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## CASES OF INTEREST

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### IP/Entertainment Law Weekly Case Update for Motion Picture Studios and Television Networks

February 8, 2012

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**Thayil v. Fox Broadcasting**, USDC S.D. New York, February 2, 2012

 [Click here for a copy of the full decision.](#)

- District court dismisses plaintiff's complaint accusing producers of *American Idol* and other reality competition shows of stealing his ideas and infringing his copyrights, holding that the allegedly stolen elements were not copyrightable, and that plaintiff's conclusory allegations did not suffice to state a claim.

Pro se plaintiff Paul Thayil created a marketing plan outlining his concepts for two projects, "Musicflow" (a multicity tour of amateur musicians) and "ShyDancer" (a television show that would air selected home videos of participants dancing in their own homes). Plaintiff brought suit against defendants, creators and producers of four entertainment competition shows – *American Idol*, *So You Think You Can Dance*, *America's Got Talent* and *Dancing with the Stars* – alleging various claims including copyright infringement, misappropriation of trade secrets, unfair competition, fraud, conspiracy to defraud, and violations of the Racketeer Influenced and Corrupt Organization Act (RICO). Plaintiff claimed that defendants rejected the submission of his marketing plan and then used his ideas in their own shows.

Plaintiff asserted that defendants used various aspects from the marketing plan, including meetings with investors to generate funds and partnerships for the shows, choosing judges, inviting musicians to take part in the shows, working with other major companies across the United States, after an audition, having contestants use the phrases "going to Hollywood" or "not going to Hollywood," encouraging contestants to travel between cities, encouraging contestants to reach the top group of competitors, choosing music for performances on the shows, and using *American Idol* as a mechanism to discover new talent so that defendants could exploit and benefit from their record sales. Plaintiff also alleged that defendants misappropriated the essence of his "Musicflow" idea – that young amateur musicians be given exposure in major cities, with the end result that they are able to market their music. The district court granted defendants' motion to dismiss all of plaintiff's claims, finding that the plaintiff "fail[ed] to make factual assertions to support his generalized accusations of defendants' wrongdoing." Rather, plaintiff's complaint was "filled with conclusory allegations of wrongdoing and violation of various laws, which are unsupported by factual assertions that would allow this court to draw a reasonable inference that defendants are liable for the alleged misconduct."



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With respect to plaintiff's copyright claim, the court found that, even taking as true plaintiff's factual allegations in support of his assertions that defendants had access to and had copied his marketing plan, plaintiff failed to plead any factual allegations to support a finding that those elements of his plan that defendants allegedly copied were protected by copyright or that the alleged copying by defendants amounted to an unlawful taking. At the outset, the court noted that, to the extent that plaintiff asserted claims based on defendants' alleged misappropriation of ideas, his copyright claim must be dismissed. The remaining elements that plaintiff claimed defendants misappropriated from his marketing plan – having meetings with investors and choosing judges, for example – were generalized strategies or actions, ones that the court found reasonably would be undertaken by anyone seeking to create a competitive reality show using amateur performers, and were not protectable expressions. The court also noted that the two expressions plaintiff claimed defendants misappropriated – “going to Hollywood” and “not going to Hollywood” – did not appear in the his marketing plan.

The court also dismissed plaintiff's misappropriation of trade secrets and unfair competition claims under New York law, finding that Thayil had failed to allege facts in support of those claims. Specifically, the court found that his unsupported and conclusory allegations that he, at all times, considered the marketing plan to be a trade secret, that he provided it to defendants as a trade secret or that they understood that it was a trade secret, were not entitled to a presumption of truth. Plaintiff failed to allege that he protected his marketing plan in a way consistent with the protection of a trade secret or that when he gave the plan to defendants, he delivered it with an expectation of confidentiality that defendants agreed to or understood. Plaintiff likewise failed to adequately state a claim for unfair competition, since he did not allege facts that would allow the court to draw the inference that he owned a property right or commercial advantage in his marketing plan that defendants appropriated. The court noted that Thayil did not exclusively own a property right in the idea of exploiting amateur performers, nor the exclusive right to benefit from such general activities as meeting with investors to generate funds and partnerships.

The district court dismissed plaintiff's complaint with prejudice, finding it “beyond cavil that given the opportunity to amend, Thayil would not be able to cure the deficient pleading[.]” especially in light of his previous unsuccessful suit, which the Missouri district court dismissed.

**Corbello v. DeVito**, USDC District of Nevada, January 31, 2012

 [Click here for a copy of the full decision.](#)

- District court grants summary judgment in favor of defendants, writers and producers of the Broadway musical *Jersey Boys*, in copyright infringement action brought by widow of author of biography upon which musical was based, holding that defendants had valid licenses and sub-licenses to exploit the biography.

Author Rex Woodward wrote a biography (the Work) of defendant Thomas Gaetano DeVito, a founding member of the musical group the Four Seasons, based on various interviews and discussions he had with DeVito over several years. Woodward and DeVito agreed that they would be considered co-authors of the Work and would share equally in the profits. Woodward died in 1991. DeVito registered the Work with the U.S. Copyright Office in his name alone. DeVito later granted defendants Frankie Valli and



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Robert Gaudio an exclusive, irrevocable, perpetual, worldwide, and assignable license to freely use and adapt certain materials, including the Work, into a musical. Under the license agreement, DeVito would receive 20 percent of royalties received by Valli and Gaudio in exploiting the Work. Valli and Gaudio sub-licensed the Work to the writers and producers of *Jersey Boys*, who eventually adapted the Work into the successful Broadway play *Jersey Boys*.

Woodward's widow, plaintiff Donna Corbello, sued DeVito, Valli, Gaudio and others involved with the writing, production, and distribution of the play *Jersey Boys* for, among other things, copyright infringement (under the copyright laws of the United States, United Kingdom, Australia, and Canada), vicarious copyright infringement, and contributory copyright infringement. Corbello also had the certificate of registration for the Work changed in 2009 to add Woodward's name as a co-author of the Work. The court granted summary judgment in favor of all defendants except DeVito, leaving only claims against DeVito for accounting and breach of contract for trial.

The court granted defendant Jersey Boys Records Limited Partnership's ("JB Records") motion for summary judgment. JB records argued that court had no personal jurisdiction over it and that plaintiff failed to state a claim for copyright infringement, vicarious infringement, or contributory infringement. Although it found that JB Records was subject to personal jurisdiction in Nevada by virtue of sales of its records in the state, the court concluded that plaintiff failed to show that the Cast Album, a musical recording of the cast of *Jersey Boys*, infringed on the Work because it was not substantially similar. In addition, plaintiff pleaded no facts establishing that JB Records was aware of any infringement of the Work, as required for a contributory infringement claim, or that JB Records had the right and ability to control other infringers of the Work, as required for a vicarious infringement claim.

The remaining *Jersey Boys* defendants, including Valli and Gaudio, moved for summary judgment on various grounds, including that plaintiff's claims were barred by the applicable statutes of limitation, lack of personal jurisdiction, the inapplicability of foreign copyright laws, failure to establish copyright infringement, and that the infringement claims were precluded by the defendants' valid license. The court rejected defendants' motions based on lack of personal jurisdiction, finding that defendants purposefully availed themselves of personal jurisdiction in Nevada by directing their alleged infringing activities toward the state. The court also found no evidence that plaintiff knew or could have known about the alleged infringement prior to 2007, when she filed suit, and her claims were timely.

The court agreed with defendants, however, that foreign copyright laws did not apply to plaintiff's infringement claims. Under the Second Circuit's holding in *Itar-Tass Russian News Agency v. Russian Kurier* that issues of copyright ownership should be decided by the law of the country in which the work was created and issues of infringement should be decided by the copyright law of the country where the infringement occurred, only U.S. Copyright law applied to plaintiff's infringement claims.

The court granted summary judgment in favor of all defendants, except DeVito, holding that plaintiffs' copyright claims were precluded by DeVito's grant to Valli and Gaudio of a valid license to exploit the Work in creating and producing *Jersey Boys*. The defendants, including the director and producers of *Jersey Boys*, were acting under valid sub-licenses from Valli and Gaudio. The court rejected plaintiff's argument that the sub-licenses were invalid because the license to Valli and Gaudio terminated, under its terms, when their sub-license to an initial producer lapsed, finding that the license did not terminate, and that even if it had, the parties' course of conduct, including DeVito's continued acceptance of royalties and his failure to terminate the license under governing statutes caused the license to remain in effect.



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