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CASES OF INTEREST

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Music Law Weekly Case Update for Music Industry Executives

February 8, 2012

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Corbello v. DeVito, USDC District of Nevada, January 31, 2012

 [Click here for a copy of the full decision.](#)

- District court grants summary judgment in favor of defendants, writers and producers of the Broadway musical *Jersey Boys*, in copyright infringement action brought by widow of author of biography upon which musical was based, holding that defendants had valid licenses and sub-licenses to exploit the biography.

Author Rex Woodward wrote a biography (the Work) of defendant Thomas Gaetano DeVito, a founding member of the musical group the Four Seasons, based on various interviews and discussions he had with DeVito over several years. Woodward and DeVito agreed that they would be considered co-authors of the Work and would share equally in the profits. Woodward died in 1991. DeVito registered the Work with the U.S. Copyright Office in his name alone. DeVito later granted defendants Frankie Valli and Robert Gaudio an exclusive, irrevocable, perpetual, worldwide, and assignable license to freely use and adapt certain materials, including the Work, into a musical. Under the license agreement, DeVito would receive 20 percent of royalties received by Valli and Gaudio in exploiting the Work. Valli and Gaudio sub-licensed the Work to the writers and producers of *Jersey Boys*, who eventually adapted the Work into the successful Broadway play *Jersey Boys*.

Woodward's widow, plaintiff Donna Corbello, sued DeVito, Valli, Gaudio and others involved with the writing, production, and distribution of the play *Jersey Boys* for, among other things, copyright infringement (under the copyright laws of the United States, United Kingdom, Australia, and Canada), vicarious copyright infringement, and contributory copyright infringement. Corbello also had the certificate of registration for the Work changed in 2009 to add Woodward's name as a co-author of the Work. The court granted summary judgment in favor of all defendants except DeVito, leaving only claims against DeVito for accounting and breach of contract for trial.

The court granted defendant Jersey Boys Records Limited Partnership's ("JB Records") motion for summary judgment. JB records argued that court had no personal jurisdiction over it and that plaintiff failed to state a claim for copyright infringement, vicarious infringement, or contributory infringement. Although it found that JB Records was subject to personal jurisdiction in Nevada by virtue of sales of its records in the state, the court concluded that plaintiff failed to show that the Cast Album, a musical recording of the cast of *Jersey Boys*, infringed on the Work because it was not substantially similar. In addition, plaintiff pleaded no facts establishing that JB Records was aware of any infringement of the



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Work, as required for a contributory infringement claim, or that JB Records had the right and ability to control other infringers of the Work, as required for a vicarious infringement claim.

The remaining *Jersey Boys* defendants, including Valli and Gaudio, moved for summary judgment on various grounds, including that plaintiff's claims were barred by the applicable statutes of limitation, lack of personal jurisdiction, the inapplicability of foreign copyright laws, failure to establish copyright infringement, and that the infringement claims were precluded by the defendants' valid license. The court rejected defendants' motions based on lack of personal jurisdiction, finding that defendants purposefully availed themselves of personal jurisdiction in Nevada by directing their alleged infringing activities toward the state. The court also found no evidence that plaintiff knew or could have known about the alleged infringement prior to 2007, when she filed suit, and her claims were timely.

The court agreed with defendants, however, that foreign copyright laws did not apply to plaintiff's infringement claims. Under the Second Circuit's holding in *Itar-Tass Russian News Agency v. Russian Kurier* that issues of copyright ownership should be decided by the law of the country in which the work was created and issues of infringement should be decided by the copyright law of the country where the infringement occurred, only U.S. Copyright law applied to plaintiff's infringement claims.

The court granted summary judgment in favor of all defendants, except DeVito, holding that plaintiffs' copyright claims were precluded by DeVito's grant to Valli and Gaudio of a valid license to exploit the Work in creating and producing *Jersey Boys*. The defendants, including the director and producers of *Jersey Boys*, were acting under valid sub-licenses from Valli and Gaudio. The court rejected plaintiff's argument that the sub-licenses were invalid because the license to Valli and Gaudio terminated, under its terms, when their sub-license to an initial producer lapsed, finding that the license did not terminate, and that even if it had, the parties' course of conduct, including DeVito's continued acceptance of royalties and his failure to terminate the license under governing statutes caused the license to remain in effect.

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