

Corbello v. DeVito
No. 2:08-cv-00867-RCJ-PAL (D. Nev. June 14, 2017)

Year	2017
Court	United States District Court for the District of Nevada
Key Facts	Plaintiff, Donna Corbello, is the widow and heir of Rex Woodward, the writer of a biography about Defendant Thomas DeVito, a founding member of the band The Four Seasons. In 1988, Woodward and DeVito agreed they would be co-authors of DeVito’s “authorized biography,” sharing equally in the book’s proceeds, including any adaptations. In 1990, Woodward completed the book and died shortly thereafter. In 1991, DeVito registered the book in his name only as an unpublished autobiography, and in 1999, transferred his right to adapt the biography for purposes of creating a musical based on the “life and music” of The Four Seasons; the hit musical <i>Jersey Boys</i> opened in 2005. After obtaining an amended copyright registration listing Woodward as co-author of the book, Corbello sued to obtain an accounting of her share of the profits derived from the licensing, or alternatively, the unauthorized use, of the biography to produce <i>Jersey Boys</i> , because she had learned that the biography had “inspired the form, structure, and content of the musical,” and alleged the creators of <i>Jersey Boys</i> had copied assorted scenes and conversations, <i>e.g.</i> , the dialogue and scenes concerning the origins of The Four Seasons’ songs. In 2015, the Ninth Circuit reversed and remanded a number of claims previously dismissed on summary judgment (mainly various defenses and contractual claims), noting that the 1999 transfer of rights may have lapsed in 2004, such that the subsequent exploitation of the book in <i>Jersey Boys</i> “may have infringed Corbello’s copyright interests.” In 2016, the trial court denied summary judgment on the substantive copyright infringement claims, ruling that there remained “a genuine issue of material fact” as to whether certain dialogue and references in <i>Jersey Boys</i> were fair use. On remand, the court granted Defendants’ motion for judgment as a matter of law in part, and the jury subsequently returned a verdict for the Plaintiff on the remaining substantive claims of copyright infringement, including determining that the use of the biography was not a fair use. Defendants then sought judgment as a matter of law on their fair use defense.
Issue	Whether unauthorized use of quotes and other references from an unpublished biography in a Broadway musical was a fair use.
Holding	The court granted Defendants’ motion for judgment as a matter of law with respect to their fair use defense, relying most heavily on the fourth fair use factor, which it called “the most important.” The court held that the first factor, purpose and character of the use, weighed against a finding of fair use “as it does in most cases” because the use is commercial. As to the second factor, the nature of the copyrighted work, the court held it weighed in favor of fair use because, while the work was unpublished, it was “not unavailable to the public because of a deliberate choice by the copyright owner, but because it [was] not commercially viable,” and as such, the work’s biographical (<i>i.e.</i> , factual) nature overshadowed the fact that it was unpublished. The court held that the third factor, the amount of work used, favored a finding of fair use because “the amount of protectable, creative material potentially copied . . . is very small, less than 1%” of the autobiography, and anything taken was factual rather than expressive. Finally, the court held that the fourth factor, effect on the potential market of the work, “greatly favor[ed]” Defendants because before the play debuted, “the [biography] had no market value”; indeed, “[i]f anything, the Play has increased the value of the [biography].”
Tags	Ninth Circuit; Unpublished; Textual work
Outcome	Fair use found

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