

IN THE  
**Supreme Court of the United States**

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DONNA CORBELLO,

*Petitioner,*

*v.*

FRANKIE VALLI, *et al.*,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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**BRIEF IN OPPOSITION**

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## RESTATEMENT OF QUESTIONS PRESENTED

**Marshall Brickman** and **Rick Elice** wrote the script for *Jersey Boys: The Story of Frankie Valli & The Four Seasons*. **Frankie Valli** and **Bob Gaudio** were the prime sources for the script; and the producers and owners of the show.

**Tommy DeVito** was a member of The Four Seasons. He left the band in 1972 on hostile terms. The Writers researched a wide range of materials about the band. They interviewed many sources, among them, Valli, Gaudio, producer Bob Crewe, and also DeVito. DeVito later sent the Writers an Autobiography he co-wrote in the late 80's with a music journalist and lawyer, **Rex Woodard** who passed away in 1991. Petitioner **Corbello** is Woodard's heir. DeVito settled with Corbello before trial and before DeVito passed away in 2020.

Corbello claims *Jersey Boys* infringes the Autobiography. At issue: *two historical works*. Respondents asserted that any putative similarities involved facts, clichés, non-actionable phrases, scènes-à-faire, real people, actual places and true events in the lives of Valli and Gaudio—among them Gaudio's own stories about songs written by Gaudio (not DeVito); stories about events in Valli's life (not DeVito's). The Circuit ruled unanimously and “unremarkably” that none of these alleged “similarities” can be owned or protected.

A more accurate statement of the **Question Presented** is: Whether Plaintiff, co-owner of the Autobiography, can get around the long and widely accepted principle that *historical facts and events* are not protected under

copyright law by claiming that the facts and events were really “*fictionalized*” and “*made up*” when a) The Autobiography by its own unequivocal language repeatedly declared itself to be the “straight talking” truth about Frankie Valli, “an alternative to the bogus biographies . . . about The Four Seasons” etc.; b) The Autobiography was marketed (without success) to about 29 publishers by Woodard and later by Petitioner with cover letters (*see* Supp.ER.96-105<sup>1</sup>) promoting the Autobiography as “the truth” about The Four Seasons and which “documents the history of The Four Seasons”; c) when those same letters highlighted as “true” revelations about some of the *identical* events that Petitioner now calls “fiction”; d) when Petitioner’s counsel in his first Complaints in this action touted the Autobiography as the work of a serious music *journalist/historian* based on investigative research and FOIA requests; and as the “complete and truthful chronicle of The Four Seasons” (ER13048); e) when there was no evidence in the Record to support any claim to “fiction”; and f) when Petitioner Corbello testified that she could not say whether any portion of the Autobiography was fiction or not (ER5234; ER5266).

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1. Docket entries in Ninth Circuit Appeal No. 17-16337 are cited “R\_\_.” References to Petitioner’s Opening Brief, at R49-1, are cited “OB\_\_.” References to Respondents’ Answering Brief, at R74, are cited “AB\_\_.” References Petitioner’s Excerpts of Record in the court below are cited “ER\_\_.” References to Respondents’ Supplemental Excerpts of Record, at R71 are cited as “Supp.ER. \_\_.”

**RULE 29.6 NOTATION**

Pursuant to Rule 29.6, Respondents Frankie Valli, Robert J. Gaudio, Marshall Brickman, Eric S. Elice, Des McAnuff, and Michael S. David are individuals, with no parent corporation, stock or shareholders. Respondents Dodger Theatricals, Ltd., JB Viva Vegas, L.P, Jersey Boys Broadway Limited Partnership, DSHT, Inc., Skunk, Inc., and Getting Home, Inc. are closely-held corporations of which no publicly held company owns 10% or more.

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## INTRODUCTION & THE OPINION BELOW

Two signal features of the Ninth Circuit’s unanimous opinion and the oral argument before the Panel deserve attention. They are telling:

***The Decision “rests” on an “unremarkable proposition” of law:*** The Ninth Circuit introduced its legal analysis with a statement which unambiguously undoes any grounds for seeking certiorari. The ruling states that it is not based at all on any new or controversial proposition of law:

***Our decision rests primarily on “the unremarkable proposition that facts, in and of themselves, may not be form [sic] the basis for a copyright claim. 1 Nimmer on Copyright § 2.11(A). . . . [A] nonfiction biography like the work in this case is necessarily structured around historical facts and events, not themselves copyrightable.***

On close examination, each of the alleged similarities between the Play and the Work are based on historical facts, common phrases, and *scenes-a-faire* (scenes that are indispensable, or at least standard, in the treatment of a given idea,” *Apple Computer, Inc. v Microsoft Corp.*, 35 F.3d 1435, 1444 (9<sup>th</sup> Cir. 1994) . . . or elements that were treated as facts in the Work and are thus unprotected by copyright, even though now challenged as fictional. Neither Valli nor the other defendants violated Corbello’s copyright by depicting in the Play events in their own lives

that are also documented in the Work. Because the Play did not copy any *protected* elements of the Work, we conclude, there was no copyright infringement.

R136 (Opinion dated Sept. 8, 2020), attached as Appendix A to Petition for Writ of Certiorari, at 3a (“App.” or “Opinion”).

***Petitioner Admitted that the Work was “represented to be true”***: At Oral Argument, Judge Tashima, speaking of the DeVito Autobiography, asked one question of Petitioner’s counsel:

***Judge Tashima: “Is it [the Autobiography] represented to be true?”***

***Petitioner’s counsel: “Sure.”***

Judge Tashima had no further questions for Petitioner’s counsel.

R126, available at [www.youtube.com/watch?v=wcX2luGbxco&t=163s](https://www.youtube.com/watch?v=wcX2luGbxco&t=163s) (queued to time index 2:43).

Yet Petitioner’s counsel still nurses, as he did on appeal, the notion that any alleged similarities of historical fact *might* have been “fictionalized.” And he claimed, without any support in the record – literally none – that because the work was “unpublished” it could still theoretically be called, recharacterized or retroactively declared “fiction.” If one can magically recharacterize non-fiction as “fiction,” then maybe one might be able to

get some added protection that the original work was not entitled to in the first place. That is the sleight-of-hand that this Petitioner hopes to play in this disingenuous last-minute effort to claim ownership of facts and events that no one can or should own.

The entire “fictionalization” ploy not only lacks any foundation in the record, but it is a creature of Petitioner’s counsel’s own pure speculation. Petitioner’s counsel gamely offers that because the Work was “unpublished,” *“Indeed, the subject statements may never have appeared in the published text, or, may have been prefaced by a disclaimer.”* Petition for Writ of Certiorari, at 5, n.1 (“Pet.”) (emphasis added). This wishful speculation in the face of firm and repeated assertions that the Autobiography was a work of sound historical fact, disposes of this Petition. No court has to accept this kind of disingenuous back-filling – whether it does so under the name of “copyright estoppel” or “asserted fact.” Petitioner’s speculative “fiction” ploy fails under either name.

## STATEMENT OF THE CASE

### THE CONSISTENT AND CLASSIC LINE OF HISTORICAL WORKS RULINGS ACROSS THE CIRCUITS MAKES THIS CASE UNWORTHY OF CERTIORARI

**The Baseline Historical Works Cases:** The baseline law on historical works has been in place across all Circuits for many decades; in fact over a century. The lesser level of copyright protection afforded historical works has been restated and reaffirmed numerous times without dispute in *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980), *Narell v. Freeman*, 872

F.2d 907 (9th Cir. 1989) (following *Hoehling*), *Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620 (9th Cir. 2010) (following *Hoehling* and *Narell*), *Nash v. CBS, Inc.*, 899 F.2d 1537 (7th Cir. 1990), *Vallejo v. Narcos Prods. LLC*, 833 F. App'x 250 (11th Cir. 2020), *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 105 S.Ct. 2218, 85 L. Ed. 2d 588 (1985) and *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 111 S.Ct. 1282, 113 L. Ed. 2d 358 (1991), and in numerous other cases that follow them and by commentators including Nimmer.

When it comes to *historical* works, the lesser protection afforded them is intended to ensure that there is *breathing room for history*. It is intended to ensure that the monopoly of copyright is *not* extended to *history in any broad sense*: not to *portrayals or characterizations* of real people (as might be an issue if DeVito were a fictional character); and not to broader similarities in the depiction of historical events and their causes (as might be an issue with fiction). That is what *Narell and Benay* and all the other historical works cases are about. There is nothing new or novel about any of them. Judge Learned Hand articulated the very same view *100 years ago*:

[N]ot only are all the facts recorded in history in the public domain, but since the narration of history must proceed chronologically, - or at least such is the convention, - the order in which the facts are reported must be the same in the case of a second supposed author. ***There cannot be any such thing as copyright in the order of presentation of the facts, nor, indeed, in their selection, although into that selection may go the highest genius of authorship***, for indeed, history depends wholly upon selection from the

undifferentiated mass of recorded facts.” *Myers v. Mail & Express Company*, 36 C.O. Bull. 478, 479 (S.D.N.Y. 1919) (unreported).

See *Norman v. Columbia Broad. Sys., Inc.*, 333 F. Supp. 788, 797 (S.D.N.Y. 1971) (emphasis added), citing Judge Hand, whose ruling is still a touchstone. In the Autobiography there is nothing even close to any such unprotected “ingenious” selection. In the case at bar Petitioner can only point to putative but meager similarities<sup>1</sup> of phrases found in very different treatments of the stories about The Four Seasons’ (the “Band”) main hit songs. The selection of those hit songs are more than obvious fare for *any* history of *any* band. And that is particularly so in a play like *Jersey Boys* in which those same hit songs are performed and worked into the script.

Petitioner cannot own any of that. It is frivolous to suggest otherwise. The Ninth Circuit recognized and addressed that:

There is no viable arrangement and selection argument here, both because the unprotectable elements that appear in both the Play and the Work are not “numerous enough” (Citations omitted) and because, even if there were an original synthesis of those elements in the Work, ***it is not present in the Play***. The

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1. The Circuit Court’s Opinion reviews in very precise detail each of the alleged similarities and why they are either not protected or simply too different or too trivial (i.e., the use of Mary’s name) to count as similarities. The remaining putative similarities are also unprotected clichés and phrases, unprotected in any kind of work, fiction or non-fiction.

selection of the true stories behind the band's most popular songs and the arrangement of those stories in roughly chronological order is not original and so not protectable by copyright.

App. 11a, n.2. (emphasis added).

The Ninth Circuit, based on its examination of the two works, also saw clearly that in the bigger picture, the Autobiography and the Play present the stories of the Band's songs and its history from very different perspectives and interpretations. The Ninth Circuit emphasized:

The Work and the Play depict those historical events from different perspectives, with different characterizations of the people involved, in different media, and communicating a different overall message.

*Id.* This observation puts the alleged similarities in perspective. They are microscopic – involving only limited parallels in unprotected clichés and phrases – especially when they are seen in the broader comparison of the works. The Play has a dramatic arc. The Autobiography has no dramatic arc or structure; it just reports one disconnected anecdote after another in pure chronology.

As Petitioner recognized in a letter to DeVito's counsel, the Autobiography lacks "conflict," which the Play features. Supp.ER.106. She acknowledged that it would need to be re-written to include conflict between band members if it were to become "saleable." *See id.* When DeVito declined to make these changes, i.e., to make it more like the Play (including adding music to which he had no rights), Corbello sued.



The Ninth Circuit ruling cites to most of the standard legal chestnut cases: *Hoehling*, *Narell*, *Benay*, and *Nash* among many others. And in citing *Feist*, the panel observed: “It is thus a feature of copyright law, not a bug or anomaly, that an author who deals in fact rather than fiction receives incomplete copyright protection for the results of his labor.” App. 8a-9a.

Historical works of other plaintiffs – works that are loaded with spectacularly more hypothetical and speculative historical accounts than DeVito/Woodard’s – have still foundered on the very same historical works doctrine:

As the Ninth Circuit recounted:

“Given an express representation that the work is factual, the case law indicates that the author will be estopped from claiming fictionalization, even if most readers would not believe the representation.” 1 Nimmer on Copyright § 2.11. Claimed fictions that have been treated as facts for copyright purposes under this approach include a novel hypothesis about the cause of the Hindenburg explosion, *Hoehling*, 618 F2d at 978-79; a theory that John Dillinger was not killed by law enforcement and instead retired to the West Coast, *Nash*, 899 F2d. at 1538, 1541; and a “true crime” book with fantastical stories, *Houts*, 603 F.Supp. at 30; And representations that the author was the scribe of a spiritual power, *Oliver*, 41 F.Supp. at 297.

App. 19a-20a.

None of this is novel or worthy of revisiting in a certiorari petition. The Ninth Circuit went on to cite other rulings in which disingenuous claims to “fictionalization” have been briskly rejected (*see* App. 24a-25a), *Crane v. Poetic Product Ltd.* 593 F. Supp. 2d 585 (S.D.N.Y 2009) among them. But the bottom line is that the judicial estoppel doctrine “protect[s] against a litigant playing “fast and loose with the courts.” App. 20a (quoting *Religious Tech. Ctr. v. Scott*, 869 F.2d 1306, 1311 (9th Cir. 1989) (Hall, J., dissenting). In claiming “fictionalization,” this Petitioner was playing fast and loose with the District Court, with the Ninth Circuit; and now in this Petition.

Petitioner’s canard that the Opinion’s “asserted facts” doctrine is a “newly coined” doctrine about fictionalization claims is specious. The Opinion is clear that it is applying the “copyright estoppel” doctrine as it was so named and so applied in a number of the older cases it relied on. It just gives a new name to that long-recognized doctrine. The Opinion considers the “asserted facts” doctrine a better name for the old “estoppel” rule because it does not suggest any wrongdoing on the part of a plaintiff. But such duplicitous unfairness is precisely what is in play here with Corbello’s “we could have made it up” claim. A work should be taken for what it presents itself to be. Corbello’s claim, that it should be treated otherwise, is disingenuous at best. Judge Tashima’s crisp question shuts down this Petition.

## THE FICTION PLOY AND PETITIONER'S LATE FICTIONALIZATION TURN

The central feature of this Petitioner's fictionalization claim was belatedly manufactured by her counsel after Petitioner collided with the classic line of cases that afforded less protection to historical works.

Not only had the Autobiography and Woodard's marketing letters touted the Work's historical veracity, but the initial Complaints in this action also touted the Work as one of straight and highly researched history, the "complete and truthful chronicle of the Four Seasons." ER13048. Among other things, the first two Complaints highlighted the investigative effort behind it and the FOIA requests that Woodard had issued to unearth the "secret past" of The Four Seasons as well as other "discover[ies]" that he had made about their lives. Neither sweat nor discoveries are protected under 17 U.S.C. §102(b). *See, e.g.*, AB43.

But on briefing of the Motion To Dismiss in 2009,<sup>2</sup> Petitioner was confronted with the *Hoehling*, *Narell* and *Benay* line of cases and the lower level of protection that the Autobiography could expect. Caught off guard, Petitioner argued that *Hoehling* (which *Narell* cited with approval) had been "***eviscerated***" and that Respondents' counsel had "***invented***" the thin copyright doctrine regarding facts and historical events. ER7772; ER6801.

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2. The Court did not then apply the copyrightability test to any of the alleged similarities, but allowed the claim to pass the 12(b)(6) motion merely because the Plaintiff's work and the Defendants' work were identified.

Thereafter Petitioner's counsel turned to claiming that the Autobiography was "**fictionalized**" and her expert so opined without the slightest factual foundation. But that was never the way Woodard saw it; he described himself to publishers as a music "**historian**" and journalist and his work as one that discloses "**the truth**" about the band members' past. Supp.ER.96-97. That was not the way the Autobiography presented itself either; it promised "*straight talk*" about The Four Seasons and Frankie Valli; a push-back against the "bogus biographies perpetrated" by others. That was not the way that Corbello, herself, presented it to other publishers; she used the same form letters that Woodard had sent. *Compare* Supp.ER.96-97 *with* Supp.ER.102-03.

And, what was specifically listed on the letter's attachment (Supp.ER.98-99) among the "**truths**" disclosed by the Autobiography? Some of the very same things that Petitioner now wants to call "fiction." For example: the stories behind the Band's songs *Sherry*, *Big Girls Don't Cry*, *Dawn* and, of course, "*Walk Like a Man*." Also specifically called out in Woodard's letters as "truth" was the fake shooting in the car story. Supp.ER.96; Supp.ER.101. The Ninth Circuit immediately recognized these as unprotected historical events. Indeed, as the Respondents' own stories.<sup>3</sup>

DeVito, at the time of his deposition, the only living author of the Work, said of his work with Woodard: "I just don't want anything in there that isn't true and I don't

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3. What makes this case so peculiar is that Petitioner claims to own the Respondents' own stories about their own lives. It is not the kind of case that one is likely to see again.

want anything in there that's made up or anything like that. I want it about my life story 'cause that's my life." ER5159, at 9-12. DeVito's only cavil with Woodard was that Woodard tried to remove curse words from what DeVito said. Otherwise, DeVito affirmed that what was reported in the Autobiography was "true." ER5041.

At trial Petitioner offered no evidence, beyond counsels' speculation, that Woodard fictionalized anything. Corbello admitted she could not say what if anything was fiction. ER5234; ER5266. Indeed, counsel's decision to discredit Woodard's integrity as a journalist is a rather striking choice of tactic.

So, Plaintiff's counsel had to work around that inconvenient truth. To do that they spent much time in the near 35 depositions they noticed trying to find points of *disputed fact*,<sup>4</sup> and to conclude from them that the Autobiography must have been "*fictionalized*." But that does not make them "fiction." See App. 19a-27a (citing *Nash*; *Hoehling*; *Idema v. Dreamworks Inc.*, 162 F. Supp. 2d 1129, 1183 (C.D. Cal. 2001); *Houts v. Universal City Studios, Inc.*, 603 F. Supp. 26, 30-31 (C.D. Cal. 1984); *Lake v. Columbia Broad. Sys.*, 140 F. Supp. 707, 708-09 (S.D.

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4. Disputed facts do not become fiction because they are disputed. Discredited histories are not simply reshelfed by publishers in the fiction section of a bookstore. The process of historical writing is often *about* disputed events. Statements asserted as fact may or may not turn out to be true, but they are nonetheless *factual* statements. The whole premise of defamation law is that *false* statements of fact can be actionable. They are not viewed as "fiction" or opinion unless a reasonable reader would see them as fiction or opinion. And no reasonable person would have any basis for thinking that here. All the evidence in the record was to the contrary.

Cal. 1956); *Oliver v. Saint Germain Found.*, 41 F. Supp. 296, 299 (S.D. Cal. 1941). The Ninth Circuit rejected this disingenuous maneuver. Trial time too was wastefully occupied with the same casuistry.

This canard is at the heart of Petitioner’s “estoppel” argument: that an historical fact asserted to be true can nevertheless be called “fiction” until it is actually published (or gets a publishing deal). The thought is specious. It would mean that historians doing research on unpublished works cannot rely on them as factual, but must contemplate that the owner can sue them for infringement and later claim that some of the “facts” used were actually “fiction.” Courts reject that. App. 25a.

The Autobiography forcefully declared its factual status. That should end the analysis. The serious assurances given to publishers that the Work was non-fiction, if made up, as Petitioner now claims, would subject Woodard and any publisher that published it as “non-fiction” to serious ethical and legal repercussions. (For example, James Frey’s *A Million Little Pieces*; full refunds were given to deceived readers by the publisher after the claimed true-life memoir was exposed as filled with fabrications.) Petitioner proposes that this Court should approve of Petitioner’s maneuver. But it is unethical to recast a non-fiction work as a fiction work; or to sell it to a publisher as non-fiction and then announce that it was really “fiction.” That duplicity would be a breach of any publishing contract. There is nothing innocent about it.

**PETITIONER’S “FICTION” PLOY DESERVES NO  
ATTENTION FROM THIS COURT**

Petitioner’s “fiction” ploy made for needless discovery, protracted the trial and confused the jury’s task. The Ninth Circuit correctly rejected this ploy and called it for what it was - unsupported in the record and legally baseless.

The district court JMOL Ruling recognized them as problematic. Commenting on the “Walk Like a Man” dialogue, for instance, the district court observed that while the jury might have believed that dialogue to be “fiction,” such a finding was “perhaps not even permissible given the work’s claim of historical accuracy.” ER28.

Courts have uniformly treated quotations presented as accurate reconstructions of actual conversations—as are those in the Autobiography—as facts. Where a work reconstructs historical conversations and presents dialogue as “actual quotations by real people,” such dialogue “is not protectable by copyright.” *Crane*, 593 F. Supp. 2d at 595 (dialogue surrounding the death of Pope John Paul presented as fact, treated as fact, not fiction). Another court pointed out:

plaintiff argues that since the book contains many examples of conversations and events that the author and Dr. Helpert [whose “true-life stories” the book represented to contain] could not possibly have been present to experience, the book is clearly fictional. This, however, is the very nature of biographical works that involve any historical perspective. All historical

renditions would be deemed fictionalized under plaintiff's theory merely because the author was not there personally.

*Houts*, 603 F. Supp. at 30, 31 (granting summary judgment). The same holds for the Autobiography's purportedly "invented" dialogue, which was touted by its author and Petitioner as truth.

Another maneuver by Petitioner is to claim that if an account of an event was disputed, challenged or "erroneous," it is protected "fiction." OB5, 7, 13. But this case is not about proving the "true history" of *The Four Seasons*. It does not matter if the Autobiography's accounts are "correct or incorrect" *Hoehling*, 618 F.2d at 979 (novel hypothesis about the cause of the Hindenburg explosion, presented as fact, treated as fact); nor does it matter if they are controversial or disputed, provable or unprovable ; *Nash*, 899 F.2d at 1541 (novel and dubious theory that Dillinger survived the Chicago shootout and lived out his days in California, presented as fact, is treated as fact; "the first person to conclude that Dillinger survived does not get dibs on history").

Even where an "incorrect fact" appears in an *unpublished* work, the analysis does not change. *Compare Harper & Row*, 471 U.S. at 564, OB55, *with Idema*, 162 F. Supp. 2d at 1183 ("Plaintiffs cannot claim to have the exclusive right to exploit these facts for dramatic purposes, *even if* Respondents only learned of the alleged events . . . by reading Plaintiffs' works.").

The District Court did not need to invoke the phrase "copyright estoppel," as Petitioner seems to believe was required (OB30, 65), to ultimately reject as a matter of



law her remaining claims of infringement of “fictitious” material. This Court should likewise recognize Petitioner’s claims as unsupportable.

**WHETHER A WORK IS “PUBLISHED”  
OR “UNPUBLISHED” IS A MEANINGLESS  
DISTINCTION IN THIS CASE**

It is not clear at all why lack of publication of a work makes it more likely to be “fiction” or should weigh in favor of such a claim. Historians regularly research and depend on *unpublished works*. Historians like Arthur Schlesinger and their publishers reacted in horror to decisions like *Salinger v. Random House, Inc.*, 811 F.2d 90, 98 (2d Cir. 1987). Pet. 6. They urgently pressed for an amendment to Section 107 to make it clear that unpublished works did not come in for special protection. They succeeded in 1992 and for good reason the copyright statute was amended to make it clear that use of unpublished works was *not* presumptively unfair. That change in the law also had implications for how *Harper & Row* was to be read.

The other non-sensical dimension to Petitioner’s proposal that a work’s unpublished status supports claims to “fiction” is that copyrightability is a legal concept that does not turn on whether something is published or unpublished. It may have some now diminished bearing on fair use. But one does not even reach fair use unless protectable expression has been infringed.

Also, the idea that the Autobiography is “unpublished” makes no sense. If the Autobiography infringed another work, then the limited circulation and its marketing would be deemed a “publication” under copyright law. And if the Autobiography defamed a person it referred to, its

circulation to any third party would be a “publication” under defamation law. Equating an unpublished work with a fictional work is flim flam. It is not the stuff that legitimate certiorari petitions are made of.

**PETITIONER’S MISCHARACTERIZATIONS OF THE RECORD AND THE IRRELEVANCE OF ACCESS WHICH WAS ALWAYS CONCEDED**

Petitioner’s statement of the facts and characterizations of the record should be read with caution: We object to them because they distort and mischaracterize the record. They are devoted almost entirely to tendentiously arguing Petitioner’s *access and use* case. Respondents had forthrightly conceded access at all stages of this case. The only legally material issue is whether any alleged similarities were protected as a matter of copyright law. Petitioner played and replayed the access case at every stage of this proceeding in the hopes that they would overcome their lack of protectability problem and perhaps prejudice Respondents.

We will not attempt to chase down each of the record mischaracterizations here, or to run down all of Petitioner’s rabbit holes - especially when they have no bearing on the legal issues at hand. But we broadly object to them. Rather, we offer these points regarding access generally.

Any writer, like Brickman and Elice, who does conscientious research on an historical or biographical drama will, by definition, have *access* to all works into which they conducted research. They will have taken notes on them. They will thus have *made use* of them and, perhaps, have benefitted by it. But that does not establish

anything close to infringement; nor should it paint a bullseye on their backs by virtue of their research. On this very point, Nimmer observes:

***[E]ven where the fact of copying is conceded, no legal consequences will follow . . . Even where there is no dispute about a) the validity of plaintiff's copyright, b) defendant's access to the work, and c) very strong resemblances between them, the result is only to show probative similarity—but the court may still grant summary judgment to the defendant, as when defendant took only the unprotected elements of the Plaintiff's work.***

4 Nimmer on Copyright § 13.03[A] at 13-40.1 to 13-40.2 (2017) (emphasis added); AB22.

That is what the Respondent creators of *Jersey Boys* did at most. They interviewed Valli, Gaudio, DeVito, and producer Bob Crewe, among others; they had access to another unpublished biography of The Four Seasons (Supp.ER.110); to a prior treatment for the play (ER4647; Supp.ER.110) as well as numerous articles and online materials. Woodard himself had 17 ringed notebooks full of articles and other peoples' writings about The Four Seasons, on which he based his own research. ER2574. Hence, they had "**access**" to published and unpublished works; and made "**use**" of them to gain knowledge about their subjects.

When Brickman and Elice interviewed DeVito, they took extensive and detailed notes of what DeVito had to say. ER10194-10202. At the close of their interview, DeVito offered to send them a copy of a manuscript of his

Autobiography which he had written in the late 80's with Woodard.<sup>5</sup> DeVito sent it to them. Much of what DeVito told the writers in the interview was, naturally, in the Autobiography as well. The DeVito interview notes reflect many of the same events referenced in the Autobiography.

DeVito and Valli parted ways in 1972 and had little to no contact after that. DeVito and his Autobiography were hostile and extremely negative toward Valli; and blamed the split up on Valli. The Play reflected this conflict, but takes Valli and Gaudio's point of view, blaming DeVito for the split up and for the Band's indebtedness to the mob.

Petitioner attempted to get around the thin protection problem posed by historical works by playing up the "fiction" ploy and by telling and retelling the "access" story as they have attempted to do in their Petition. While copyright plaintiffs generally play their access, use and

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5. A reading of the interview notes shows why DeVito wanted the writers to see his Autobiography. He knew that the Play would reflect Frankie Valli's point of view and, specifically, Valli's negative view of him. The two had not spoken since their split. The interview reflects DeVito's grievance and his effort at self-defense. He hoped that with his interview and the Autobiography, the writers might see things more his way. The Play did not turn out that way. But the writers and director sought to complement DeVito and to make him feel part of the effort, the Director in particular, in the hopes that DeVito would appear on stage on the opening nights – something which he ultimately did in several cities. Still the Play blames the split on DeVito and his putting the Band in debt to the mob. In the Autobiography, the debt to the mob was blamed on a band manager – not Tommy. And in the Autobiography, the mob sit-down ends with the band unifying behind Tommy. In the Play, the mob sit-down ends with Tommy being kicked out of the Band and Frankie taking on the debt. Both have mob sit-downs, but they end in opposite ways.

“inspiration” stories to *substitute* for copyrightability, these stories have no bearing on the legal question of copyrightability. The Ninth Circuit and other courts do not indulge such efforts.

1. ***Petitioner insists on arguing “access”*** when it has been conceded, as here. Yet, ***“[n]o amount of proof of access will suffice to show copying if there are no similarities.”*** *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*, 462 F.3d 1072, 1081 (9th Cir. 2006).

2. ***Petitioner insists on replaying alleged “admissions” of “copying,”*** even when such admissions have no bearing on whether *protected expression* was copied. OB16, 17, 19 n.11. In *Idema*, the defendant writers and Steven Spielberg admitted that they had “copied” his work to make their movie.

The Court is even willing to assume, . . . that Defendants made “use” of Plaintiffs’ works as source materials during the development of “The Peacemaker.” . . . ***The question remains whether Defendants copied Plaintiffs’ protected expression.***

*Idema*, 162 F. Supp 2d. at 1171 n.44.

3. ***Petitioner insists on replaying defendants’ statements of being “inspired” by plaintiff’s work.*** Petitioner here has repeatedly referenced Des McAnuff’s praise of the Autobiography as “delicious” and statements of a writer suggesting that they learned impressive things from it. But courts have consistently regarded such allegations as irrelevant to substantial similarity. *See Shipman v. R.K.O. Radio Pictures, Inc.*, 20 F. Supp. 249,

250 (S.D.N.Y. 1937), *aff'd*, 100 F.2d 533 (2d Cir. 1938) (“If what the alleged infringer took was not copyrightable, the copyright owner may not complain, although his work may have been what directly *inspired* the work of the infringer.”) (emphasis added); *Sinicola v. Warner Bros., Inc.*, 948 F. Supp. 1176, 1190-91 (E.D.N.Y. 1996) (“even if the Film were *inspired* or *adapted* from the Novel, that would still not be sufficient. . .”). Musicians and other artists typically say that they were “inspired” by other artists, but that does not mean that they plagiarized or infringed the work of those who inspired them.

**4. *Petitioner insists on rifling through drafts and research materials.*** Respondents view prior drafts and research as irrelevant to proving substantial similarity in a final script. In *See v. Durang*, 711 F.2d 141, 142 (9<sup>th</sup> Cir. 1983), the Ninth Circuit rejected that a plaintiff was entitled to discovery of early drafts “on the theory they might reflect copying from plaintiff’s play that was disguised or deleted in later drafts.” “Copying deleted or so disguised as to be unrecognizable is not copying.” *Id.*; *see also Walker v. Time Life Films, Inc.*, 615 F. Supp. 430, 434 (S.D.N.Y. 1985), *aff'd*, 784 F.2d 44 (2d. Cir. 1986); *Idema*, 162 F. Supp. 2d at 1185 n.67; 4 Nimmer, §13.03[B][1][b].

**5. *Petitioner insists on replaying suggestions that defendants wrongly obtained their work.*** Petitioner’s claim that the Writers obtained the manuscript through “*false pretenses*” is wrong. OB54-55. Even if the Writers violated some agreement with DeVito (which he has never complained of), that could have no bearing on a *copyright* claim. There is either copying of *protected expression* or not. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, at 568 n.18 (1994) also defeats this contention: “[B]eing denied permission to use a work does not weigh against

*a finding of fair use.*” (emphasis added). And similarly, it would not weigh against finding no use of protected expression.

## REASONS FOR DENYING THE PETITION

### ***I. The Ninth Circuit’s Affirmance Creates No “Conflict” With Other Circuits Or “Tension” With This Court***

#### ***A. The Affirmance Is in Accord With the Long-Followed and Consistent Rulings of Other Circuits and This Court***

In her first complaints in this action, Petitioner touted the Autobiography as the work of a serious music journalist/historian based on investigative research. *See* App. 15(a) (referencing “research notebooks” of Petitioner’s late husband). She only later started claiming that the Autobiography was “fictionalized” or “fictitious” as she and her counsel struggled to deal with the implications of *Feist*, *Hoehling*, *Narell*, and *Benay*; and the lesser protection afforded historical works. Petitioner continues to press her “fictitious” claims here. *See* Pet. 3–5, 21, 24, 34, 35. But as the Ninth Circuit observed, “The asserted facts do not become protectable by copyright even if, as Corbello now claims, all or part of the dialogue was made up.” App. 32a.

Thus, both parts of the Ninth Circuit’s affirmance follow the holdings of this Court and the Second Circuit, as well as its own prior decisions. *See* App. 8a–9a, 13a–19a, 20a, 25a, 27a–30a, 32a. The affirmance also is consistent with decisions of other Circuits that came before it and that have come since on the free availability of information that is factual or held out as factually accurate. *See, e.g.,*

*Miller v. Univ. City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981); *Nash*, 899 F.2d at 1541; *Narcos*, 833 F. App'x at 257. *See generally* U.S. Const. Art. I § 8 (“The Congress shall have Power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”); *Baker v. Selden*, 101 U.S. 99, 103 (1879) (“The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book.”).

Certiorari, therefore, should be denied first and foremost for the case’s sheer unremarkable legal basis.<sup>6</sup> *See* App. 3a (“Our decision rests primarily on ‘the unremarkable proposition that facts, in and of themselves, may not be form [sic] the basis for a copyright claim.’”), *citing* 1 Nimmer on Copyright § 2.11(A).

***B. The Tenth Circuit’s Jacobsen Decision Is Plainly Unhelpful to Petitioner and Is Not in Conflict with Long-Prevailing Case Law***

Petitioner makes two certiorari pitches. Both grossly distort the facts and holdings below.

First, Petitioner claims that the Ninth Circuit’s affirmance creates a “conflict” with a single decision, *Jacobsen v. Deseret Book Co.*, 287 F.3d 936 (10th Cir. 2002).

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6. There is yet another reason why this Petition leads nowhere: On any remand, the Ninth Circuit would have to rule on the fair use grounds which would readily defeat any claim on any remaining putative similarities – if such exist.



*See* Pet. 5 n.2, 34–35. Yet unlike the instant case—in which the Ninth Circuit affirmed a post-trial judgment as a matter of law—*Jacobsen* involved a *motion to dismiss* for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Compare* App. 32a, *with Jacobsen*, 287 F.3d at 940–41. The Tenth Circuit held that defendants “arguably copied more than a few words and phrases” from the plaintiff’s unpublished memoir. *Id.* at 947. *See also id.* at 945 n.7 (referring to plaintiff’s work as an “unpublished manuscript”); *Jacobsen v. Deseret Book Co.*, No. 2:99–CV–893K, 2001 WL 1806858, at \*1-2 (D. Utah Jan. 12, 2001) (noting that the plaintiff had distributed 75 copies of a revised manuscript to family and friends, and that one defendant had encouraged him to publish his memoir). But the Tenth Circuit noted that whether dialogue at issue was original expression could not be determined at that stage of the litigation, because it turned, “at least in part, on additional evidence to be presented at trial.” *Jacobsen*, 287 F.3d at 947.<sup>7</sup>

Here, in contrast, there *was* a trial. Evidence showed that the other members of The Four Seasons had been telling the same stories themselves for years, and recalled the events and conversations as having occurred with substantially similar words as reported in the Autobiography. The Autobiography also represented itself as true, as did Petitioner and her late husband in letters to nearly 30 prospective publishers. *See* App. 30a–31a.<sup>8</sup>

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7. The Tenth Circuit gave the *Jacobsen* plaintiff’s statements no special allowance for their being as yet unpublished. Nor did it give the plaintiff any license of the type Petitioner asks of this Court (*see* Pet. 5 n.1), to reserve the statements at issue upon publication or disclaim them as fictional or dramatized.

8. Moreover, the first time Frankie Valli and Bob Gaudio reviewed the Autobiography was at their depositions. *See* App. 81a.

Ultimately, both courts below concluded that statements like “social movement” or “Well, asshole, what do you plan to do about it?”—the supposedly “original expression” of the Autobiography—only involved “ordinary phrases” that were not protectible as a matter of law. *See* App. 17a, 29a–30a, 32a, *citing* *Narell*, 872 F.2d at 911, 912; *cf. Jacobsen*, 287 F.3d at 947. This case does not involve potentially “reconstructed” dialogue of the type or caliber that the Tenth Circuit in *Jacobsen* concerned itself with. *Compare* Pet. 5 n.2, *with Jacobsen*, 287 F.3d at 947; *see* App. 25a (the Autobiography “purports to accurately document conversations in which its co-author, DeVito, *actually participated*”).

With respect to “ordinary phrases” and clichés, this case is the latest in a line that courts unfortunately have had to consider for more than a century, involving lists of purportedly actionable similarities that are “not only unpersuasive, but in many parts silly.” *See Bachman v. Belasco*, 224 F. 817, 818 (2d Cir. 1915) (dismissing copyright infringement action against play over commonality between statements such as “She is in a highly nervous condition,” and “He will probably be in a highly nervous state.”).

### ***C. The Ninth Circuit’s Affirmance Would Not Alter Harper & Row***

Second, Petitioner claims the Ninth Circuit’s affirmance creates “tension” with the Court’s fair use decision in *Harper & Row*. Pet. 5, 34. She claims the statements at issue are “subjective portraits of real persons,” in an attempt to liken them to the author’s own “reflections” and “perceptions” that the *Harper & Row* majority found expressive. However—much more so than in *Harper & Row*—much of the material at issue

here is “matter-of-fact representation of the words of others . . . ; such quotations are ‘arguably necessary adequately to convey the facts,’ . . . and are not rich in expressive content.” *Harper & Row*, 471 U.S. at 598 ; 105 S.Ct. at 2250 (Brennan, J., dissenting). To the extent the Autobiography contained “reflection,” the Play did not use it. *See, e.g.*, App. 26a–27a (“The only similarity between” the Autobiography’s account of someone Frankie Valli dated and a composite girlfriend character in the Play “is the fact that Valli asked DeVito about a woman named Mary”); 30a–31a (band discussion about title and subject matter of song “Walk Like A Man”).

Quite significantly, the *Harper & Row* Court did not treat or regard “quotes attributed by President Ford to third persons” as among the protected parts of the Ford Memoir. 471 U.S. at 570. They were *excluded* from the analysis, along with “quotes from Government documents.” *Id.* Neither are protected by copyright. But here, Corbello seeks ownership of quotes attributed to third persons. They are expressly excluded from protection under *Harper & Row*.

Petitioner is incorrect that the Ninth Circuit’s holding would have altered the *Harper & Row* outcome. Pet. 6 n.3. In his contract with Harper & Row, President Ford expressly acknowledged that his work would contain “unique *information* not previously disclosed about Author’s career and personal life.” *Harper & Row*, 471 U.S. at 603; 105 S.Ct. at 2252 (Brennan, J., dissenting) (emphasis added).<sup>9</sup> However, the impact on copyrightability

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9. Petitioner ignores that in response to *Salinger v. Random House, Inc.*, 811 F.2d 90, 98 (2d Cir. 1987) (Pet. 6), Congress amended 17 U.S.C. § 107 to state that “The fact that a work is

of the material's nature as "information" was an issue that the majority concluded it "need not reach," because the defendant had admitted to using "generous verbatim excerpts" of President Ford's manuscript. *Id.* at 548–49; 2224. "[T]he fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material," the *Harper & Row* majority observed. *Id.* at 565; 2233. Indeed, the bulk of the *Nation's* article consisted of direct verbatim paragraphs lifted from the manuscript, along with paraphrasing and with barely any comment of any kind. *See id.* at 570. This case involves no such "verbatim" copying. *See* Pet. 6.<sup>10</sup>

In the end, this is not a case of authored "dialogue . . . now resid[ing] in the public domain" as a result of the Ninth Circuit's holding, as Petitioner contends. Pet. 25. Rather, this is a case of a claimant misusing copyright law and twisting *Harper & Row* to unfairly claim adverse possession of other people's life stories. The Court should not indulge this casuistry.

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unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." *See* 17 U.S.C. § 107; "Fair Use of Unpublished Works," PL 102–492, Oct. 24, 1992, 106 Stat. 3145. The amendment "was introduced as a result of concerns by some biographers, historians, and publishers" over limitations suggested by the *Salinger* decision on "their ability to use unpublished primary source material." H.R. REP. 102-836, 4, 1992 U.S.C.C.A.N. 2553, 2555.

10. *Harper & Row* differs from the instant case in another highly significant respect: President Ford never later speculated through counsel that his own work had been "fictitious," as Petitioner has done here, in a specious and desperate bid for copyright protectability. Pet. 21, 24, 34–35. And *Harper & Row* makes clear that President Ford's quotes of third parties were not protected.

## CONCLUSION

This case turns on copyrightability of historical, biographical and factual works. There is nothing new at issue here in the long and consistently followed historical works line of case law relied on by the Circuit; there is no novel or critical question of law to be untangled. The facts, as they are carefully detailed by the Circuit, preclude that. The Petition should be denied.

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