

No. _____

In the Supreme Court of the United States

THE MOODSTERS COMPANY,

Petitioner,

v.

THE WALT DISNEY COMPANY; DISNEY ENTERPRISES,
INC.; DISNEY CONSUMER PRODUCTS AND INTERACTIVE
MEDIA INC.; DISNEY INTERACTIVE STUDIOS, INC.;
DISNEY SHOPPING, INC.; PIXAR,

Respondents.

**On Petition for Writ of Certiorari to the United
States Court of Appeals for the Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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(i)

QUESTIONS PRESENTED

1. Originality is the “touchstone,” the “sine qua non,” and the “premise” of copyright law. An artist may obtain a valid copyright if she meets this “extremely low” bar for creativity through her expression of a statutorily eligible work. The Copyright Act defines statutorily eligible works in 17 U.S.C. § 102(a). While § 102(a) does not list literary and animated characters, lower courts have uniformly found characters independently protectable as components of literary or audio-visual works. Yet the Second, Seventh, and Ninth Circuits have all announced different standards to determine when copyright law independently protects characters. None of these standards depends on originality.

The first question for this Court is whether originality is the proper standard to determine character copyrightability, and, if not, what the proper standard is?

2. The circuit courts are split over whether to decide copyrightability as a question of fact or law. If a question of fact, this Court held in *Feltner v. Columbia Pictures Television, Inc.*, that juries—not judges—decide disputes in copyright cases. 523 U.S. 340 (1998). And the sole question for a Rule 12(b)(6) motion is whether the complaint states enough facts to plead a plausible claim.

The second question for this Court is whether copyrightability—for a character or any work—is a

(ii)

question of fact, or involves questions of fact, ill-suited for resolution on a Rule 12 motion?

(iii)

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Denise Daniels was also a plaintiff in the district court and appellant in the Ninth Circuit along with The Moodsters Company.

RULE 29.6 STATEMENT

Petitioner The Moodsters Company has no parent corporations and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in any court that are directly related to this case other than the proceeding from which this petition arises: *Daniels v. The Walt Disney Co.*, No. 18-55635, Am. Opinion (9th Cir. May 4, 2020), addressing appeal from *Daniels v. The Walt Disney Co.*, No. 2:17-cv-04527-PSG-SK, Judgment (C.D. Cal. May 9, 2018).

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PETITION FOR WRIT OF CERTIORARI

Petitioner The Moodsters Company (Moodsters Co.) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals and order denying the petition for panel rehearing and rehearing en banc, App. 1a-17a, is reported at 958 F.3d 767 (9th Cir. 2020). The original opinion of the court of appeals, App. 18a-33a, is reported at 952 F.3d 1149 (9th Cir. 2020). The opinion and order of the United States District Court granting defendants' motion to dismiss the second amended complaint, App. 34a-50a, is not reported but available at 2018 WL 3533363 (C.D. Cal. May 9, 2018). The opinion and order of the United States District Court granting defendants' motion to dismiss the first amended complaint with leave to amend, App. 51a-68a, is not reported but available at 2018 WL 4849700 (C.D. Cal. Jan. 31, 2018).

JURISDICTION

The Ninth Circuit entered judgment on March 16, 2020. App. 18a-33a. On May 4, 2020, the court of appeals filed an order amending its opinion and denying the Petitioner's timely petition for panel rehearing and rehearing en banc. App. 1a-17a. Jurisdiction of this Court is proper under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clause 8 of the U.S. Constitution: “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.”

Amendment VII to the U.S. Constitution: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

17 U.S.C. § 102(a): “(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.”

17 U.S.C. § 106: “Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: ...

(2) to prepare derivative works based upon the copyrighted work;”

INTRODUCTION

Some are heroes; others villains. Some mimic reality and others personify fantasy. And some appear in comic books and video games, while others in television shows and movies. Whatever the role or forum, fictional characters epitomize the essence of creativity. They capture our imagination based on the artist’s expressive selection of traits and characteristics that combine to make that character unique. For that reason, characters often represent the most valuable part of any work. But the law that protects them—character copyrights—is in chaos. Every circuit court to address this subject employs a different test. And circuit courts remain conflicted about whether copyrightability is a question of fact or law. This Court has never addressed the subject of character copyrights—and it shows in the fractured approaches employed by the lower courts.

The threshold issue for this Court to decide is the proper standard for a character copyright. This Court has held that “originality”—the “very premise” of copyright law—governs copyrightability. Yet the three circuit courts that have developed standards for character copyrightability have jettisoned originality as a standard. The Ninth Circuit, for instance, has created its own three-part test that remains foreign to any other area of copyright law.

The Second Circuit deploys a vague “sufficient delineation” standard. And the Seventh Circuit asks whether the character offers something more than a stock character—the closest test to originality while still not referencing it. Based on these diverging tests, neither artists nor entertainment companies can discern the metes-and-bounds of which characters are protected by copyright. Moodsters Co. asks this Court to resolve this uncertainty, and decide the proper standard for character copyrights.

Whatever the standard, this Court should also address whether character copyrightability—or copyrightability of *any* work—is a question of fact or law. The Seventh Circuit’s survey of the law shows that the circuits are “split” with some deciding copyrightability as a matter of law, and others finding issues of fact. The outcome of this split has constitutional importance. This Court has held that the Seventh Amendment attaches to fact disputes in copyright cases in *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998). Thus, if character copyrightability is a question of fact, then courts—like the Ninth Circuit here—violate artists’ constitutional rights when they decide the issue as a matter of law. This issue is important and ripe for the Court to decide.

This Court should also accept review because the Ninth Circuit panel erred. Emotions are abstract. No one knows what they look like. Or what color they may be. And scientists dispute how many exist. Moodsters Co. brought to life the abstract concept of emotions through its creative expression of five anthropomorphic single-emotion color-coded characters that reside inside a child. No other

artist—and Disney in particular—had ever before expressed characters with The Moodsters’ unique combination of traits and characteristics. These characters were so original that Disney—including its most senior executives—copied them for its billion-dollar blockbuster *Inside Out*.

But the district court and panel denied Moodsters Co. the chance to prove its copyright infringement claims when they dismissed its complaint by finding the characters unprotected as a matter of law. The district court and panel relied on an evolving standard divorced from originality in favor of questions about whether The Moodsters were famous enough to qualify for copyright. Above all, both courts denied Moodsters Co. the chance to offer evidence—including from a preeminent expert in the field—to prove its claims. Moodsters Co. asks this Court to grant review, so the Court can address this important and unsettled area of copyright law.

STATEMENT OF THE CASE

Denise Daniels and her company Moodsters Co. brought the abstract concept of emotions to life through five unique animated characters. As detailed in their 89-page complaint, no other artist had ever before expressed characters with the combination of traits and characteristics as The Moodsters. CA9.R.Excerpts.72-160. Indeed, their creation of these characters stemmed from many expressive choices selected and arranged to create characters unlike any others seen in any prior work. *Id.*, *e.g.*, at ¶¶37-38, 51-59, 76, 96-105, 143, 163-165, 176-192, 198-333; *see also* App. 48a.

But the district court and Ninth Circuit never

addressed the amended complaint for plausibility in dismissing Moodsters Co.'s copyright infringement claims on a Rule 12(b)(6) motion by the defendants (collectively Disney). App. 1a-68a. Rather, the Ninth Circuit affirmed the dismissal of the copyright infringement case by finding that The Moodsters characters are not copyrightable as a pure matter of law because they are not "sufficiently delineated" or "especially distinctive." App. 1a-17a. The courts thus provided Moodsters Co. no chance to prove the originality of its characters. Nor did any fact finder ever assess Disney's wanton copying.

A. Factual Background

Denise Daniels, an expert on children's emotional intelligence and development, had an idea to bring emotions to life through individual characters. See App. 4a-5a. Daniels started a company—Moodsters Co.—and recruited industry-leading talent to help develop and express the characters. App. 5a, App. 52a; see also CA9.R.Excerpts.78-81. Daniels and Moodsters Co. had a blank slate to work from in creating the characters as emotions have no standard physical form or character attributes. CA9.R.Excerpts.112-113.

The amended complaint detailed how numerous creative choices were available in how to express the idea of characters representing emotions, including, for example, choices in general physical form, number, and types of emotions for the character ensemble. CA9.R.Excerpts.112-116. Moodsters Co. eventually selected and arranged several creative choices to express The Moodsters characters: five gendered anthropomorphic animated

characters each paired with a core body color that lived together “inside a child,” and which each included many other nuanced expressions, like the anger character’s tendency to explode from the head when angry. See CA9.R.Excerpts.72-160, e.g. ¶¶37-38, 51-59, 143, 176-192, 198-333; see also App. 5a. No other artist had ever created a character like any of the Moodsters before. CA9.R.Excerpts.93-116 ¶¶96-105, 163-165, 178-192; see also App. 48a.

Moodsters Co. raised over \$3 million in investment capital to refine and develop these characters. App. 46a; CA9.R.Excerpts.102 ¶146. With that capital, Moodsters Co. focus-group tested the characters with a diverse range of children at Yale University. *Id.* ¶¶147-149; App. 45a. Moodsters Co. also released a professional-grade “pilot” episode in 2007. App. 5a. Moodsters Co. used this pilot and its “bible” to pitch The Moodsters to potential collaborators. App. 5a-6a, App. 52a-53a.

Moodsters Co. had its most extensive discussions with Disney. In fact, Daniels and Moodsters Co. pitched The Moodsters to Disney executives (and even Roy E. Disney—the son and nephew of the founders—had access) every year from 2005 through 2009. App. 5a-6a, App. 53a; see also CA9.R.Excerpts.87-89. In 2010, Disney started to work on the movie *Inside Out*. App. 6a. *Inside Out* features five color-coded, single-emotion characters that reside in a child. App. 6a, App. 53a. Disney released *Inside Out* in 2015. App. 6a.

B. The District Court Proceeding

Daniels sued Disney for breach of contract and Moodsters Co. sued for copyright infringement. App.

6a-7a. Moodsters Co. is the owner of the registered copyrights in the literary bible and audiovisual pilot *The Moodsters* works and all their protectable components. App. 60a, CA9.R.Excerpts.99-100; *see also* App. 16a-17a (“There is no dispute that the 2005 Moodsters Bible and the 2007 pilot television episode are protected by copyright.”). Moodsters Co. alleged copyright infringement by Disney of the individual Moodsters characters and the ensemble of The Moodsters characters. App. 7a. Rather than answer, Disney moved to dismiss the amended complaint under Federal Rule of Civil Procedure 12(b)(6). *See* App. 7a.

The district court adopted Disney’s argument that Moodsters Co.’s “characters are not protectable in the first instance, either individually or as an ensemble” and thus found it unnecessary to address whether Disney’s *Inside Out* characters were substantially similar to *The Moodsters* characters. App. 60a. It cited the Ninth’s Circuit “test” for character copyrightability, stating that a character is “copyrightable independent of the underlying work in which the character appears” when it (1) has “physical as well as conceptual qualities,” (2) is “sufficiently delineated to be recognizable as the same character whenever it appears,” and (3) is “especially distinctive” and “contain[s] some unique elements of expression.” App. 60a-61a; *DC Comics v. Towle*, 802 F.3d 1012, 1020-21 (9th Cir. 2015). The district court called this standard a “rigorous test.” App. 65a; *see also* App. 38a, App. 46a. The district court found that The Moodsters characters were not sufficiently delineated because they had not persisted over time, not been widely distributed, and their traits were not “on par with those of the iconic

characters” like Sherlock Holmes, Tarzan, Superman, and James Bond. App. 61a-67a. The district court, thus, granted Disney’s motion, but allowed Moodsters Co. leave to amend its copyright infringement claims. App. 65a-68a.

Moodsters Co. filed a second amended complaint that Disney again moved to dismiss. *See* App. 7a. Because the district court had at first focused on the lack of “persistence” of The Moodsters “over time or over multiple iterations,” App. 61a-63a, the second amended complaint included facts about the “second generation” of Moodsters which appeared in certain books and toys distributed by major retailers. *See* App. 40a.

But the district court dismissed the second amended complaint as well. *See* App. 7a; App. 34a-50a. To start, the court was “unpersuaded” that the second generation Moodsters could be widely and instantly recognized as the same characters. App. 43a-44a. In the district court’s opinion, the differences in certain details of the physical appearance, like arm length, and changes to certain names of individual Moodsters characters (although the ensemble retained the name The Moodsters) in the authorized derivative second version of Moodsters characters prevented protection for the original version of the characters. App. 40a-44a. So the court determined that The Moodsters characters still “fell short of the Ninth Circuit’s rigorous test” for copyrightability. App. 46a. It also concluded that The Moodsters as an ensemble “are neither delineated nor distinctive” to a degree sufficient for copyright protection, and declined to apply the Ninth Circuit’s alternate “story being told” test. App. 48a-49a.

Even though Moodsters Co. emphasized the fact-intensive nature of these issues, CA9.R.Excerpts.66-68, 325-326, 337, the district court never addressed the second amended complaint for plausibility. Rather, the district court decided as a matter of law that The Moodsters characters were not copyrighted. *See* App. 34a-68a. To support this conclusion, the district court made its own findings about lack of sufficient delineation and distinctiveness without allowing Moodsters Co. to develop the record and offer evidence about the unique selection and arrangement of features of its characters. *Id.* The district court also disregarded Moodsters Co.’s detailed allegations about the original novelty of these characters. *See id.*

C. The Ninth Circuit Decision

The Ninth Circuit affirmed the district court’s dismissal of Moodster Co.’s copyright infringement claims by holding The Moodsters characters did not qualify for copyright protection. App. 4a. The panel stated The Moodsters characters failed to meet its *Towle* test for copyrightability because the characters were too “lightly sketched” and lacked “consistent, identifiable character traits and attributes.” App. 4a. The Court focused on changes in names, certain physical appearance details, and situational attributes seen between the first generation Moodsters characters—the basis for infringement—and the authorized derivative “second generation Moodsters” characters, to say that the first generation Moodsters lacked “consistent” identifiable traits and attributes “across iterations.” App. 10a-12a. It also noted that ideas, unlike expression of ideas, do not have protection under copyright law.

App. 9a (citing 17 U.S.C. § 102(b)). It stated that the “notion of using a color to represent a mood or emotion is an idea that does not fall within the protection of copyright” and the idea of an emotion is also not copyrightable. App. 9a-10a.

After Moodsters Co. petitioned for rehearing, pointing out, among other things, that the fact finder should determine copyright protection based on a work at a single point in time (when the author fixes her expression in a tangible medium), the Ninth Circuit made some small changes to its opinion. *See* App. 1a-17a. The court removed several sentences and phrases mentioning the second generation Moodsters toys, including a footnote that maintained that the second generation “remains relevant.” *Cf.* App. 27a; App. 10a. But the amended opinion still justified its decision that the first generation of Moodsters are not protectable by copyright by discussing the different individual character names and certain different physical appearance details and situational attributes across the first and second generation Moodsters character iterations App. 8a-13a. The panel contrasted its views of The Moodsters with protected characters like Godzilla and James Bond, which maintained some consistent traits, despite physical appearance changes, “across various productions.” *Id.*

The Ninth Circuit held that The Moodsters thus fail the second prong of its *Towle* test, but then made a conclusory finding that The Moodsters are not “especially distinctive” and lack some unique elements of expression even if The Moodsters are sufficiently delineated. App. 12a-13a. The Court cited no other characters that any individual Moodsters

character, or The Moodsters ensemble, was indistinct from, however. *Id.* It made no finding that there was only one or just a few ways to express the idea of emotion-based characters so that Daniel's ideas and the expression of The Moodsters merged. *Id.* Indeed, such a finding would conflict with the detailed allegations in Moodsters Co.'s complaint about the many creative choices they selected and arranged to express characters unlike any characters seen in any prior work. CA9.R.Excerpts.72-160, e.g. ¶¶37-38, 51-59, 143, 164-165, 176-192, 198-333

The Ninth Circuit then stated that its "story being told" test first mentioned in *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954) remains a valid alternate test for character copyright protection. App. 13a-14a. It stated this test represents "a high bar" for protection, though. App. 13a. It held The Moodsters thus enjoy no protection under that test either. App. 14a.

REASONS FOR GRANTING THE WRIT

I. **This Court should decide what standard governs the copyrightability of fictional characters because the circuits are split.**

This petition asks the Court to address the copyrightability standard for fictional characters. Although the Copyright Act does not explicitly list animated characters as protectable subject matter, every circuit court to address this issue has found them protectable as components of statutorily protected audiovisual or literary works. *See, e.g., Warner Bros., Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 240 (2d Cir. 1983) ("there has been no doubt that copyright protection is available for characters

portrayed in cartoons”); *Warner Bros. Entm’t, Inc. v. X One X Prods.*, 644 F.3d 584, 597 (8th Cir. 2011) (“It is clear that when cartoons or movies are copyrighted, a component of that copyright protection extends to the characters themselves”); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 754 (9th Cir. 1978) (recognizing copyrightability of animated characters and citing “a series of cases dating back to 1914 that have held comic strip characters protectable under the old Copyright Act”); *see also* App. 7a (“Although characters are not an enumerated copyrightable subject matter under the Copyright Act ... there is a long history of extending copyright protection to graphically-depicted characters.”). But circuit courts are split over the standard characters must meet for copyright protection. This Court should accept review to resolve this crucial uncertainty.

The Court has announced a singular standard to qualify for a valid copyright—originality. “The *sine qua non* of copyright is originality.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). Originality is a constitutional requirement, and “remains the touchstone of copyright protection today.” *Id.* at 346-47. It is also a low standard: “the requisite level of creativity is extremely low; even a slight amount will suffice.” *Id.* at 345. This minimal standard promotes copyright law’s ultimate aim “to stimulate artistic creativity for the general public good.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). Thus, an artist may obtain a valid copyright when she expresses her original work of authorship in a fixed medium. 17 U.S.C. §§ 101, 102(a), 302(a).

But the lower courts have deviated from this “touchstone” of originality to determine when fictional characters receive copyright protection. The Second, Seventh, and Ninth Circuits have all created different standards. These different standards lead to unpredictable results. For decades now, commentators have sung a single chorus about the inconsistent approaches among the circuit courts about character copyrightability:

- “Unfortunately, while copyright law plays an important role in allocating rights to the use of characters, the law in this area is very unclear.” Zahr K. Said, *Fixing Copyright in Characters: Literary Perspectives on a Legal Problem*, 35 CARDOZO L. REV. 769, 772 (2013).
- “The development of copyright protection for fictional characters has been riddled with uncertainty and inconsistency as courts have struggled to fit fictional characters into the rubric of copyright law.” Kathryn M. Foley, *Protecting Fictional Characters: Defining the Elusive Trademark-Copyright Divide*, 41 CONN. L. REV. 921, 926 (2009).
- “Since copyright law does not explicitly address the issue of protection for fictional and cartoon characters, courts are free to apply a number of standards to determine whether or not a character is copyrightable.” Cathy J. Lalor, *Copyrightability of Cartoon Characters*, 35 IDEA: THE JOURNAL OF LAW & TECH. 497, 503-504 (1995).
- “Recent court decisions have shown that the legal doctrines for the protection of literary

and cartoon characters are rather inconsistent, unclear and quixotic. ... In addition, the judicial process by which the courts have selected the appropriate legal doctrine has become such a complicated maze that the outcome is neither predictable nor fair.” E. Fulton Brylawski, *Protection of Characters - Sam Spade Revisited*, 22 BULL. COPYRIGHT SOC’Y U.S.A. 77, 77 (1974).

This Court should resolve this uncertainty.

A. The Seventh Circuit’s standard most closely tracks the touchstone question of originality.

The Seventh Circuit addressed character copyrightability in *Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004). *Gaiman* involved an ownership dispute between comic book authors. *Id.* at 648. On appeal, one of the authors argued that two characters were not protected by copyright. *Id.* at 657. The Seventh Circuit rejected this argument, and explained the low threshold for a character to enjoy copyright protection.

At the outset, the court explained that stock characters receive no protection. *Id.* at 659-61. The court provided several examples, like “a gesticulating Frenchman, a fire-breathing dragon, a talking cat, a Prussian officer who wears a monocle and clicks his heels,” among others. *Id.* at 660. Copyright law offers no protection because “such stereotyped characters are the products not of the creative imagination but of simple observation of the human comedy.” *Id.*

But the court found both characters still exceeded the low threshold for copyright protection. The first disputed character—Count Cogliostro—qualified for a copyright protection because his “age, obviously phony title (“Count”), what he knows and says, his name, and his faintly Mosaic facial features combine to create a distinctive character. No more is required for a character copyright.” *Id.* Indeed, “once [Count Cogliostro] was drawn and named and given speech he became sufficiently distinctive to be copyrightable.” *Id.* at 661.

The court’s treatment of the second disputed character also underscores this lenient standard. The second character—Medieval Spawn—lacked a proper name, and differed from other characters only through “his costume and manner of speech, together with the medieval background.” *Id.* “But that is enough expressive content for copyrightability,” under the Seventh Circuit’s standard. *Id.* Put another way, the Seventh Circuit recognized a low standard for character copyrightability, even though it did not adopt originality as the test.

B. The Second Circuit applies a “sufficient delineation” test.

The Second Circuit follows an ill-defined “sufficient delineation” test. The court first addressed character copyrights in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930). Judge Learned Hand examined whether several characters from a play qualified for copyright. *Id.* at 122-23. In rejecting the plaintiff’s argument for protection of his literary characters, Judge Hand provided the oft-quoted—yet vague—standard:

If *Twelfth Night* were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare's "ideas" in the play, as little capable of monopoly as Einstein's Doctrine of Relativity, or Darwin's theory of the Origin of Species. It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.

Id. at 121. Courts and commentators have called this standard a "sufficient delineation" test. *See, e.g., Silverman v. CBS Inc.*, 870 F.2d 40, 50 (2d Cir. 1989) (relying on *Nichols* and finding "Amos 'n Andy" characters "sufficiently delineated"); *Warner Bros.*, 720 F.2d at 240 (explaining that *Nichols* "recognized the possibility that a literary character could be *sufficiently delineated* to support a claim of infringement by a second comer") (emphasis added); *see also X One*, 644 F.3d at 597 (allowing copyright protection for characters "to the extent that such characters are sufficiently distinctive").

Detective Comics, Inc. v. Bruns Publications, Inc. is another application of this standard. In *Detective Comics*, the Second Circuit affirmed a finding that the *Wonderman* comic infringed the character copyright in *Superman*. 111 F.2d 432, 433-434 (2d Cir. 1940). The court found that a

complainant “is not entitled to a monopoly of the mere character of a ‘Superman’ who is a blessing to mankind[.]” *Id.* at 434 (citing *Nichols*, 45 F.2d 119). But “[s]o far as the pictorial representations and verbal descriptions of ‘Superman’ are not a mere delineation of a benevolent Hercules, but embody an arrangement of incidents and literary expressions original with the author, they are the proper subjects of copyright and susceptible of infringement because of the monopoly afforded by the act.” *Id.* at 433-34. Thus, the Second Circuit recognizes and protects characters with copyrights, but fails to provide clear guidance as to when copyright attaches to a character.

C. The Ninth Circuit applies two different, heightened standards.

The Ninth Circuit applies the most stringent standards of any circuit court. The court articulated its first “story being told” standard in *Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc.*, 216 F.2d 945, 950 (9th Cir. 1954). This decision focused on literary characters. *Id.* The court declined to find the “Sam Spade” character protected. *Id.* at 950. But the court explained that copyright law may protect a literary character if he is the “story being told,” and not just a mere “chessman in the game of telling the story.” *Id.* The Ninth Circuit stated in this appeal that this standard remains valid. App. 12a-13a.

The Ninth Circuit has adopted a second test for graphic characters. In *Walt Disney Productions v. Air Pirates*, the court explained that animated characters, rather than literary characters, have “physical as well as conceptual qualities” and thus are “more likely to contain some unique elements of

expression.” 581 F.2d at 755. So the court affirmed copyright protection for twenty-one Disney characters, ranging from well-known characters like Mickey Mouse to obscure characters like Toby Tortoise and Max Hare. *Id.* at 753 n.5.

The court later adopted the three-part test in *Towle* to determine when copyright protects graphical characters. 802 F.3d at 1020-21. The court held that a graphical character must (1) have “physical as well as conceptual qualities,” (2) “be ‘sufficiently delineated’ to be recognizable as the same character whenever it appears,” and (3) be “‘especially distinctive’ and ‘contain some unique elements of expression’” *Id.* Thus, the Ninth Circuit requires the most rigorous standard of the circuit courts.

This Court should grant review to resolve this split over when copyright law protects characters. The degree of copyright protection for an artist’s character varies greatly depending on which circuit court hears the dispute. And each circuit court above replaced originality—the “touchstone” and “sine qua non” of copyright law—as the standard in favor of various enhanced tests.

The panel decision underscores the need for this Court to decide this issue. Even though originality remains “the very ‘premise of copyright law,’” *Feist*, 499 U.S. at 347 (quoting *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981)), the panel decision avoided this foundational doctrine at all costs. *See generally* App. 1a-17a. Instead, the panel applied the same

“rigorous” standard that the district court employed. App. 7a-8a, App. 38a. This rigorous standard betrays the “extremely low” standard for all other works. *Feist*, 499 U.S. at 345. The panel decision also reflects the outcome-determinative conflict with the Seventh Circuit’s standard. Under *Gaiman*, The Moodsters characters are not stereotypical characters by any means. Until this Court rules, geography—not creativity—will decide the fate for artists’ original characters.

The Ninth Circuit’s standard also violates basic elements of the Copyright Act. By statute, an artist’s copyright term “subsists from [a work’s] creation.” 17 U.S.C. § 302(a). A work is “created” when it is “fixed” “for the first time”—and “fixed” means put in a tangible medium of expression, like on paper or other material object that stores the work. 17 U.S.C. § 101. Any later versions fixed or expressed on a tangible medium are derivative, separate works that copyright law independently protects when they employ another original expression. *Id.*; 17 U.S.C. § 103(b) (“The copyright in a ... derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.”). Thus, copyrightability of any work depends on the time that the artist first expressed her work in a tangible medium.

But the Ninth Circuit’s vague standard invites courts to disregard these foundational aspects of the Copyright Act. For instance, the district court found that the Moodsters characters failed to persist “over time or over multiple iterations.” App. 39a, App. 63a. The panel likewise weighed similarities and differences across generations. App. 8a-13a. Yet the only question under the Copyright Act was whether the Moodsters characters were original enough when first expressed in a tangible medium.

II. This Court should grant review to address whether a copyright dispute over an original character presents a question of fact about protection for the character.

Whatever the standard, this Court should also decide whether copyrightability of an animated character—or any work—is a question of fact or law. The Court has suggested that copyrightability is a question of fact. Most recently, in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, the Court held that designs on cheerleading uniforms are eligible for copyright protection as a two- or three-dimensional work of art. 137 S. Ct. 1002, 1007-13 (2017). The Court decided subject matter eligibility as a question of law over statutory interpretation. *Id.* But the Court expressed “no opinion on whether these works are sufficiently original to qualify for copyright protection,” suggesting that the copyrightability determination of the particular uniform was a question of fact. *Id.* at 1012 n.1. Indeed, this Court has traditionally considered copyrightability of particular works as questions of fact. *See, e.g., Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59-60 (1884) (“the existence of those *facts* of

originality, of intellectual production, of thought, and conception on the part of the author *should be proved.*”) (emphasis added). This Court’s review is necessary to eliminate the uncertainty in circuit courts below, and to vindicate the right of artists to have juries—not judges—resolve facts in copyright disputes.

A. The circuit courts are split about whether copyrightability disputes are questions of fact versus questions of law.

The circuit courts do not speak with one voice about whether the validity of a copyright is a question of fact versus a question of law. To start, the Federal Circuit observed that this Court has never addressed this important issue. *Oracle Am., Inc. v. Google, Inc.*, 750 F.3d 1339, 1353 n.3 (Fed. Cir. 2014). And the Seventh Circuit surveyed the circuit courts that have addressed this issue and found them “split.” *Gaiman*, 360F.3d at 648. The Second and Ninth Circuits have found copyrightability is a mixed question of law and fact, while the First Circuit and Seventh Circuit have decided copyrightability as a matter of law. *Id.* (citing *Matthew Bender & Co. v. W. Publ’g Co.*, 158 F.3d 674, 681 (2d Cir.1998); *N. Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1035 (9th Cir. 1992); *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 34 n. 5 (1st Cir. 2001); and *Publ’ns Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 478 (7th Cir. 1996)). This split is reason alone for the Court to accept this case for review.

In fact, the Ninth Circuit—the circuit with perhaps the most copyright disputes—is inconsistent

itself. The court’s earliest precedent holds that the question of originality “is one of fact, not of law; one that may not be summarily disposed of upon a motion to dismiss, but which must be established by proof.” *Dezendorf v. Twentieth Century-Fox Film Corp.*, 99 F.2d 850, 851 (9th Cir. 1938) (citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903)). The court reiterated this holding in *North Coast*. 972 F.2d at 1035 (“plaintiff was entitled to have the validity of its copyright determined by a trier-of-fact”); *see also Kamar Int’l, Inc. v. Russ Berrie & Co.*, 657 F.2d 1059, 1061 (9th Cir. 1981).¹ But the Ninth Circuit has also decided originality—and thus copyrightability—as a matter of law. *See, e.g., Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1073 (9th Cir. 2000) (finding commercial photograph of a vodka bottle was an original work as a matter of law).

Character copyright cases compound this uncertainty. In *Halicki Films, LLC v. Sanderson Sales & Mktg.*, the Ninth Circuit emphasized that character copyrightability is a “fact-intensive issue.” 547 F.3d 1213, 1225 (9th Cir. 2008). As a result, the court remanded the appeal to the district court to decide whether “Eleanor”—the inanimate car in *Gone in 60 Seconds*—qualified for copyright protection. *Id.* On remand, the district court found a triable issue for the jury to decide. *Halicki v. Carroll Shelby Int’l*, No. 04-08813, Dkt No. 330 at 1, 13-16 (C.D. Cal. Aug. 12, 2009) (CA9.R.Excerpts.26, 38-41). In contrast, the Ninth Circuit found the Batmobile character

¹ The Ninth Circuit even found a plausible claim of originality in a six-word phrase and a four-part lyrical sequence from a song called *Playas Gon’ Play*. *Hall v. Swift*, 782 Fed. Appx. 639 (9th Cir. 2019), *modified by* 786 Fed. Appx. 711 (9th Cir. 2019).

protected by copyright and a magician who revealed tricks unprotected—both as a matter of law. *See Towle*, 802 F.3d at 1019-23; *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175-76 (9th Cir. 2003). The Ninth Circuit likewise decided that the Moodsters characters were not protected by copyright as a matter of law as well. *See* App. 4a, App7a-14a.

This uncertainty is unique in the field of intellectual property law. Questions of fact dominate the validity of every other form of intellectual property. This Court has found fact issues underlie patent validity challenges. *See Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966) (holding that obviousness of patents under 35 U.S.C. §103 is a question of law involving multiple underlying issues of fact); *see also Gen Elec. Co. v. Nintendo Co.*, 179 F.3d 1350, 1353 (Fed. Cir. 1999) (explaining that patent validity under §102 is a question of fact). Courts reach the same conclusion with trademark validity. *E.g.*, *Zobmondo Entm't, LLC v. Falls Media, LLC*, 602 F.3d 1108, 1113 (9th Cir. 2010) (“The issue of trademark validity is considered an intensely factual issue.”); *see also U.S. Patent & Trademark Office v. Booking.com B.V.*, 140 S. Ct. 2298, 207 L. Ed. 2d 738, 749-59 (2020) (rejecting argument that booking.com is ineligible for trademark protection as a matter law because whether a given term is generic and thus unregistrable “depends on whether consumers *in fact* perceive that term as a name of a class or, instead, as a term capable of distinguishing among members of the class” (emphasis added)). Courts likewise recognize the factual nature of the existence of trade secrets. *See, e.g.*, *Garter-Bare Co. v. Munsingwear, Inc.*, 723 F.2d 707, 714-15 (9th Cir. 1984) (reinstating jury’s factual findings over trade

secret). The Court should resolve this unique uncertainty in copyright law.

B. This Court needs to resolve this uncertainty because this issue is of constitutional importance.

The Court's determination of this issue will affect artists' Seventh Amendment right to trial by jury. Juries—not judges—decide factual disputes in copyright cases. *Feltner*, 523 U.S. at 355. And for good reason. “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations [or other works of art], outside of the narrowest and most obvious limits.” *Bleistein*, 188 U.S. at 251. Yet courts that decide copyrightability as a matter of law eliminate the jury entirely. As one judge held, the copyrightability of a work is a question that the “jury has nothing to do with.” *Pivot Point Int’l, Inc. v. Charlene Prods., Inc.*, 932 F. Supp. 220, 225 (N.D. Ill. 1996) (Easterbrook, J.).

This Court has fiercely defended against any intrusion to the right to trial by jury. “Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.” *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). And this Court has long stressed the need of the courts to protect this right:

The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right

so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.

Jacob v. New York City, 315 U.S. 752, 752–53 (1942). But until this Court resolves whether copyrightability is a question of fact, scores of artists risk wrongfully losing their Seventh Amendment rights. The time is now for the Court to resolve this issue.

The panel decision erred when it decided that copyright law did not protect the Moodsters characters as a matter of law. Copyright protection extends to the original selection and arrangement of even unprotected elements. *Feist*, 499 U.S. at 348-49. In the character context, by definition “[a] character is an aggregation of the particular talents and traits his creator selected for him. That each one may be an idea does not diminish the expressive aspect of that combination.” *Warner Bros.*, 720 F.2d at 243. And similar issues in copyright law are mixed questions of law and fact. *See, e.g., Harper & Row, Publr., Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (addressing fair use doctrine).

Indeed, an artist need only prove two elements to establish copyright infringement: “(1) ownership of a valid copyright, and (2) copying of *constituent elements* of the work that are *original*.” *Feist*, 499 U.S. at 361 (emphasis added). Both elements involve originality. And the circuit courts regularly find questions of fact about the infringer’s copying of original elements. *See, e.g., L.A. Printex Indus., Inc.*

v. Aeropostale, Inc., 676 F.3d 841, 852 (9th Cir. 2012) (reversing summary judgment on “fact-oriented standard” over substantial similarity because “the selection, coordination, and arrangement” of the copyrighted design compared to accused design presented a triable fact issue); *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946) (explaining whether a defendant copied enough from an artist’s original expression is “an issue of fact which a jury is peculiarly fitted to determine”); *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1296 (D.C. Cir. 2002) (“because substantial similarity is customarily an extremely close question of fact, summary judgment has traditionally been frowned upon in copyright litigation”). Neither logic nor law allows courts to decide originality as a matter of law for copyrightability while reserving that same issue as a question of fact for the copying element. Thus, the fundamental question for the panel was whether Moodsters Co.’s 89-page complaint stated a plausible claim that a copyright protects the Moodsters characters. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-63 (2007).

Yet the panel decision disregarded Moodsters Co.’s detailed factual allegations, despite elementary rules to the contrary. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (“the allegations of the complaint should be construed favorably to the pleader”).² The amended complaint detailed how no

² The constitutional basis for Rule 12 motions assumes that courts will not decide fact issues on the merits. *See, e.g., Arthur R. Miller, From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 22 (2010) (explaining that common law demurrer procedures—the constitutional basis for Rule 12 motions—“focused exclusively

other artist had created characters as anthropomorphized emotions—an inherently abstract concept—that featured the Moodsters characters’ unique and expressive traits and characteristics. CA9.R.Excerpts.93-116 ¶¶96-105, 163-165, 178-192. Indeed, the amended complaint even featured a preeminent animation historian expert witness who would opine to these averments. CA9.R.Excerpts.103-109 ¶¶155, 160, 164-165. And the amended complaint described the wide range of options to express the idea of single-emotion characters. CA9.R.Excerpts.112-116.

But the panel ignored these factual allegations and decided that the Moodsters characters were not copyrightable as a matter of law. The panel did not mention plausibility or the detailed factual allegations in the amended complaint. *See generally* App. 1a-17a. Rather, the panel imposed its opinions and impressions in place of the pleading. The panel, for instance, compared different generations of the Moodsters characters and opined, “it would be difficult to conclude that the 2005 Moodsters are the same characters as those sold at Target in 2015.” App. 27a.³ But here are exemplary depictions of one

on the legal sufficiency of the plaintiff’s statement of each substantive element of a cause of action, and did *not* involve a judicial assessment of the case’s *facts or actual merits.*”) (emphasis added); *see also* Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008).

³ The Ninth Circuit panel removed this conclusion from its opinion after Moodsters Co. petitioned for rehearing. *Cf.* App. 10a, App. 27a. But that removal does not change the panel’s underlying determination of its perceived differences in the generations of Moodsters to convey the Moodsters are insufficiently “delineated” or not “especially distinctive,” while

of the characters in these different versions of The Moodsters (each with the signature explosion-from-the-head expression, among other common traits):



CA9.R.Excerpts.147.

The panel’s role was not to make personal determinations about these characters—the first generation or otherwise. At base, the originality, delineation, or distinctiveness—whatever the standard—of the selection and arrangement of combined traits and attributes that make up The

disregarding the similarities. App. 8a-13a. Nor is the question over later iterations of a character even relevant. As mentioned above, later versions of a character are a derivative work, which “does not affect or enlarge the scope ... or subsistence of, any copyright protection in the preexisting material.” 17 U.S.C. § 103(b); *see also Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496 (7th Cir. 2014) (holding that derivative versions of Sherlock Holmes characters in later works could not prevent copyright on original Sherlock Holmes character from passing into public domain at end of copyright term of first Sherlock Holmes work).

Moodsters is a fact issue for the jury. The panel usurped that right through its fact-specific determinations about the characters while ignoring other factual allegations. This erosion of the Seventh Amendment, and more generally the rise of trial by pleading,⁴ will continue unless this Court decides that copyrightability includes fact issues reserved for the jury. At a minimum the Court should reverse the Ninth Circuit's judgment and remand to the district court for a jury to decide the originality of The Moodsters characters and whether Disney copied them.

III. This case presents exceptionally important issues and is an ideal vehicle for review.

Uniform federal copyright law has paramount importance. “The objective of the Copyright Clause was clearly to facilitate the granting of rights national in scope.” *Goldstein v. California*, 412 U.S. 546, 555 (1973). As Joseph Story explained,

It is beneficial to all parties, that the national government should possess this power; to authors and inventors, because, otherwise, they would be subjected to the varying laws and systems of the different states on this

⁴ See, e.g., Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 337 (2013) (concluding that “it is not unreasonable to assume that the new plausibility regime may lead to judges resolving fact issues on a motion to dismiss” and “thereby intruding on a domain historically committed to the trial process and juries, something that even the fact and narrative pleading systems of times gone by never allowed”).

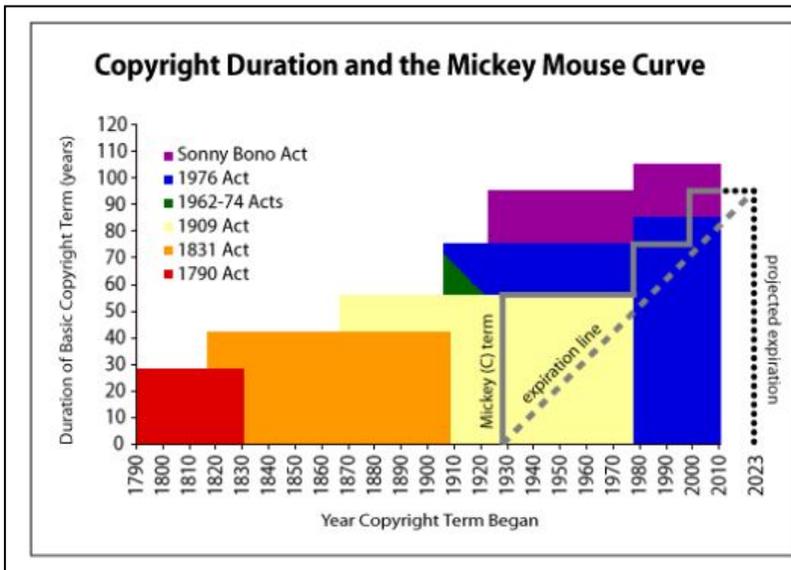
subject, which would impair, and might even destroy the value of their rights; to the public, as it will promote the progress of science and the useful arts, and admit the people at large, after a short interval, to the full possession and enjoyment of all writings and inventions without restraint.

Joseph Story, *Commentaries on the Constitution of the United States* § 502, at 402 (Rotunda & Nowak eds., 1987). But these virtues are defeated by adopting different standards across the circuit courts over copyright law. This Court has never addressed character copyrights. As a result, the circuit courts employ widely divergent standards that decrease certainty and thus fail to incentivize creativity.

Moodsters Co. and Disney are the ideal parties to present these foundational issues about character copyrightability to this Court. Copyright law protects individuals and small companies. In *Stewart v. Abend*, for instance, this Court explained the purpose of copyright's monopoly rights: "The limited monopoly granted to the artist is intended to provide the necessary bargaining capital to garner a fair price for the value of the works passing into public use." 495 U.S. 207, 229 (1990); *see also Twentieth Century Music*, 422 U.S. at 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor."). Now more than ever, in an era of dull reboots and mundane sequels, copyright law must foster creativity. And Moodsters Co. created new, novel, and—above all—original characters that no one had ever expressed before. Moodsters Co. brought the abstract nature of emotions to life. Disney copied

these original characters after its executives viewed the pilot and considered the characters. Moodsters Co. is the ideal party to advocate for a standard to prevent this story from repeat sequels.

Disney is also an appropriate party to vet the proper standard over character copyrights. While Disney benefited from copying the Moodsters characters in *Inside Out*, Disney is also notorious for its aggressive protection of its own characters. Professor Thomas Bell's "Mickey Mouse curve," for instance, reflects Disney's successful efforts to extend the duration of copyright terms every time Disney's copyright on Mickey Mouse nears expiration:



Tom W. Bell, *Copyright Duration and the Mickey Mouse Curve*, August 6, 2009, available at <https://techliberation.com/2009/08/06/copyright->

duration-and-the-mickey-mouse-curve/. And for good reason. Forbes values fictional characters. Even Daffy Duck's uncle, Scrooge McDuck, exceeds \$28 billion in net worth to Disney—a result only possible with copyright protection. See Foley, *Protecting Fictional Characters*, 41 CONN. L. REV. at 923. Disney is also as litigious as any company in its enforcement of its character copyrights, as it even sued the Academy Awards for copyright infringement after a trivial skit at the Oscars that briefly included Snow White. *Disney Company Sues Over Snow White Use*, N.Y. TIMES, Mar. 31, 1989, available at <https://www.nytimes.com/1989/03/31/movies/disney-company-sues-over-snow-white-use.html>. As a copyright owner and infringer, Disney is an ideal party to litigate the standard for character copyrightability.

CONCLUSION

Character copyrights are among the most lucrative copyrights in existence. Yet the circuit courts produce uncertain outcomes based on inconsistent tests divorced from the foundational principles of copyright law. And some courts have excised the jury from its constitutional role in these disputes. The time is now for this Court to address this important body of law—for the first time no less. The Court should grant Moodsters Co.’s petition for a writ of certiorari.

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