

2016: the Year in Review



Diane Krausz

Chair
Entertainment, Arts and Sports Law
Section

2016 was a significant year, broadly speaking and in the world of Entertainment Law. With limited space for a review, below are some of the year's most personally interesting cases and developments.

First, two updates picking up directly from Stephen Rodner's excellent 2015 annual overview. Following up from last year's decision by the U.S. District Court for the Central District of California in *Good Morning to You Productions v. Warner/Chappell Music*, the question of whether the lyrics to the song "Happy Birthday to You" were still under copyright has been settled. In June 2016, the court finalized a settlement agreement with Warner/Chappell declaring all of "Happy Birthday" officially in the public domain. This followed a brief period of "Happy Birthday" finding itself an orphan work after 2015's initial confirmation that the melody's copyright had long since lapsed, and that the copyright for the lyrics had never been properly obtained in 1935 by the Clayton F. Summy Co., whose rights in the song ultimately shifted to Warner/Chappell after a buyout in 1988. It must be noted that some more financially conscious members of the industry can heave a sigh of relief now that the need to substitute "For He's A Jolly Good Fellow" into birthday scenes is lifted.

Next, a look at the Second Circuit's 2016 reversal of the district court's highly controversial 2015 decision in *TCA Television v. Kevin McCollum*. Disagreeing in every respect with the lower

court's holding that the inclusion of the famous Abbot and Costello routine "Who's on First?" in the play *Hand to God* was fair use, the Second Circuit laid out an analysis of fair use factors that came out in favor of the plaintiffs on every point. Yet having laid out this rebuttal of the district court's finding on fair use, the Second Circuit then dismissed the complaint on the grounds that plaintiffs had failed to plead a valid chain of title to "Who's on First?"

Chain of title was a theme in 2016, particularly for theatrical works. Of note was the lawsuit filed in December 2016 against the producers of upcoming Broadway show *Anastasia*. In *de Becdelievre v. McNally* (U.S. District Court for the Southern District of New York), Jean-Etienne de Becdelievre, representing his mother, Marcelle Maurette's eponymous 1952 play, seeking a court order delaying *Anastasia's* April 2017 opening until a licensing agreement can be reached for the rights in his mother's work. Maurette's play was the underlying source material for both the 1956 movie starring Ingrid Bergman and the 1997 animated film that inspired the Broadway show. Both of these films, it is claimed, licensed Maurette's play; but the Broadway show's producers may have failed to do the same. Similarly, and with likely bigger financial consequences, see too the November 2016 decision in *Corbello v. DeVito* (U.S. District Court for the District of Nevada). A federal jury in Nevada found that 10 percent of the success of Broadway smash hit "Jersey Boys" could be traced back to unlawful infringement on *Tommy DeVito—Then and Now*, an unpublished autobiography co-authored by DeVito and a late Texas lawyer by the name of Rex Woodward. » Page 56

New York Law Journal

MONDAY, JANUARY 23, 2017

Diane Krausz of Diane Krausz & Associates has represented individuals and entities in the entertainment industry for over 30 years. Laura Godorecci assisted in the preparation of this article.

Krausz

« Continued from page S3

This case involved a particularly tangled and fascinating web of authorship for a highly successful long-running Broadway show. It seems that authorship and chain of title have become more serious topics of interest to entertainment law litigators as the stakes involved increase.

And let me conclude by mentioning one of the year's most confusing and impactful developments: the June 2016 DOJ decision for musical compositions that, in terms of music publishing licensing, rendered full-works rather than fractional song licensing the standard in

accordance with the DOJ's consent decrees. The announcement raised an avalanche of unresolved questions, including:

- Are performing rights organizations (PROs) apart from ASCAP and BMI included in the announcement's purview?
- If not, what happens when control of a song's ownership is divided between ASCAP or BMI and a PRO such as SESAC?
- Will music publishers now each charge administration fees to certain co-authored compositions?

The questions abound as the music industry seeks clarification, and the DOJ maintains that things could not be clearer. Here's to more clarification in 2017!

②