



Big Boys Don't Cry: Federal Appeals Court Rejects Copyright Infringement Claim Against Jersey Boys Musical

By David R. Ellis

In a case decided by the U.S. Court of Appeals for the Hollywood Circuit, also known as the Ninth Circuit Court of Appeals, a three judge panel ruled that the authors of the award-winning Broadway musical, *Jersey Boys*, did not infringe the copyright in the autobiography of one of the members of The Four Seasons, the famous 1960s band led by Frankie Valli. *Corbello v. Valli*, 2020 WL 5361461 (9th Cir. 2020).

The lawsuit was brought by Donna Corbello, widow of Rex Woodard, an attorney, writer, and devoted fan of the band, who partnered with one of the original band members, Tommy DeVito, in the late 1980s, to write a book telling “the whole story” of The Four Seasons. The two produced an autobiography of DeVito that was ghostwritten by Woodard and completed in 1991, shortly before Woodard died.

According to the court, *Jersey Boys* depicts the history of the popular musical quartet, The Four Seasons, from its origins in New Jersey in the 1950s to its induction in the Rock and Roll Hall of Fame in 1990. The show includes such Four Seasons hits as “Walk Like a Man,” “Big Girls Don’t Cry,” and “Sherry” and recreates the band’s musical legacy on stage. Beginning in 2005, *Jersey Boys* ran on Broadway for over ten years, toured the country repeatedly, and was adapted as a movie in 2014.

The book reads as a straightforward historical account and is presented as an autobiography, with DeVito listed as a co-author. In the book, DeVito, as the narrator, describes his book as the “complete and truthful chronicle of The Four Seasons.” He contrasts the work with inaccurate accounts that others had published, notes his “candor,” and asserts that this is a true behind-the-scenes depiction of the band.

For several years, Corbello tried to get the book published but was unable to do so. In 2005, she contacted DeVito to discuss her continuing interest in publishing the work, but was rebuffed. Soon afterwards, *Jersey Boys* debuted on Broadway. It was a smash hit, winning four Tony Awards, and

Corbello hoped that the show would renew interest in the band, so she took steps to confirm the registration of Woodard’s and DeVito’s copyright in the book.

When she checked the records of the



U.S. Copyright Office, she learned that shortly before Woodard’s death in 1991, DeVito had registered the work solely in his own name. Corbello was eventually able to secure recognition of Woodard as co-author of the copyrighted work, without DeVito’s cooperation, and registered the copyright in 2007. Corbello also learned through news accounts that DeVito had provided the musical’s writers with a copy of the work while creating the production and that DeVito was profiting from its success.

Corbello sued DeVito in 2007 for breach of contract, an equitable accounting, and copyright infringement. Ultimately, she sued fourteen defendants in all, including band members DeVito, front man Frankie Valli, and Bob Gaudio, as well as writers, directors, and producers of the musical. DeVito subsequently settled with Corbello, and the case went up and down through the federal courts for thirteen years, including a jury trial and multiple appeals.

In this appeal, the principal question was whether the defendants had infringed Woodard’s copyright in the autobiography. The defendants claimed that although the plaintiff’s work and defendants’ musical were similar in many respects, whatever was copied by the defendants were unprotected elements, namely historical facts rather than expression protected by copyright.

Under Section 102 of the U.S. Copyright Act, 17 U.S.C. § 102, copyright provides protection for “original works of authorship fixed in a tangible medium of expression,” and does not extend to any underlying “idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”

Here, the court said that the allegedly infringed book is a work of historical fact, as recounted by DeVito with the assistance of Woodard’s writing skills. The creative aspects of the book do not generally concern things

like character, plot, and setting, but rather writing style and presentation. Neither DeVito nor Woodard created or even claimed to have created any characters, plot lines, settings, etc. So, although the creative expression in their book — the “writing style and presentation” — is protected by copyright, the historical elements presented in the book are not.

The two works clearly were similar in many respects, but that is because they were both based on the same set of historical facts. Likewise, they both included common phrases and “scenes-a-faire” (scenes that are “indispensable, or at least standard, in the treatment of a given idea,”), and elements that were treated as facts in the book and are thus unprotected by copyright, even though some of them were later challenged as made up by DeVito. The court found that Valli and the other defendants did not violate the plaintiff’s copyright by depicting in the play events in their own lives that were also described by DeVito and Woodard in their book.

Thus, the court’s decision rested on the proposition that facts, in and of themselves, may not form the basis of a copyright claim, particularly a nonfiction biography which is necessarily structured around historical facts and events, which are not themselves copyrightable. Accordingly, because the authors and producers of *Jersey Boys* did

not copy any protected elements of the plaintiff's book, the court concluded that the defendants had not infringed the plaintiff's copyright.

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A trip down Memory Lane as we continue to celebrate our 90th Anniversary

Memory Shared of "Skit Night"

By Denis DeVlaming

The more senior members of the Clearwater Bar can take a walk down



memory lane by remembering "Skit Night" that took place in various venues around the city. Judges, lawyers, judicial assistants, and staff all got together to rehearse a comedic

spoof on the profession and ourselves. The turnout was always standing room only. One skit night stands out in particular. It was entitled "Cheers" from the TV show that was popular at the time. The 1994 production was filmed and then played before a live audience (The bar). The commercials poked fun at law firm advertisement and the late Judge Pat Caddell performed a hilarious rendition of "hair club for men". As he spoke his lines, someone out of view of the camera sprayed a magic potion on his bald head. Editors spliced the scene and "poof" Judge Caddell had a full head of hair!

The late Mike Schwartzberg performed an edition of "Not Necessarily the Judicial News" and made fun of everyone he could. No offense was taken, only applause followed. Sadly, most lawyers reading this article never heard of "Carnac the Magnificent". It was a skit made famous by the former *Tonight Show* host, Johnny Carson. He would dress up as a swami and as envelopes would be handed to him, he could predict the answers to questions that were contained in the envelopes. I was the one saddled with playing Carnac and I enjoyed getting away with poking fun at lawyers and judges as I dressed the part.

There was a wonderful sense of comradery within the bar and between the bar and the judiciary at those events. All talk of court cases and trials ceased and a truly memorable social event was enjoyed by all.

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Cheers

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CARNAC (The Magnificent)

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