

**United States Court of Appeals
for the Ninth Circuit**

DONNA CORBELLO,

Plaintiff-Appellant,

– v. –

FRANKIE VALLI; ROBERT J. GAUDIO; MARSHALL BRICKMAN; ERIC S. ELICE; DES MCANUFF; DSHT, INC., FKA Dodger Stage Holding Theatricals, Inc.; DODGER THEATRICALS, LTD.; JB VIVA VEGAS, LP; MICHAEL S. DAVID; JERSEY BOYS BROADWAY LIMITED PARTNERSHIP; JERSEY BOYS RECORDS LIMITED PARTNERSHIP; SKUNK, INC.; GETTING HOME, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR NEVADA, LAS VEGAS IN NO.: 2:08-CV-00867-RCJ-PAL,
HONORABLE ROBERT CLIVE JONES, U.S. DISTRICT JUDGE

**BRIEF FOR *AMICUS CURIAE* DRAMATISTS
LEGAL DEFENSE FUND IN SUPPORT OF
APPELLEE AND AFFIRMANCE**

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The Dramatists Legal Defense Fund (the “DLDF”) respectfully submits this memorandum of law as *amicus curiae* in support of defendants Frankie Valli, Robert J. Gaudio, Marshall Brickman, and Eric S. Elice (“Defendants”), the authors of the dramatico-musical *Jersey Boys* (the “Musical”), and to apprise the Court of theatre industry practice and underlying policy considerations.

Plaintiff Donna Corbello (“Plaintiff” or “Corbello”) is the owner of an unpublished, ghost-written manuscript (the “Autobiography”) about Tommy DeVito (a member of the famed music group, The Four Seasons) that has failed to garner interest from a single publishing house since it was first circulated in 1990. Now, after the Musical was created and produced by the Defendants with great international success, Plaintiff is attempting to extort the Defendants by claiming ownership over historical events that appeared in the unpublished work, on the theory that the events in the manuscript that were once represented as autobiographical facts are now to be deemed by the court as copyrighted fiction owned solely by Corbello.

Thinly veiled as an issue of “fair use,” Corbello’s appeal is merely an attempt to circumvent and frustrate the District Court’s comprehensive decision founded on well-established precedent that *Jersey Boys* does not infringe on Corbello’s property. In fact, the Court need not address the issue of fair use, as Plaintiff’s claims fail under the principle of copyright estoppel. Failure to

recognize copyright estoppel here would subject playwrights to vexatious and costly litigation brought by biographers to force payments from subsequent authors merely for using the same facts—an overreaching and opportunistic assertion of intellectual property rights that subverts the principles embodied by both the First Amendment and the Constitution’s Copyright Clause.

PRELIMINARY STATEMENT

The Plaintiff owns the Autobiography entitled *Tommy DeVito: Now and Then*. Her ownership of the manuscript, however, should not prevent dramatists like the Defendants from making use of historical facts that may be included within it. When researching the events and characters of history, dramatists need to rely on the public assurances of historians, biographers, and the like that their histories, biographies, etc. are factual. *Houts v. Universal City Studios, Inc.*, 603 F.Supp. 26, 28 (C.D. Cal. 1984). This doctrine, dubbed “copyright estoppel” in the Ninth Circuit, has been applied so consistently that even those claiming that the authorship came from such unlikely sources as ghosts and aliens cannot later assert that what was presented as fact is actually a litigant’s creative fiction. *See Oliver v. St. Germain Foundation*, 41 F. Supp. 296 (C.D. Cal. 1941)(prohibiting plaintiff from disavowing initial claims that other-worldly spirits authored the book); *Urantia Found. v. Maaherra*, 895 F.Supp. 1347 (D. of Ariz. 1995) (prohibiting

plaintiff from asserting copyright ownership after claiming the work was dictated by alien beings). Because Plaintiff made consistent and clear representations as to the historical truth of the Autobiography, she should be estopped from now claiming that these are actually creative fictions deserving maximum protection under copyright law.

Once copyright estopped is properly applied, Plaintiff's remaining, specific claims are for ownership of common phrases or scenes-a-faire. These claims relate to such clichés as describing a song as a “tearjerker,” identifying band members as “desperate” or “cool,” and receipt of a large payment as a “fat bonus.” The court should reject such claims inasmuch as they subvert the First Amendment and the Progress Clause of the Constitution, violate the idea/expression dichotomy embodied in U.S. copyright law, and are in conflict with industry standards and public policy.

INTEREST OF AMICUS CURIAE

The Dramatists Guild of America, Inc. (the “Guild”) formed the DLDF in 2009 to advocate for free expression in the dramatic arts as guaranteed in the First Amendment of the United States Constitution, and to encourage the vitality of a robust public domain, in support of the purpose of the Constitution's “Copyright Clause.”

The DLDF is governed by an elected Board of Directors that currently includes such renowned dramatists as J.T. Rogers (*Oslo, Blood and Gifts*), Sarah Ruhl (*In the Next Room*), Lydia Diamond (*Stick Fly*), and the current President, John Weidman (*Assassins, Contact, Anything Goes*). The Board also includes several lawyers well established within the theatre industry. The sole member of the DLDF is the Dramatists Guild, a century-old trade association with a governing board of playwrights and musical theatre authors that includes Marsha Norman (*The Color Purple, 'Night Mother*), Stephen Sondheim (*Sweeney Todd, Company*), Tony Kushner (*Angels in America*), and John Guare (*House of Blue Leaves, Six Degrees of Separation*). The current president of the Guild is Doug Wright (*I Am My Own Wife, War Paint*).

Defendants are not members of the DLDF, but Rick Elice and Marshall Brickman are members of the Guild. Regardless, the DLDF and the Guild recognize that their interests and the interests of the public are threatened by Plaintiff's attempts to cordon off historical facts for her exclusive use.

Dramatists often draw on a broad variety of source material for inspiration for their works. Some have drawn on material in the public domain, like *Les Miserables*, and *Natasha, Pierre & The Great Comet of 1812*. But this practice is not a recent phenomenon. Shakespeare's *King Lear* was based on a well-known folk tale, and there was another play at the time based on the same story (*The True*

Chronicle History of King Leir). In modern times, The Disney Company has adapted public domain stories into films and then into stage musicals like *Beauty and the Beast*, *The Little Mermaid*, and *Aladdin*, not to mention *The Lion King*, which is loosely based on *Hamlet*. Several shows on Broadway recently are based on stories or historical facts in the public domain, such as *Come From Away*, *Indecent*, *Oslo*, and *Hamilton*.

Artists frequently produce competing adaptations of the same public domain material. Just as frequently, the marketplace often rewards one adaptation as superior to another. E.g., both 2012's "The Snow Queen" and 2013's "Frozen" were animated movies based on Hans Christian Andersen's "The Snow Queen"; "The Phantom of the Opera" was adapted by Kathleen Masterson (book) and David Bishop (music) in 1986, just a year before Helen Grigal's (book and lyrics) and Walter Anderson's musical in 1987, both ostensibly competing with another 1986 adaptation by Andrew Lloyd Webber (music) and lyricists Charles Hart and Richard Stigoe.

Of course, the DLDF, as established by the Guild, is keenly aware of the need to protect copyright. Copyright infringement can have a significant negative impact on a dramatist's income and reputation; many of the nation's dramatists who are most vulnerable to these harms sit on the Guild's Council. Similarly, a fledgling playwright may not gain deserved attention or be able to maintain control

of his or her work if copyright is infringed; many of these emerging talents are among the Guild's 7,500 members nationwide. In fact, the dramatists' rights to own their copyrights and to control their work are the founding principles on which the Guild is based, and dramatists have forgone unionization, accepting an economically disadvantaged labor status for the last ninety years or so, in order to preserve these rights.

Because the DLDF's mission is to advocate for free expression while advancing the interests of a trade association of copyright owners, our every statement is preceded by a consideration of "the property rights [that copyright law] establishes in creative works, which must be protected up to a point, and the ability of authors, artists, and the rest of us to express them- or ourselves by reference to the works of others, which must be protected up to a point." Judge Pierre Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1109 (1990). *See Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006); *see also Cariou v. Prince*, 714 F.3d 694,705 (2d Cir. 2013). This gives the DLDF a unique perspective – and duty – to present a balanced and reasoned view without an ideological predisposition one way or the other. The DLDF would take exception to Lord Andrew Webber attempting to stifle the creative work of Masterson and Bishop or Grigal and Anderson, viewing as legitimate all tellings of historical fact, allowing

the public as superior to litigation to determine which adaptation should be in the market and successful.

From this rare vantage point, the DLDF can see that the Autobiography is not a compelling adaptation of the historical facts, but the Musical is. Therefore, we request that Corbello be estopped from reversing claims of truthful biography to curb the chilling effects that earlier storytellers can have on subsequent dramatists who may draw upon similar facts, historical events, and generic ideas that surround the lives of real people.

ARGUMENT

I. Plaintiff's Claims Barred by Copyright Estoppel

Plaintiff is barred by copyright estoppel from asserting exclusive ownership over the facts set down in the Autobiography. "Under the doctrine of copyright estoppel, once a plaintiff's work has been held out to the public as factual the author-plaintiff cannot then claim that the book is, in actuality, fiction and thus entitled to the higher protection allowed by fictional works." *Houts*, 603 F.Supp. at 28. This is well-established precedent within the Ninth Circuit.

For Example, in *Lake v. Columbia Broadcasting System, Inc.*, 140 F.Supp. 707, 708 (S.D. Cal. 1956), plaintiff wrote a book "declared in the preface to be an accurate historical biography based on a factual account of Wyatt Earp's career . . .

.” A subsequent author drew from the biography to create a radio play. Because the plaintiff could only claim the “sequence of the claimed historical events and in a few instances the content of the dialogue,” the court found the claim was not actionable under the doctrine of copyright estoppel. *Id.* at 709.

Likewise, in *Marshall v. Yates*, 1983 U.S. Dist. LEXIS 12305, at *29 (C.D. Cal. 1983), the plaintiffs published “Shadowland” which they publicized as, *inter alia*, “one of the most absorbing books on true crime ever published” wherein “truth can be more brutal than fiction.” Yet, when a subsequent author discussed those same events in a subsequent work, plaintiffs reversed field, alleging “that portions of ‘Shadowland’ were ‘fictionalized elements’” protected under copyright. *Id.* at *28. Again, the court was explicit, stating that “plaintiffs were estopped from contending that portions of ‘Shadowland’ were fictionalized, because ‘Shadowland’ was presented to the public as nonfiction work.” *Id.*

The decision in *Marshall* went further, as the plaintiffs asserted copyright protection under the supposition that they held the book out as factual, but never *completely* factual. The court rebuffed this assertion, too, stating that a prior author was not allowed to “clearly represent that the book is factual, and then avoid estoppel merely because the plaintiff had the foresight to not represent that each line, fact, detail, and chapter was factual and unembellished” as “[s]uch a result

would entirely incapacitate the estoppel doctrine.” *Id.* at *29. This decision was echoed in *Houts*, cited above.

Even facts ostensibly drawn from sources that strain credulity are barred by the doctrine of copyright estoppel. For example, in 1941 a plaintiff filed suit after publishing “A Dweller on Two Planets,” a volume supposedly revealed by other-worldly beings. *Oliver*, 41 F.Supp. at 296. A subsequent author claimed his book also came through other-worldly beings with similar methods of spiritual communication and incidents; both authors claimed the role of amanuensis. *Id.* at 299. When the first author sued the subsequent author for copyright infringement, the court was clear: “One who narrates matters of fact may be protected by copyright as to his arrangement, manner and style, but not as to material or ideas therein set forth.” *Id.*

See Urantia, 895 F.Supp. at 1347 wherein the court prohibited the plaintiff from claiming the initial term of copyright, as this right belonged only to the authors, which plaintiff had originally claimed were alien beings. *See also Nichols v. Universal Pictures Corporation, D.C.*, 34 F.2d 145 (S.D.N.Y. 1929).

In sum, “the Court is not concerned with whether the stories . . . are fact or fiction. The Court is only inquiring into how the book was held out to the public The single dispositive determination is whether the book was presented to the public as factual.” *Marshall*, 1983 U.S. Dist. LEXIS 12305 at *31. This is legal

precedent whether the source of the facts is an other-worldly spirit that strains modern credibility, thinly-documented historical events such as those surrounding the life of Wyatt Earp, or stories presented as true but with a clearly sensationalist veneer as in a true-crime book.

In the case at bar, the title page of the Autobiography trumpets its truthful nature: “Tommy DeVito: Then and Now by Tommy DeVito.” Further to the point, cover letters sent by the ghost writer (Corbello’s late husband) to potential publishers stated that the Autobiography would “tell the world the never suspected secret past” “detailing” the truth with a number of previously unknown “disclosures.” The ghost writer emphasized that he obtained “portions of the F.B.I. file on the Four Seasons” by “employing the Freedom of Information Act.” He tantalizes by reminding the potential publisher that “the public has an obsession with the lives of rock and roll performers, and positively no one . . . has lived the roller coaster existence of Tommy DeVito.” *See* Exhibit 12, “Mr. Woodard’s Efforts To Find A Publisher for the Work.” In one cover letter, the ghost writer could not be more explicit: “DeVito provides me page after page of true experiences which makes the Beach Boys’ story pale in comparison.” *See* Exhibit 13, “Mr. Woodard’s 12/11/1990 Letter to March Tenth, Inc.”

Plaintiff’s claims in this appeal are on all fours with the doctrine of copyright estoppel as well-established within the Ninth Circuit. Plaintiff’s work

was presented as the authorship of DeVito and his ghost writer revealing truthful facts, some of which can be corroborated by the F.B.I, that were held out to publishers and subsequent authors alike as factual. To somehow distinguish the Autobiography from other works of nonfiction would eviscerate well-established precedent in the Ninth Circuit. This would create both costly confusion in the theater industry, as well as a chilling effect among all dramatists researching stories based on true events.

II. Thin Copyright Does Not Protect Common Phrases, Scenes-a-Faire

Once copyright estoppel is applied properly, plaintiff's remaining claims melt away, per the underlying decision from the District of Nevada, as common or clichéd phrases and scenes-a-faire. "Originality remains the *sine qua non* of copyright." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991). *See Harper & Row Publs. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (stating, "No author may copyright his ideas or the facts he narrates"); *Fodor v. L.A. Unified Sch. Dist.*, 2014 U.S. Dist. LEXIS 188398, at *32-33 (C.D. Cal. 2014). Whether a compilation of data or historical narrative, the facts can heavily dictate the surrounding presentation. "This inevitably means that the copyright in a factual compilation is thin." *Feist*, 499 U.S. at 349.

Historical fiction is consistently reduced to such “thin” protection. For example, in *Chase-Riboud v. Dreamworks Inc.*, 987 F.Supp. 1222, 1223 (C.D. Cal. 1997), the plaintiff spent three years researching the story of Amistad, the slave revolt on the ship of the same name. Even though Dreamworks Inc. had openly used the plaintiff’s work, the court stated that the “[n]o claim of copyright protection can arise from the fact that plaintiff has written about . . . historical and factual items, even if we were to assume that [the alleged infringer] was alerted to the facts in question by reading [the infringed work].” *Id.* at 1226. In short, “[t]he scope of copyright in historical accounts is narrow indeed.” *Id.*, quoting *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980).

Plaintiff’s claims provide textbook illustrations for when thin protection of copyright should be applied. For instance, Corbello claims ownership of such clichéd language as the phrase “tear jerker” to describe the song, “My Mother’s Eyes” (*Opening Brief* p. 14) and a larger-than expected payment from a club owner as a “fat bonus” (*Id.*). Yet, federal jurisprudence has already established that common phrases are not copyrightable. See *Harper*, 471 U.S. at 564 (finding that the description of the White House Tapes as a “smoking gun” is “so integral to the idea expressed as to be inseparable from it”). See also *Narrell v. Freeman*, 872 F.2d 907 (9th Cir. 1989) (refusing to protect the phrases “rekindle old memories” and “pitched overboard” as banal), this refusal further confirmed in *Norse v. Henry*

Holt & Co., 991 F.2d 563, 566 (9th Cir. 1993). *See also Hoehling*, 618 F.2d at 979 (stating that copyright protection did not extend to common phrases of a particular historical period, such as “Heil Hitler” or the German national anthem in a book related to Nazi Germany).

The Plaintiff even tries to claim the descriptor of DeVito as “cool,” when everybody knows this honor belongs exclusively to the King of Cool, Steve McQueen. *See* Wikipedia, *Steve McQueen*, https://en.wikipedia.org/wiki/Steve_McQueen (last visited October 16, 2018).

While this is not a legal argument, it certainly indicates the absurdity of Corbello’s appeal and the wastefulness her claims have imposed upon the Defendants, this Court, and institutions, like the DLDF, charged with the stewardship of copyright and its vital counterpart—a robust public domain.

As another example, Plaintiff attempts to secure ownership over scenes-a-faire. Scenes-a-faire are “incidents, characters, or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.” *Chase-Riboud*, 987 F.Supp at 1227. *See Cavalier v. Random House*, 297 F.3d 815, 822 (9th Cir. 2002); *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*, 462 F.3d 1072, 1077 (9th Cir. 2006). Under this doctrine, “a second author does not infringe even if he reproduces verbatim the first author’s expression.” *Landsberg v.*

Scrabble Crossword Game Players, Inc., 736 F.2d 485, 489 (9th Cir. 1984); *See v. Durang*, 711 F.2d 141 (9th Cir. 1983).

Established case law have included in the definition of scenes-a-faire: “prodigal son” characters (*Funky Films*, 462 F.3d at 1078); embellishment of a central historical figure to also serve a symbolic, “dramatic function” (*Chase-Riboud*, 987 F.Supp. at 1228); and use of a moon-themed night light in a children’s book (*Cavalier*, 297 F.3d at 823).

This is tantamount to such elements in both the *Autobiography* and *Jersey Boys* as Frankie Valli’s desperation for a break in the music business, or even the young band member’s loss of virginity soon after achieving professional success, not unusual in any story with a “coming-of-age” theme. Not the least of these scenes-a-faire within Plaintiff’s claims is the repetitive insistence that the comparison of The Four Seasons as more traditional entertainers versus The Beatles as a social movement belongs solely to the *Autobiography*. *E.g., Opening Brief*, p. 19.

Comparing any Sixties rock group to The Beatles is standard. Describing a young man smoking cigarettes as thinking he is “cool” or a young musician as “desperate” for a break is practically indispensable. As these are clichés and scenes-a-faire, they are not protected as copyrightable material.

III. Public Policy Favors a Strong Declaration of the Rights of the Dramatist

More is at stake here than mechanical application of the fair use factors. Public policy concerns require clarity in the protection of an individual artist's freedom of expression. Private interests cannot be allowed to generate heavy social costs that harm not only the artists, but also the broad social interest.

A. Fair Use is the First Amendment's Ambassador in Copyright

The principle that courts should protect against private censorship was first embodied in the Statute of Anne and later the Copyright Clause "to be the engine of free expression." *See Harper & Row Publr., Inc.*, 471 U.S. at 558. First Amendment protections are "embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use." *Id.* at 560. In fact, the Copyright Act was meant, among other things, to encourage free speech. *See* Rebecca Tushnet, *Copyright Law as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. Rev. 1, 2 (2000) (stating that "[t]he First Amendment gets government off speakers' backs, while the Copyright Act enables speakers to make money from speaking and thus encourages them to enter the public marketplace of ideas").

Were the court to uphold the Plaintiff's claim in this case, it would frustrate the purpose of the Copyright Clause, and the federal statute that embodies it, by stalling that engine of free expression. Dramatists need to have the right to sort through the public domain to find facts on which to base compelling stories, and must be able to use standard literary devices like scenes-a-faire to tell those tales. The Plaintiff, however, is seeking to privatize these elements of the public domain by claiming ownership of them. Legitimizing such a claim would not only undermine free expression, but legalize a theft... not just from the Defendants, but from the public at large for whom copyright law was created to benefit. *See* Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. Rev. 1180, 1192-93 (1970) (stating that the First Amendment must "encroach upon the author's right to control his work in that it renders his "ideas" per se unprotectible, but this is justified by the greater public need for free access to ideas as part of the democratic dialogue"); *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1168 (9th Cir. 1977) (stating that "when idea and expression coincide, there will be protection against nothing other than identical copying of the work").

B. Broader Social Costs Outweigh Private Interests

In addition to potentially curtailing an individual's First Amendment rights and privatizing elements of the public domain, there are significant costs to society for the court to consider. Should the court allow Plaintiff to encumber the Musical, it risks adding to a growing body of "copyright false positives" that will impair freedom of speech for the U.S. as a whole, add to unnecessary litigation and transactional costs for appropriate use of public domain material, and weaken the public's willingness to adhere to the Copyright Act. The DLDF requests that the court weigh these social costs in favor of Defendant's fair use.

"False positives" occur in law when an individual is found guilty or liable of some wrongdoing when he or she should not be." A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. Econ. Lit. 45, 60 (2000). "Copyright False Positives" are "instances in which copyright enforcement actions target activities that are not infringements" Ben Depoorter & Robert Kirk Walker, *Copyright False Positives*, 89 Notre Dame L. Rev. 319 n.13(2013). "Copyright False Positives often motivate copyright owners to seek enforcement of rights that are . . . outside the scope of copyright." *Id.* at 321. Enforcement of non-existent intellectual property rights can have a variety of unnecessary and negative social costs that should be avoided. *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325, 332-33, 349-59 (1989) (describing social costs of the copyright system).

One significant social cost of Copyright False Positives is that they can “hamper free speech and the rightful exercise of copyright exceptions.” Depoorter & Walker (2013), *supra* at 340. See C. Edwin Baker, *First Amendment Limits on Copyright*, 55 Vand. L. Rev. 891 (2002); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354, 411 (1999); Marci A. Hamilton, *Copyright at the Supreme Court: A Jurisprudence of Deference*, 47 J. Copyright Soc’y USA 317 (2000). Copyright False Positives threaten to erode the tradition of jurisprudence in favor of the First Amendment, and, if they are not curbed, have the effect of bestowing property rights upon copyright owners for material that should be “free as the air to common use.” *Int’l News Serv. v. Assoc. Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting). This stifles the production of new work, even in situations where, as here, the benefits of allowing authors, as a class of professionals, to make fair use of the public domain outweigh any theoretical detriments to that same class from lost royalties. Landes & Posner, *supra* at 332-33, 349-59.

Another social cost is “increased litigation and transactional costs” for valid uses of public domain material, like purported facts and scenes-a-faire. Depoorter & Walker (2013), *supra* at 343; see, e.g., *Nash v. CBS, Inc.*, 899 F.2d 1537, 1540 (7th Cir. 1990) (stating, “Every work uses scraps of thought from thousands of

predecessors, far too many to compensate, even if the legal system were frictionless, which it isn't"). The widely acknowledged trend of "copyright trolling" also attests to these increased social costs. *See, e.g., Third Degree Films v. Does 1-47*, 286 F.R.D. 188, 190 (D. Mass. 2012). The instant case is the epitome of this social cost: artists have been forced to prove that their use is non-infringing, or risk the sharp end of Damocles' sword.

Finally, "a perception that copyright law reaches beyond reasonable boundaries and serves private but not public interests" could weaken society's willingness to adhere to the Copyright Act by respecting owners' rights. Depoorter & Walker (2013), *supra* at 345-46; *see, e.g.,* Lawrence Lessig, *Free Culture* 184-87 (2004). The DLDF hopes the court will address this demonstrated social cost.

IV. Conclusion

While the DLDF recognizes the competing interests in promoting free speech while protecting copyright ownership, Corbello is patently barred by the principles of copyright estoppel from claiming that the Work, presented for years to publishers and Defendants alike as historically factual, is actually fictitious.

The DLDF urges this Court to affirm the June 13, 2017, Order of Judge Jones, and to make a strong declaration that the law does not allow a plaintiff simply to reverse prior assertions of facts in order to claim a windfall from more

successful authors. While it may be disappointing for one copyright owner to achieve limited or no success, while watching another explode with accolades for a work based on the same historical subject matter, it is inherent to the progress of the arts that the public be allowed to decide which authors most successfully utilize elements that are not protected by copyright, and are favored in the marketplace of ideas.

For the foregoing reasons, and in keeping with the Copyright Clause of the United States Constitution, the U.S. Copyright Act, controlling Supreme Court and Ninth Circuit case law, and well-accepted practices of the theater industry, the Dramatists Legal Defense Fund respectfully requests that the Order below be affirmed.

October 30, 2018

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rules of Appellate Procedure 29, 32(a)(5), 32(a)(7), and Circuit Rule 29-2, the foregoing brief is proportionally spaced, has a typeface of 14-point Times New Roman, and contains 4,361 words, excluding those sections identified in Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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