in. Something between 200
8 and 400 people is my guess.

9 Q. And what's the point of this screening? Why does somebody
10 want to film a -- screen a film at Telluride?

11 A. To -- our whole point in screening it at Telluride is to
12 assist in marketing efforts for the film, to try and sell it.

13 Q. If a prospective buyer were to come forward out of these
14 screenings, how long would it typically take to complete a
15 deal?

16 A. Well, there is more than one film festival and you want
17 multiple offers to help, you know, keep -- get the best
18 possible deal you could. So my guess is you would need at
19 least 30 to 45 days to reach a material terms deal, but then
20 you would need at least another 45, so maybe a total of 90 days
21 to close the deal and have it completely done.

22 MR. TANNER: That's all I have, Your Honor.

23 THE COURT: Thank you.

24 Mr. Neureiter?

25 CROSS-EXAMINATION

1 BY MR. NEUREITER:

2 Q. It's Mr. McGuire?

3 A. Yes.

4 Q. I am Reid Neureiter. I represent Ms. Franklin. Just a
5 couple questions.

6 You said you have been involved in the Amazing Grace
7 film project since 2008; is that correct?

8 A. That's correct.

9 Q. But you didn't know that in 2011 Aretha Franklin sued
10 Mr. Elliott to get an injunction to stop him from showing the
11 film?

12 A. No, I did not, actually. I was not involved in the project
13 at that time. It didn't involve any of the sales efforts that
14 happened from my perspective off-line. It may sound strange,
15 but I didn't know anything about it until a couple weeks ago.

16 Q. And it's just been in the last couple weeks that you
17 started talking with representatives of Ms. Franklin about
18 showing the film at Telluride; is that right?

19 A. I didn't talk to them. I mean, the topic came up because
20 my friend, Rick Levy, was actually going to Telluride and he
21 talked to me about the possibility of maybe we could -- maybe
22 it was possible we could reach a deal and he and I would be
23 involved in making a deal in Telluride. And I told him I was
24 not going to Telluride, but we talked about the film screening
25 there.

1 Q. So to be clear, neither you nor anybody that you know of
2 told Aretha Franklin that this film would be showed at
3 Telluride.

4 A. I have not spoken to Ms. Franklin in my life. Rick spoke
5 to her. He told me that he spoke to her, but I don't know
6 whether he spoke to her about the film being shown in
7 Telluride. I don't know.

8 Q. Isn't it true that Telluride only discloses its lineup of
9 films like a day before? Like this past Wednesday was when
10 they announced publicly the films that would be shown?

11 A. Announced publicly, but people in the business know much
12 sooner than that.

13 Q. But a 73-year-old woman in Detroit might not know about
14 Telluride's lineup until last Wednesday or Wednesday, two days
15 ago, when it was publicly announced, correct?

16 A. I don't know what she knows and doesn't know. I do know
17 that Rick Levy knows and I know that he spoke to her at some
18 point in the last three weeks. I don't know what he said to
19 her.

20 MR. NEUREITER: No further questions.

21 THE COURT: Redirect?

22 MR. TANNER: No, Your Honor. No redirect. Thank you.

23 THE WITNESS: Thank you.

24 THE COURT: Thank you.

25 MR. MORRIS: Thank you, Your Honor.

1 Continuing with defendant's portion of the hearing
2 today, beyond the first witness, Mr. McGuire, we would move the
3 admission of the 1968 agreement. There has been no objection
4 as to authenticity, but with Your Honor's permission, given the
5 time frame of all of this, my colleague, Mr. Rodgers, would
6 speak to the issues to the extent there is not
7 cross-examination of the witness about it, but to argue the
8 significance of that 1968 agreement.

9 THE COURT: That's fine.

10 MR. MORRIS: Thank you, Your Honor.

11 MR. RODGERS: Thank you very much, Your Honor.

12 When you look at exhibit -- I will call it the 1968
13 contract, if you will notice between -- it says Atlantic
14 Recording and Warner Brothers, and I don't think I would fault
15 Ms. Franklin for not remembering something that got executed in
16 1968. I can't remember what I did last week sometimes, so I
17 don't necessarily fault that, but certainly the contract speaks
18 for itself.

19 And you've got to think of the time in 1968, you have
20 got a recording company and a movie company, so it's not just
21 recording. You have got movies in there as well and that would
22 be Warner Brothers.

23 THE COURT: Well, I am not a witness in these
24 proceedings, but Warner Brothers does more than just make
25 movies.

1 MR. RODGERS: Correct, Your Honor.

2 So I think counsel points out Paragraph 1A, which is
3 certainly important. It's an exclusive personal service
4 contract for a five-year period. So time-wise we have got
5 1968. We have got the concert in 1972. So our position, the
6 defendant's position, is that during that that's clearly within
7 that five-year period. So the question is does this
8 '68 contract relate to the performance in 1972? So it's an
9 exclusive service contract for five years. And it certainly
10 talks about phonographic records and clearly that's what it
11 says.

12 When you read through this contract, there is
13 substantial compensation going back and forth for that
14 five-year period that Ms. Franklin is getting compensated for.
15 And so during that five-year period, it's an exclusive personal
16 service contract to be decided under New York law, too, by the
17 way. That's how this contract is to be interpreted.

18 So counsel also points to on Page 7 and kind of
19 discounts it, which I guess is a good strategy to use, all
20 recordings and all derivatives made therefrom together with the
21 performances embodied shall be entirely the company's property.
22 We think that language is very telling as to what it means with
23 respect to the 1972 concert.

24 That language filters over on Page 8 and talks about
25 among other things specifically that the company gets the

1 artist's name and her likeness as well. And so when
2 Ms. Franklin testifies, well, I never agreed to give my
3 likeness away, 1968, we have got her signature on the back
4 here, so that's exactly what took place, that she did give that
5 likeness away and she gave her rights away for a five-year
6 period with respect to her performances.

7 If you go to Page 9 under 5A, again you will see
8 embodying performances. And that's what we submit that was
9 done in 1972 was a performance. The affidavit that was
10 submitted -- again, Your Honor, we got in this case I think
11 three hours ago, longer than that, probably about five hours
12 ago. But if you look at the late -- not late filed, but the
13 affidavit filed later in the proceeding, it talks about "I
14 conducted a live recording." That's on Paragraph 2 of
15 Ms. Franklin's affidavit. Certainly recordings were covered
16 under this, so under her own words she agreed to give away her
17 recordings for sure.

18 A small note, Your Honor, Page 21, the agreement is
19 assignable, so it ultimately was assigned. Finally, Your
20 Honor, the agreement is to be construed under New York law. So
21 we think those are the key provisions of the '68 agreement.

22 I would also note that -- and we don't have evidence
23 for today, but in 1968 the custom and usage was different than
24 it is today. The technology is completely different then than
25 it is today. You can bring a cellphone in and do stuff today.

1 You are not seeing that in 1968, so we would argue that needs
2 to be factored in.

3 So we don't think with respect to likelihood on the
4 merits that there is really any chance. When you look at this
5 agreement, in 1968 it was the deal. A deal is a deal and she
6 signed her rights away with respect to this 1972 concert.

7 The final point I note, Your Honor, with respect to
8 the quitclaim agreement, there is language that -- again, Your
9 Honor can certainly read it -- "Assignee specifically
10 understands that Assignee will need to obtain permission from
11 Aretha Franklin." I think that to the extent that permission
12 is otherwise required under the 1968 agreement, why it came
13 about in 2013, I -- today I don't understand that, but I think
14 what's controlling is the 1968 agreement.

15 So those are just the items I wanted to point out,
16 Your Honor.

17 *THE COURT:* All right.

18 *MR. MORRIS:* With the Court's permission, I will
19 conclude the argument portion of the submission of the
20 evidence --

21 *THE COURT:* Please.

22 *MR. MORRIS:* -- with that. And Your Honor, we would
23 move the admission of the '68 agreement.

24 *THE COURT:* I think I did take it, but nevertheless --

25 *MR. NEUREITER:* No objection.

1 MR. MORRIS: Thank you, Your Honor.

2 Your Honor, the motion for temporary restraining order
3 and preliminary injunction should be denied. The plaintiff has
4 not and cannot show likelihood of success on the merits. There
5 is a real and substantial issue about who owns the rights in
6 that film.

7 Now, frankly in the papers there is not discussion of
8 the 1968 agreement that was discovered in 2013, but frankly,
9 when you superimpose that fact on top of the rest of the time
10 line, the chronology, it makes perfect sense. Frankly, there
11 was a settlement or as part of the dismissal of the action that
12 sought an injunction against Mr. Elliott. Ms. Franklin
13 believed she owned the rights. Mr. Elliott at that point did
14 not know about this 1968 agreement. It only occurred, came to
15 the floor in 2013 as someone at Warner Brothers found it. So
16 there is a real substantial likelihood that Ms. Franklin does
17 not own the rights to that picture.

18 Now, counsel for the plaintiff notes that the only
19 hiccup is that. It's more than a hiccup. It goes to the
20 essential element of likelihood of success on the merits and,
21 of course, it's the plaintiff's burden.

22 Furthermore, with regard -- quite apart from the whole
23 issue of the 1968 agreement, and that does provide inconsistent
24 language internally about recordings and records, but then
25 Section 4 is much broader than that and has to be construed in

1 that regard. And as Mr. Rodgers had pointed out before, the
2 fact of the presence of Warner Brothers is significant. Warner
3 Brothers now does a variety of things, but this is 1968 when
4 this deal was entered into.

5 And Ms. Franklin's memory was better. She thought it
6 was maybe '68. She was within a year of the date of the
7 agreement that was before us that she hadn't seen. So they
8 have not shown likelihood of success on the merits with regard
9 to the rights in the intellectual property. It's the very core
10 of this.

11 But let's go beyond that. It still gets to the issue
12 of likelihood of success on the merits or lack thereof. One is
13 the issue of time and laches. Frankly, the fact that this has
14 been known about for some time, at least through Ms. Franklin's
15 agents through some time, it is not appropriate now at the very
16 last minute on Friday afternoon before a 7:30 in the evening
17 showing to seek this remedy. We have a real problem of laches.

18 And then finally there is a real issue about fair use.
19 There is a real issue about fair use. This is under the
20 anti-bootlegging provision that Ms. Franklin states one of her
21 claims on. It cites to a case in the emergency motion
22 analogizing it to another film released that escapes me right
23 at the moment, but the substantial difference here, the basis
24 for distinguishing that prior authority is here we are not
25 talking about broad distribution. Counsel for the plaintiff

1 referred here to broad distribution. At this point we are
2 talking about three showings in a theater that might hold as
3 many as 400 people, as few as 200. It is not a broad
4 distribution.

5 This is to promote potentially getting a distribution
6 contract on the film. This is a fair use to a very limited
7 audience. Ms. Franklin loves the film. The Court can take
8 judicial notice of and there has been evidence with regard to
9 the Telluride Film Festival, and as an institution this is not
10 showing at Joe's Film Festival in Oil Trough, Arkansas.

11 So in terms of fair use, therefore, you simply do not
12 apply here. There is at least a substantial argument that
13 Telluride Film Festival can make that this is fair use and
14 should be considered as fair use. That's the essential element
15 of likelihood of success. And I will wrap this up very
16 quickly, Your Honor. Thank you. Thank you for your patience
17 on Friday afternoon.

18 *THE COURT:* I really like the Joe's Film Festival.
19 That's a good shot.

20 *MR. MORRIS:* You made my day, Your Honor. Thank you.

21 The next essential element -- and I don't need to
22 remind the Court of the essential elements of injunctive relief
23 -- but the one I want to focus on here beyond likelihood of
24 success or the lack of likelihood of success, which is
25 plaintiff's burden, is the balancing of hardships.

1 Injunctive relief, of course, is a creature of equity
2 of the courts, and one of the factors is balancing the
3 hardships. Now, Ms. Franklin has a right to control her
4 likeness and her recordings unless she is contracting them
5 away. So she's got that in play on the one hand, but there is
6 a substantial question about the contract and whose right that
7 is.

8 On the other hand, you have got the Telluride Film
9 Festival and the promoters around that who have been developing
10 this. You have got at least 200 people looking to show up and
11 see it. So if you look at the balance of hardships here, this
12 is not diminishing the value. It's to try to increase, promote
13 the value of the film in order that there might be a
14 distribution agreement in the future. That's the purpose of
15 these film festivals, whether it's Toronto, Salt Lake City or
16 CON.

17 So when you balance the hardships, the greater
18 hardship is to the film festival, particularly by the plaintiff
19 having waited until this late date and time. So with regard to
20 their absence of proof on the essential elements, the motion
21 should be denied for that reason.

22 Now, there was a little bit of discussion at the end,
23 Your Honor, about no need for a bond or a *de minimus* bond. I
24 needn't emphasize too much for the Court, the Court knows well
25 the rules, Rule 65. The Court may issue injunctive relief only

1 if -- I don't have my book in front of me, but I believe the
2 language is only if there be a bond unless there is a
3 government agency, which Ms. Franklin is not, although she is
4 very well respected in Detroit.

5 There needs to be a bond. What's the harm to the
6 Telluride Film Festival? Mr. Neureiter suggested without
7 evidence that he thinks it's probably not going to make a
8 difference. Well, this is a major film festival that they have
9 been advertising for. People are coming from not only
10 Telluride, but throughout the United States to come see the
11 festival. There is a harm not only in terms of just the
12 turnstile, the ticket box, but also the reputational interest
13 of the festival this way.

14 So there should not be an injunction because the
15 plaintiff has not met their burden. If Your Honor is
16 anticipating that there be a bond, it needs to be a substantial
17 bond. It needs to be a cash bond. Because otherwise there is
18 no way for the film festival to make good its damages to the
19 extent that the injunction is granted improvidently.

20 So we would ask first and foremost that the motion for
21 the temporary restraining order/PI be denied.

22 THE COURT: Thank you.

23 Mr. Neureiter?

24 MR. NEUREITER: I will try to be brief, Your Honor.
25 We are just a couple or just a few hours from screen time.

1 On the issue of fair use, Your Honor, a complete
2 mischaracterization of what the fair use doctrine is about.
3 There are four elements for determining whether a use is fair
4 or not. If you look at the purpose of the character of the
5 use, typically that's are you using it for educational purposes
6 or are you using it to make money off of? Here it's clearly a
7 use to make money to get a distribution deal to benefit
8 Mr. Elliott, to benefit the film festival, that is not
9 educational in nature.

10 The nature of the copyrighted work, this is -- nobody
11 disputes this is 100 percent her performance. It's her
12 performance. This is not -- this is not just a piece. It's
13 not a slight piece. It is significant. And the amount and the
14 substantiality of the portion taken, there are cases where
15 10 percent of a film is copyrighted material, and I think we
16 cited the Elvis Presley case. The court granted an injunction
17 there. Here it's 100 percent of Ms. Franklin's intellectual
18 property, her name, likeness being used in the performance, and
19 finally the effect of the use upon the potential market.

20 This whole thing is so that they can control the
21 market. They can take it out of the hands of the artist and
22 put it in their own hands. The Court is entitled to adapt to
23 the particular situations of these four elements, but in no
24 way, shape or form is this fair use.

25 A couple of last points. They say, well, there are

1 400 people, 200, 400 people down there in Telluride lined up to
2 see this. They are lined up to see something that Telluride
3 does not have the right to see. If you have 400 people lined
4 up to see a bootleg copy of the Rolling Stones concert, you
5 don't sit back and say, well, these people have traveled a long
6 way to see it. You look at the organizer of the festival and
7 say why didn't you check to see what the rights are?

8 Laches, they say. They have known about this for two
9 weeks. You heard from Ms. Franklin. She learned about it on
10 Wednesday. And I would submit that two weeks, the evidence
11 that they have of two weeks is very, very thin.

12 Finally, Mr. Morris mentioned over and over again,
13 well, there is a real and substantial issue here as to who
14 owned these rights. Exactly, exactly. And if you allow this
15 to be shown to this massive film festival where all the
16 distributors and all of Hollywood is, it lets the cat out of
17 bag and you can't put Humpty Dumpty back in.

18 It's a real and substantial issue. And that's why in
19 the preliminary injunction/TRO context, a real and substantial
20 issue where there is a probable likelihood of success on the
21 merits favors maintaining the status quo, and the status quo
22 ante in this case is don't show the film.

23 *THE COURT:* Thank you.

24 Well, the first thing I want to point out is that this
25 contract of April 1, 1968 has to be interpreted as -- by an

1 examination of the context of the agreement itself and as of
2 the time that it was done. And I certainly have not had a
3 chance to study this, but it is a recording contract for
4 phonographs, which technologically is not even operative today,
5 so it would require quite a bit of interpretation.

6 But the statement that performances are covered by
7 this agreement, the plain language of it is that these are the
8 performances under the contract, not -- it doesn't include or
9 add to, but it limits itself to the contract. But I am not
10 persuaded that that governs.

11 What I am persuaded is that whatever rights
12 Mr. Elliott received were contained in the Quitclaim Deed from
13 Warner Brothers, and Warner Brothers specifically required as a
14 condition that he had to have the consent of Ms. Franklin. And
15 the evidence is quite clear that he never has received that
16 consent.

17 The Telluride Film Festival, I -- it's regrettable I
18 am going to issue this TRO, but they have to look to
19 Mr. Elliott, not to run over the rights of Ms. Franklin in
20 order to deal with whatever embarrassment or inconvenience or
21 harm to the festival by being enjoined from showing something.
22 That's a question for Mr. Elliott to answer, not Ms. Franklin.

23 She would suffer immediate and irreparable damage by
24 this showing. And as has been pointed out, the primary purpose
25 of a temporary restraining order is to maintain the status quo

1 anti litem and that status quo ante litem is that there has not
2 been a showing of this film in a public venue such as the film
3 festival, and I would certainly say that a showing in Telluride
4 for up to 400 people in an auditorium is a public showing.
5 It's not some intimate tete-a-tete.

6 The invasion under the common law to the right to be
7 protected from the use of another person's reputation for
8 publicity purposes is recognized in common law. It's
9 recognized in Colorado, as well as in California. I think
10 there is a likelihood of success on the merits for the
11 plaintiff in this case.

12 And when I look to the question of the balance of
13 equities, well, first of all, I would say it's in the public
14 interest to protect copyright and to protect the rights of
15 artists. We have so little art left in our society anyway.
16 And the Constitution even recognizes the enhancement of the
17 arts and it's a matter of great public interest. Congress has
18 legislated on this as well.

19 Whether this constitutes bootlegging or not, I don't
20 know at this point. It's certainly a substantial question and
21 that is all that's really required in the 10th Circuit
22 jurisdiction for likelihood of success is to show the
23 presentation of a substantial question. It does not have to be
24 a certainty. And I think the issue is substantial and the risk
25 of loss to Ms. Franklin is significant and substantial.

1 This has been with us long before this case, long
2 before this nation. I am reminded of the statement in
3 Shakespeare's Othello that "who steals my purse 'tis something,
4 nothing; 'twas mine, 'twas yours, and has been to thousands
5 others."

6 "But," it says, Othello says, "he that filches my good
7 name robs me of that which not enriches him and makes me poor
8 indeed."

9 She has her name. That's the essence of her long
10 career and reputation, as is pointed out, the records which she
11 has made, the ability to draw crowds. I don't know what this
12 film shows, but I don't have to. I don't know whether the
13 restoration of the sound would be acceptable to a finder of
14 fact. It's not the point. Under the law it's whether it's
15 satisfactory to her and it's an entirely subjective evaluation.

16 So with that in mind, the irreparable harm is to her
17 and there should be an injunction issuing prohibiting the
18 publication or the presentation of this film about her and the
19 concert that she gave approximately 40 years ago. And without
20 her consent it cannot be done.

21 Under Rule 65(b), the affidavits and the testimony
22 clearly show that immediate and irreparable injury and loss or
23 damage will result to Ms. Franklin. And we have done our best
24 to permit and the defendant to be represented and this
25 defendant, the film festival, has been indeed well-represented

1 here.

2 I do not accept the argument about fair use and do not
3 think that's what the law is, but I give points for trying on
4 that.

5 Now, this performance starts tonight absent this
6 temporary restraining order. And I am going to require a bond
7 to be posted in the amount of \$1,000 cash with the Clerk of the
8 Court.

9 The defendant in this case is restrained until further
10 order of the Court from displaying, advertising this film
11 Amazing Grace without having the prior written consent of
12 Ms. Franklin.

13 Now, that's another thing. Some of the testimony was
14 about some lawyer in California that does occasional work for
15 her and talking to him. Her testimony, she didn't hear about
16 it and that's enough. Laches in my view would not apply under
17 any circumstance in this case. There just simply isn't enough
18 time. You would have to have notice and knowledge of what's
19 going on ahead of time and then deliberately withhold any
20 action. This has been a prompt response to this difficulty.

21 So the motion for a temporary restraining order is
22 granted. And are there any details? I know I haven't given
23 you complete details on the restraint because I am just doing
24 this falling from my forehead, so let's make sure that we
25 understand what it is that's being restrained.

1 MR. NEUREITER: We submitted a proposed order, Your
2 Honor. I went through Rule 65 requirements. I think you have
3 to sign. For a TRO you have to sign and put the time and hour.

4 THE COURT: Yeah, I have to do that. But counsel are
5 here and I want to make sure that they know this because I
6 don't seem to have the proposed order.

7 MR. NEUREITER: The one question I had under the rule,
8 it's people who get noticed by service or otherwise. I would
9 assume that Your Honor delivering it to defense counsel would
10 be sufficient notice to them.

11 THE COURT: Well, I think it is, yeah. I just don't
12 happen to have a copy of the TRO.

13 MR. NEUREITER: I think it may have been e-mailed to
14 Your Honor's chambers. I might have neglected to bring a copy.

15 THE COURT: Well, we will see what we can find.

16 MR. NEUREITER: If I could, I could ask my colleague
17 who is in the audience to call my secretary and she could make
18 sure that it gets --

19 THE COURT: We will get it and get it signed this
20 afternoon, but I think you need to know what it is.

21 MR. MORRIS: The specific terms being enjoined and the
22 like.

23 THE COURT: There will be no showing and that's the
24 main thing.

25 MR. MORRIS: No showing, exactly.

1 *THE COURT:* The other thing is that this order as I
2 read Rule 65 can only last for 14 days unless the parties want
3 to extend it, and I agree to that. And if not, then we will
4 have to have a hearing on the preliminary injunction. And I
5 have the time available on September 17th. This rule requires
6 me to give precedence to this kind of proceeding except for
7 earlier filed TROs or injunctions and I only have another one
8 pending right now, but I can do this on September 17 at
9 9:00 a.m.

10 *MR. NEUREITER:* Your Honor, I -- at that point the
11 reality is this case will be moot because -- so I can schedule
12 it, but the film festival lasts for three days and it's
13 scheduled to show Friday, Saturday and Sunday.

14 *THE COURT:* All right. And I think I am lucky that I
15 can't do anything with Toronto, including go through their
16 airport which is the worst one in the world.

17 *MR. MORRIS:* Even than LaGuardia?

18 *THE COURT:* Yes, and it's only because it's run by
19 U.S. customs that it's so slow. The Canadians do a great job
20 everywhere else.

21 Here is what the order is. I have it now. And I will
22 sign this so you can get it downstairs and get copies and so
23 forth. But it's ordered that the Defendant, National Film
24 Preserve, Ltd., doing business as Telluride Film Festival, its
25 agents, officers and employees and all working in concert with

1 the defendant are enjoined and barred from showing, displaying
2 or otherwise publicly releasing or projecting the film Amazing
3 Grace produced by Alan Elliott. This injunction shall expire
4 14 days from the date of this order absent further order of the
5 court.

6 The Court also finds that a bond of \$1,000 would be in
7 the interests of justice and shall be posted by Ms. Franklin
8 with the Clerk of the Court. So I will sign that now.

9 MR. MORRIS: Would Your Honor be so kind as to read
10 the participles again, enjoined from showing, displaying?

11 THE COURT: Yes. Enjoined and barred from showing,
12 displaying or otherwise publicly releasing or projecting the
13 film Amazing Grace produced by Alan Elliott.

14 MR. MORRIS: I just want to be clear to the extent
15 there is a poster or some of these brochures still around, that
16 that's not deemed to be in violation of the injunction?

17 MR. NEUREITER: We would not ask for that.

18 THE COURT: They might become collector's items and
19 you might want to protect them for that.

20 Okay. I have signed this and you can -- in fact,
21 there is another copy. I will sign this one, too, so you can
22 take them down, get them certified.

23 So Mr. Neureiter, when the festival is over and you
24 are not going to be coming back here, I would appreciate you
25 letting me know that as quickly as you can. I am getting

1 jammed up on hearings, so it would help.

2 MR. NEUREITER: We appreciate it. Your Honor, if I
3 could say we certainly appreciate Your Honor's responsiveness
4 this afternoon.

5 THE COURT: It's a living. Thank you, gentlemen.

6 Oh, wait a minute. Can we redact her phone number
7 from the record?

8 MR. NEUREITER: Yes.

9 MR. MORRIS: Yes.

10 (Recess at 4:25 p.m.)
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4		17			
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REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 8th day of September, 2015.

S/Janet M. Coppock