



THINK FORWARD

Jersey Boys Tell All: Will Supreme Court Revisit Copyright Protectability in Nonfiction Works and Tackle Novel "Asserted Truths" Doctrine?

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May 04, 2021

In 1985, the U.S. Supreme Court (“Court”) found no “fair use” of former President Ford’s unpublished memoir manuscript where The Nation Magazine’s unauthorized acquisition of the manuscript and printing of quotes, paraphrases, and facts in an article was timed to “scoop” an article scheduled shortly to appear in Time Magazine. The Court found The Nation had “arrogat[ed] to itself the right of first publication.” [Harper & Row, Publr. v. Nation Enters.](#), 471 U.S. 539, 541-42, 49 (1985) (“*Harper*”). In considering the factual and historical nature of the manuscript, the court explained that while “[c]reation of a nonfiction work, even a compilation of pure fact, entails originality, . . . the law is currently unsettled regarding the ways in which uncopyrightable elements combine with the author’s original contributions to form protected expression.” *Id.* at 547-48.

The Court clarified several years later that “no one may claim originality as to facts” because facts are discovered rather than created. [Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.](#), 499 U.S. 340, 347 (1991) (“*Feist*”). But “[f]actual compilations, on the other hand, may possess the requisite originality” because “[t]he compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers.” *Id.* at 348. However, such compilations are only allowed “thin” copyright protection. *Id.* at 349.

More recently, a 13-year copyright battle over the hit Broadway Musical “Jersey Boys” has once again put the question of the copyrightability of fact-based, nonfiction works before the High Court. This case was brought by Donna Corbello, whose late husband and devoted Four Seasons fan, Rex Woodard, ghostwrote an unpublished autobiography of Tommy DeVito, an original member of the musical group “The Four Seasons.” Currently, Corbello appeals a decision by the U.S. Court of Appeals for the Ninth Circuit, which held that stories taken from the Woodard book and used in “Jersey Boys” (portraying DeVito and The Four Seasons), constituted noncopyrightable expression. [Corbello v. Valli](#), 974 F.3d 965, 984 (9th Cir. 2020).

The Ninth Circuit held that “[t]hrough the creative expression that is in the Work—the ‘writing style and presentation’—is protected by copyright, the assertedly historical elements are not.” [Corbello](#), 974 F.3d at 976. The court found that all similarities between the Four Seasons autobiography and “Jersey Boys” were either non-protectable historical elements of the work, *id.* at 976-78, or “involved elements of the work held out as facts” because, consistent with the “asserted truths” doctrine, “an author who holds their work out as nonfiction thus cannot later claim, in litigation, that aspects of the work were actually made up and so are entitled to full copyright protection.” *Id.* at 978. Where “the text of the [autobiography] explicitly represent[ed] its account as historically accurate, not historical fiction,” *id.* at 979, the court reasoned that “[t]he asserted facts do not become protectable by copyright even if, as [Petitioner] now claims, all or part of the dialogue was made up.” *Id.* at 984.

On appeal, Petitioner asserts that the Ninth Circuit has denied copyright protection to the same type of expression held protected in *Harper* and *Feist*, and that its “newly-coined” asserted truths doctrine “alters the traditional contours of copyright protection in ways reserved for Congress.” Petition for Writ of Certiorari at 33, *Corbello v. Valli, et. al.* (2021) (No. 17-16337).

There are certainly differences among *Corbello*, *Harper* and *Feist*, but there also is a common thread. *Corbello* involves the question of whether similarities between “Jersey Boys” and Woodard’s autobiography are unprotectable facts or protectable expression. *Harper* teaches that it is more difficult to establish fair use when a significant part of an unpublished work is released and negatively impacts the marketability of the work. *Feist* concerned whether pure facts (addresses in a directory) are protectable under copyright laws, the court finding that such pure facts are entitled to “thin” protection when arranged in an original and creative way. The common thread among *Corbello*, *Harper*, and *Feist*, however, is the notion that facts, *per se*, are not protectable—but how they are expressed may be. Thus, the Court may consider Woodard’s “original contributions” in the work as a whole if certiorari is granted, and elaborate further on its statement that “the law is currently unsettled regarding the ways in which uncopyrightable elements combine with the author’s original contributions to form protected expression,” *Harper*, 471 U.S. at 548.

Key Takeaways

The Court may also set its sight on the novel “asserted truths” doctrine, which *Corbello* argues “strips copyright estoppel of its equitable foundations without cause” and “conflicts with other courts and legal doctrines.” Petition for Writ of Certiorari at 34, *Corbello v. Valli, et. al.* (2021) (No. 17-16337).

Corbello cautions authors of factual works, such as autobiographies or other historical works, to consider that a copyright over such a work may be “thin,” covering only elements such as “which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers.” Authors are further reminded by *Corbello* that assertedly historical elements in a work may not be entitled to full copyright protection, and that statements attesting to the truthfulness of a particular work may be used to negate copyright protection under the Ninth Circuit’s “asserted truths” take on copyright estoppel. Regardless of whether the Supreme Court takes this case, the fact-expression dichotomy that lies at the heart of copyright will continue to play a fundamental role in copyright jurisprudence involving fact-based and historical works.