

Ninth Circuit: Under the “Asserted Truth Doctrine” (f/k/a “Copyright Estoppel”) Authors of Nonfiction Cannot Later Claim a Work is Fictional to Pursue a Copyright Case

Article By:

Joseph A. Meckes

In an opinion that will be of particular interest to writers, the Ninth Circuit has confirmed that authors of non-fiction works cannot later claim that elements of their work were, in fact, fictional in order to extend the scope of copyright protection.

The plaintiff in [*Corbello v. Valli et al.*](#), Case No. 17-16337 (9th Cir., September 8, 2020) was the estate of the co-author of an autobiography of Tommy DeVito, one of the original members of the band the Four Seasons. Even though the work was never published, DeVito provided a copy of the autobiography to Frankie Valli and other members of the band who were working on developing a Broadway play based on the band's history. The autobiography was admittedly very helpful in developing the play, *Jersey Boys*, which went on to become a huge success.

The plaintiff claimed that various scenes in *Jersey Boys* were substantially similar to the unpublished autobiography. The case went to trial in the District of Nevada and the jury not only found infringement, but found that a full ten percent of the play's success was attributable to the infringement. The trial judge, however, entered judgment as a matter of law in favor of the defendants, holding that much of the material allegedly infringed was historical fact and therefore not entitled to copyright infringement or, at a minimum, was fair use.

Initially, the Ninth Circuit confirmed the relatively vanilla principle that copyright protection for non-fiction works extends primarily to “writing style and presentation” and not elements like “character, plot and setting” that are entitled to protection in fictional works. Because copyright law under the Constitution is intended “to promote the Progress of Science and useful Arts,” copyright law simply does not protect historical facts.

But what if the author of a purportedly accurate history later claims that certain facts were, in fact, embellishments and therefore should be treated as fiction? No dice, held the Ninth Circuit. Under the doctrine of copyright estoppel (which the Ninth Circuit renamed “the asserted truths doctrine”), “elements of a work presented as fact are treated as fact, even if the party claiming infringement contends that the elements are actually fictional.” If the author claims a written work is historically accurate, he or she “cannot later claim, in litigation, that aspects of the work were actually made up and so are entitled to full copyright protection.” As a matter of law, readers of purportedly nonfictional

works are entitled to take the author at his or her word and use purported *facts* as they see fit.

This opinion provides some useful clarity on the scope of protection to authors of nonfiction work and will give writers, researchers and entertainment companies guidance on the elements of others' work that they can use when writing about historical matters.

© Copyright 2025 Squire Patton Boggs (US) LLP

National Law Review, Volume X, Number 253

Source URL: <https://natlawreview.com/article/ninth-circuit-under-asserted-truth-doctrine-fka-copyright-estoppel-authors>