

No. 20-132

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

For almost 100 years, following a standard formulated by Judge Learned Hand, circuit courts have held that well-delineated characters can be protected by copyright independently of the works in which they appear, while stock, generic, or vaguely-defined characters cannot be. After petitioner correctly argued below that the circuits consistently “focus on differentiating stock characters” from well-delineated ones, the Ninth Circuit applied that standard and unanimously decided that petitioner’s characters—which lack persistent names and distinct characteristics—did not satisfy it. In petitioning for rehearing en banc, petitioner did not argue there was any inconsistency between the Ninth Circuit’s standard for the independent copyright protection of graphic characters and the standard applied by other circuits, and no court has ever suggested such a split exists.

1. Should this Court grant review to either (a) discard the time-tested “sufficient-delineation” standard or (b) reapply it to the characters in this particular case?

2. Is copyrightability, as petitioner submits, a question always “reserved for the jury,” Pet. 30, or may it be decided by a court where, as here, “accepting all non-conclusory allegations as true and drawing all reasonable inferences in favor of the plaintiff,” Pet. App. 54a, the complaint fails to state a claim?

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INTRODUCTION

This case was correctly decided below by applying a settled legal standard, and that fact-bound determination does not merit this Court’s review.

Petitioner does not claim that respondents’ movie *Inside Out* infringed petitioner’s *Moodsters* works. Petitioner’s *works* as a whole are protected by copyright, but petitioner rightly realized it could not claim any substantial similarity between those works and *Inside Out*. Instead, petitioner claimed that *characters* in the *Moodsters* works have copyright protection independent from the copyright in the works as a whole, and that *Inside Out* infringed those characters.

As first set forth by Judge Learned Hand in 1930, only a sufficiently delineated character can be protected by copyright independent of the work in which it appears. Stock, generic, or vaguely-defined characters cannot be. The Ninth Circuit, like its sister circuits, has long employed this approach. An experienced district judge applied it to the characters in petitioner’s second amended complaint and determined the complaint failed to state a claim. Pet. App. 34a-68a. A unanimous Ninth Circuit panel affirmed. Pet. App. 1a-17a. And, after petitioner sought rehearing, “no judge [on the Ninth Circuit] has requested a vote on whether to rehear the matter en banc.” Pet. App. 3a.

Having missed three times below, petitioner now wants a fourth swing at whether it can establish that its characters—which lack definite names, appearance, or traits other than being humanoid and associating a color (*e.g.*, red) with a mood (*e.g.*, being angry)—are sufficiently well-delineated to meet the standard. The lower courts rightly determined they

were not. At most, this is a dispute over the “[a]pplication of a properly stated rule of law,” unworthy of review under this Court’s Rule 10.

To try and make out a case for certiorari, the petition insists that the panel’s unanimous decision—described by a leading treatise as “a master class in character copyright law,” 2 Patry on Copyright § 3:164 (2020)—somehow implicates two circuit splits that this Court must resolve. Neither purported split is mentioned in petitioner’s briefs or rehearing petition below, and both are illusory.

First, there is no circuit split over the “sufficient-delineation” standard. As petitioner correctly explained below, all of the circuits “focus on differentiating stock characters” (not entitled to independent copyright) from well-delineated ones (potentially entitled to independent copyright). C.A.O.B. 31 n.9. While the circuits sometimes gloss that standard with different labels, no circuit has ever stated that its standard for the standalone copyrightability of graphic characters differs from another circuit’s. Instead, the circuits freely cite each other’s cases as guideposts in a shared approach that has governed for 90 years.

Second, while there is some uncertainty among the circuits whether to label copyrightability a factual, legal, or mixed question, there is no split over the issue the petition actually raises: whether a court can decide copyrightability when there is no factual dispute to resolve. Petitioner argues that copyrightability is a question solely for the jury, Pet. 25, which thus cannot be decided by a court in a motion to dismiss, a motion for summary judgment, or on appeal. No circuit has adopted such a rule. Indeed, even those courts labeling copyrightability and actionable copying as questions of fact routinely decide those issues at the

motion-to-dismiss or summary-judgment stage. Moreover, this Court itself has resolved copyrightability at the summary-judgment stage. Finally, contrary to the petition's claim, Pet. 24, there is no always-for-the-jury rule for other forms of intellectual property, either.

The district court rightly determined that the complaint's allegations and incorporated works failed to state a plausible claim of copyrightability because general character concepts, such as a blue biped that is often sad, are not independently entitled to copyright protection. The court of appeals rightly affirmed. There is no split implicated by those decisions. Certiorari should be denied.

STATEMENT OF THE CASE

1. In 2005, Daniels prepared a pitchbook, "The Moodsters Bible," for a proposed television program about Moodini ("the oldest and the wisest of the Moodsters," C.A.E.R. 188) and her Moodster students, Olovia/Oolvia, Zip, Sniff, Roary, and Shake. Pet. App. 5a. These "bug or alien-like" characters were "very thin with large, furry feet, and arms that reach nearly to the ground," and they had "elaborate antennae," Pet. App. 42a-43a, which "act both as ears and as emotional barometers," C.A.E.R. 182.

Other than Moodini, the Moodsters had primary colors and predominant moods—the yellow "everybody character" Zip, for example, was "happy/optimistic." C.A.E.R. 183. The green Shake was committed to "self-help" and was frequently "scared." C.A.E.R. 187. The pink Olovia was "loving" and "loved." C.A.E.R. 185. Each Moodster also had a signature accessory—a yo-yo for Zip, C.A.E.R. 183, a Zeus-like lightning bolt for the red Roary ("an energetic, determined, can-do character" who was the "bravest of all the Moodsters"), C.A.E.R. 184, and so forth.

While each Moodster had a predominant mood, they all experienced a variety of emotions. Indeed, the pitchbook proposed that each episode's structure would be that "[s]omething happens" and "[b]ecause of it, a Moodster experiences a feeling he or she can't identify." C.A.E.R. 192. For instance, the "Sample Moodster Show Idea" was that Sniff, the often-sad blue character, would become "very angry." C.A.E.R. 194.

In this iteration, the "Moodsters ha[d] extensive family groups"—"parents, grandparents, siblings, and friends"—and pets called "Woobies." C.A.E.R. 182, 189. All these creatures lived in a fantastical world with such locations as "the Emotion Ocean," "the Lonely Lagoon," and "the Aoodsment Park." C.A.E.R. 190-91.

2. In 2006 and 2007, Daniels changed Zip, Shake, Olovia, Roary, and Sniff, C.A.E.R. 182, to Zazz, Scootz, Oola, Rizzi, and Snorf, C.A.E.R. 238. While the characters' appearances remained similar, their characteristics changed. For instance, while the red Roary had been the "bravest of the Moodsters" in 2005, the yellow Zazz was the bravest in 2007. C.A.E.R. 243. Each character continued to exhibit a mix of emotions. The often-sad blue Snorf would "often surprise himself by feeling happy, joyous...even excited." C.A.E.R. 244.

3. In 2008, the characters changed again. Their signature accessories (yo-yo, lightning bolt, etc.) were replaced with "signature musical" instruments—"Zazz plays electric guitar, Oola the flute, Rizzi the synthesizer, Snorf the cello, and Scootz the clarinet. (Moodini can join in on percussion)." C.A.E.R. 271. The characters now had catch-phrases. C.A.E.R. 272-73. And the mentor-Moodster Moodini now "sport[ed] a magical tool belt" with "a talking stethoscope," a "monster spray," and "a feelings thermometer." C.A.E.R. 277.

4. An even more radical change followed “in the 2012-13 time frame.” C.A.E.R. 104. Moodini was removed entirely from the squad, and characters’ names changed again—green Scootz (née Shake) became Quigly, yellow Zazz (née Zip) became Coz, red Rizzi (née Roary) became Razz, etc. C.A.E.R. 180. Along with the renaming, they were physically transformed into “teddy-bear-like” characters who “w[ore] glasses, hats, and costumes,” and had “regularly-proportioned arms, hands, and feet.” Pet. App. 42a-43a. Rather than lanky insectoid creatures with their signature “emotional barometer” antennae, the characters now “look[ed] like small, loveable bears” (“round and cuddly” with “small ears”) who “don[ned] a detective’s hat and small cape.” Pet. App. 10a, 43a. In terms of appearance, “[o]nly each character’s color is the same as in the first generation of characters.” *Id.*

The Moodsters’ new Sherlock Holmes attire reflected their changed concept—rather than naïfs who were educated about their own mood swings by their mentor Moodini, they were now “little detectives” investigating the moods of others. Pet. App. 42a. Consequently, the Moodsters lost their “signature musical” instruments, catch-phrases, and so forth, but received the magical tools previously associated with Moodini. C.A.S.E.R. 225.

What is more, the Moodsters no longer lived in the fantasy world populated by “woobies” and the Moodsters’ “extensive family groups,” and defined by locales such as “the Lonely Lagoon.” C.A.E.R. 188-190, 209. Instead, the characters now “live[d] in a magician’s top hat under a child’s bed” in the human world, Pet. App. 42a, where they built a headquarters “with bits and pieces of toys and electronics” borrowed from that child, a boy named Zach, C.A.S.E.R. 225.

5. To trace one character from the complaint, the so-called “Happy character” changed from:

- “Zip,” an “everyboy” insectoid creature with mood antennae, a signature yo-yo, a thatched hut for a home, and a commitment to “making good food choices,” C.A.E.R. 183, 190; to
- “Zazz,” bravest of the crew, who has a “signature” electric guitar, loves “Zazzercises,” and lives in a Smurf-style toadstool house, surrounded by an “extensive family,” C.A.E.R. 271-72, 279; to
- “Coz,” a teddy-bear detective attired like Sherlock Holmes and carrying a signature magnifying glass, who lives under a boy’s bed in the human world, C.A.S.E.R. 180-81.

6. In short, as explained in the opinions below, “the majority of the characters’ traits, including such basic qualities as their names, are fluid.” Pet. App. 44a. Beside “the idea of color and emotions, there are few other identifiable character traits and attributes that are consistent over the various iterations.” Pet. App. 11a.

7. In June 2015, after years of development and publicity, Pixar released *Inside Out*, a movie about the emotions inside Riley, an unhappy girl on the cusp of adolescence. The feelings that Riley experiences after her family moves from Minnesota to San Francisco are personified by the characters Joy, Sadness, Disgust, Anger, and Fear. Their adventures inside Riley’s mind dramatize Riley’s struggles out in the real world.

8. In 2017, two years after *Inside Out*’s release, Daniels sued respondents, and in March 2018, Daniels and petitioner filed the operative second amended

complaint, in which petitioner asserted copyright infringement. C.A.E.R. 159.

Notably, petitioner did “not allege that *Inside Out* infringes *The Moodsters* as a work.” Pet. App 53a. Nor could petitioner, because there is no substantial similarity between the works as a whole, whether *Inside Out* is compared to the *Moodsters* pilot episode (about wacky alien-like creatures in a fantasy world who are taught to identify their own feelings by their emotionally savvy mentor, Moodini) or the *Moodsters* books and toys (about cuddly teddy-bear detectives living under a boy’s bed who advise the boy about feelings based on their own experiences). Pet. App. 42a. Thus, while there was no dispute over whether the *Moodsters* pitchbook or pilot episode were protected by copyright, petitioner did not claim infringement of those works.

Instead, petitioner argued that *Inside Out* infringed petitioner’s purported freestanding copyrights in the *Moodsters* characters. But even as to the characters, petitioner’s position was not that the different iterations of the *Moodsters* each represented *different* characters with specific identities. Instead, the complaint pleaded five generalized characters—a “Happy character,” a “Sadness character,” an “Anger character,” a “Fear character,” and a “Love character,” C.A.E.R. 82-87—that petitioner argued had “persisted over time.” C.A.S.E.R. 285.

These character concepts were very basic. As pleaded by petitioner, the “Happy character,” for instance, is happy and yellow, is “not human but has traits and characteristics of humans, is not androgynous, and is not an animal or object.” C.A.E.R. 123.

Petitioner’s claim of purported infringement by *Inside Out* depended on the complaint pleading each

Moodster as nothing but a bipedal color-emotion combination. For example, petitioner’s Roary, Rizzi, and Razz are not substantially similar to *Inside Out*’s Anger character (his actual name is “Anger,” unlike with the Moodsters). *Inside Out*’s Anger is squat, male, middle-aged, and dressed as a salaryman, and his job is to operate a control panel inside Riley’s mind. Roary and Rizzi are young, female, and unclothed, have prominent insect-like mood antennae and blonde pig-tails, carry a lightning bolt, and live in a fantasy world where they learn from the wise mentor-Moodster Moodini. Razz is a cute female teddy-bear detective wearing a capelet and deerstalker cap who lives under a bed in the real world and solves mood mysteries.

Petitioner’s complaint simplified Roary, Rizzi, and Razz into a “red Anger character” archetype—“animated, not human but has traits and characteristics that are, not androgynous, and not an animal or object,” C.A.E.R. 143—precisely to try to claim that *Inside Out*’s Anger fell within that same archetype, C.A.E.R. 146.

9. Respondents moved to dismiss, arguing that petitioner could not claim copyright over such undelineated character concepts independent of the works in which they appeared, and that even if those characters could be protected independently, *Inside Out* did not infringe them.

10. The district court dismissed after considering the operative complaint, and—as exhibits to the complaint or materials over which it properly took judicial notice—the *Moodsters* pitchbooks, pilot episode, and storybook.

11. The court began by explaining that, “[t]o survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted

as true, to state a claim to relief that is plausible on its face. In assessing the adequacy of the complaint, the court must accept all pleaded facts as true and construe them in the light most favorable to the plaintiff. The court then determines whether the complaint allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Pet. App. 37a (internal citations and quotation marks omitted).

The court then assessed the characters, noting that over each iteration they underwent “basic biographical changes,” and got “new names,” new homes, new jobs, and “a wholly different look.” Pet. App. 40a-42a. “[T]he majority of the characters’ traits, including such basic qualities as their names, are fluid.” Pet. App. 44a. Looking to the “traits that remain the same,” the court determined they were not sufficient to establish well-delineated, recognizable characters. Pet. App. 44a-46a. That was true whether the Moodsters were considered separately or together. Pet. App. 47a-49a.

12. Petitioner appealed, arguing that the Moodsters characters satisfied the Ninth Circuit’s standard for character copyrightability, which petitioner argued “focuses on whether characters are ‘stock characters’” and permits freestanding copyright if they are not. C.A.O.B. 31. Petitioner also argued that “[o]ther courts focus on differentiating stock characters as well,” and cited the Seventh Circuit’s *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004), as holding that a “character with [a] specific name and specific appearance was not a stock character.” C.A.O.B. 31 n.9.

13. Shortly before oral argument, petitioner submitted a Rule 28(j) letter to the Ninth Circuit. Relevant to the petition before this Court, petitioner ar-

gued that “dismissal under Rule 12(b)(6) is inappropriate” *unless* “the absence of originality is [] established either on the face of the complaint or through judicially noticed matters.” C.A. Docket 38.

14. The appeal was heard by a panel consisting of Judge M. Margaret McKeown, Senior Judge Jerome Farris, and visiting Second Circuit Judge Barrington D. Parker, Jr., sitting by designation. In an opinion written by Judge McKeown, and slightly revised following petitioner’s rehearing request, the court of appeals unanimously affirmed.

The court explained that “[l]iterary and graphic characters ... may enjoy copyright protection” independent from the works in which they appear, provided they have “consistent, identifiable character traits and attributes” and are not merely “lightly sketched.” Pet. App. 4a. But petitioner’s concepts of an anthropomorphic “Anger character” or “Happy character”—defined only by reference to a color and an emotion—did not meet that standard.

The court explained that the characters’ ceaseless variation left them without distinctive traits. “[T]he physical appearance of The Moodsters changed significantly over time.” Pet. App. 10a. Likewise, “in every iteration the five Moodsters each have a completely different name.” Pet. App. 12a. Indeed, there were few “identifiable character traits and attributes that are consistent over the various iterations.” Pet. App. 11a. Considering the traits that were consistently a part of the characters as pleaded in the complaint and shown by the works, the characters were not well-delineated; they were merely “[l]ightly sketched.” *Id.* The core traits assigned to each character were just

“the idea of color and emotions,” and such an idea was not protectable by copyright. *Id.*¹

Thus, while “[t]here is no dispute that the 2005 Moodsters Bible and the 2007 pilot television episode are protected by copyright,” petitioner could not “succeed on [its] copyright claim for The Moodsters *characters*, which are ‘lightly sketched’ and [not] sufficiently delineated” to enjoy copyright protection independent from the underlying works. Pet. App. 16a-17a.

15. Petitioner sought rehearing en banc, but the rehearing petition bears little resemblance to the petition before this Court. It made no mention of any circuit split. Nothing in the petition even suggests that other circuits apply a substantively different standard for standalone character copyright. As to resolution of the case on the pleadings, while petitioner disagreed with what the panel had done, the petition argued that the Ninth Circuit’s approach in this area was “not an outlier in copyright law.” P.F.R.E.B. 7.

16. “The full [Ninth Circuit was] advised of the petition for rehearing and rehearing en banc and no judge [] requested a vote on whether to rehear the matter en banc.” Pet. App. 3a.

¹ The court also held that petitioner could not prevail under “the story being told” test, an older standard primarily applicable to literary characters (as opposed to graphically depicted characters), because the *Moodsters* works were not “a character study of The Moodsters” but rather plot-driven adventures “by which particular emotions are introduced and explored. The Moodsters are mere chessmen in the game of telling the story.” Pet. App. 14a.

ARGUMENT**I. The Law of Character Copyright Is Not “in Chaos”**

1. The heart of petitioner’s argument for certiorari is the incorrect assertion that the law regarding the standard for independent character copyright is “in chaos” and that “every circuit court ... employs a different test.” Pet. 3. According to the petition, this “chaos” has reigned in copyright law “for decades”—unnoticed by this Court or *any* court, and caught only by sundry “commentators.” Pet. 14-15.

The petition’s premise is false. There is no chaos. Instead, there is striking coherence and comity among the circuits, which freely cite each other’s decisions as a shared explication of a legal standard first articulated by Judge Learned Hand in 1930. *All* of the circuits—as petitioner itself recognized below, before claiming this purported split—“focus on differentiating stock characters” from well-delineated ones. C.A.O.B. 31 n.9. *All* of them recognize that this process of differentiation requires first identifying the character’s specific, non-generic traits and then assessing whether those traits sufficiently delineate the character to permit a freestanding character copyright independent of any particular work.

2. Before setting forth the state of the law in this area, it is critical to reiterate a holding of the court below that has been obscured by the petition. “There is no dispute that the 2005 Moodsters Bible and the 2007 pilot television episode are protected by copyright.” Pet. App. 16a-17a. The petition begins by arguing that “characters often represent the most valuable part of any work.” Pet. 3. As the Ninth Circuit explained, the Moodsters *works* (such as the pitchbooks, pilot episode, and storybooks), and whatever value they have,

are protected. But petitioner is not trying to assert infringement of any particular piece of artwork, let alone an entire narrative work, such as the pilot episode or a storybook comprising plot, events, dialogue, theme, mood, setting, and characters. Instead, petitioner is urging an independent copyright over freestanding, barely defined character ideas such as a “Happy character” or a “Sadness character.”

3. It has long been understood that such thin characters are not entitled to protection independent of the underlying works in which they appear. In 1965, for instance, the Register of Copyrights explained that because many characters—“perhaps the large majority”—are insufficiently “developed in detail” to merit freestanding copyright, the Copyright Act does not specify a separate, copyrightable category of “character”:

Proposals have been advanced for identifying fictional characters as copyrightable works in themselves under the bill. There are undoubtedly some characters that are developed in detail and with such breadth and depth that they emerge as separately identifiable parts of the copyrighted works in which they appear. Others, perhaps the large majority, cannot be said to represent independent creations apart from the particular literary or pictorial works depicting them. As is equally true in the case of detailed presentations of plot, setting, or dramatic action, we believe it would be unnecessary and misleading to specify fictional characters as a separate class of copyrightable works.

U.S. Copyright Office, Supplementary Register’s Report on the General Revision of the U.S. Copyright Law 14 (H. Comm. Print, 89th Cong., May 1965), available at <https://tinyurl.com/y384d6w6> (“Register Report”).

“The Register of Copyrights hit the nail on the head.” Melville B. Nimmer & David Nimmer, 1 *Nimmer on Copyright* § 2.12[A][1] (Matthew Bender, Rev. Ed.) (“Nimmer”). Neither Congress, nor this Court, nor any Circuit has questioned the Register’s analysis of character copyright in the intervening half-century. To the contrary, this Court has routinely recognized the significance of the report in which the analysis appears. *See, e.g., Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 535 (2013).

4. Petitioner’s proposal that every character with any originality be copyrightable separate from any underlying work is thus not a cure for chaos but a recipe for it, not a vindication of the Copyright Act but a repudiation of it. Petitioner would upend an understanding of copyright law shared by the courts, the Register of Copyrights, Congress, and the leading treatises since Judge Learned Hand’s decision in 1930. Nor are petitioner’s policy arguments correct. The circuits’ shared approach to the copyrightability of graphic characters promotes originality by protecting *specific* well-delineated characters while leaving creators free to express character *types*—such as a red-faced hot-head who embodies anger or a biped who is mopey and blue—without fear of infringement claims.

A. All Circuits Limit Freestanding Character Copyright to Well-Delineated Characters

Under the law of every circuit, a graphic character must be well-delineated to be subject to freestanding copyright protection independent of the underlying works in which the character appears.

1. In 1930, Judge Learned Hand, writing for the Second Circuit, issued the seminal opinion in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930). That decision set forth the “sufficient-delineation” standard, under which a character cannot be independently protected by copyright unless the character is well-delineated. Judge Hand explained that while a copyright might exist for “Sir Toby Belch or Malvolio” from Shakespeare’s *Twelfth Night*, no copyright could be claimed over “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.” *Id.* at 121. “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.* Judge Hand thereby established the basic standard that the circuits have applied ever since.

2. The Ninth Circuit recognized *Nichols* as providing “the classic formulation of the doctrine” of character copyrightability, *Olson v. Nat’l Broad. Co.*, 855 F.2d 1446, 1452 (9th Cir. 1988), and applied that doctrine over a series of decisions.²

² The accord between the Ninth and Second Circuits is underscored by the unanimity of the panel below, which included judges from both circuits.

Its most thorough recent explication is *DC Comics v. Towle*, 802 F.3d 1012, 1019 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1390 (2016), which repeatedly cites *Olson*'s application of *Nichols*. The court explained that graphic characters (as opposed to purely literary ones³) can be independently protected by copyright so long as they are “sufficiently delineated” with “unique elements of expression.” *Towle*, 802 F.3d at 1021 (internal quotation marks and citations omitted). Under the Circuit’s three-step analysis, a “stock character” cannot be independently protected by copyright, while an “especially distinctive” one likely can. *Id.* A character need not always have the exact same appearance to be independently copyrightable, so long as its “distinctive character traits and attributes” persist. *Id.* at 1025. Looking at the Batmobile (the “character” before it), the court explained that while its design sometimes changed, it always had “its unique and highly recognizable name,”

³ As petitioner notes, Pet. 18, and as the court explained, the Ninth Circuit has an additional path by which characters can be afforded independent copyright protection: characters “that constitute ‘the story being told’ in a work”—such that the work is “essentially a character study”—are copyrightable, Pet. App. 13a. This standard does differ from the sufficient-delineation standard, but the only Ninth Circuit case where it appears to have been dispositive was *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945 (9th Cir. 1954), and this Court denied certiorari in that case, 348 U.S. 971, 972 (1955). Graphic characters, unlike purely literary ones, may be entitled to independent copyright protection in the Ninth Circuit if they satisfy *either* the story-being-told standard *or* the circuits’ shared sufficient-delineation standard. The court of appeals held that the Moodsters were graphic characters that failed *both* standards. Pet. App. 14a. Thus, this case does not present occasion to consider either whether to retain the story-being-told standard or to extend the sufficient-delineation standard to literary characters.

along with unusual traits such as high-tech crime-fighting gadgets and weaponry and a unique “bat-like appearance.” *Id.* at 1021-22.⁴

3. The Seventh Circuit also employs the sufficient-delineation standard. Citing *Nichols*, as well as multiple other Second Circuit and Ninth Circuit decisions, the Seventh Circuit explained in *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004), that “[a] stock character” cannot be independently protected by copyright. In contrast, “a distinctive character” possessing “a specific name and a specific appearance” and non-generalized character traits *can* be. *Id.* “As long as the character is distinctive, other authors can use the stock character out of which it may have been built without fear ... of being accused as infringers.” *Id.*⁵ As noted, petitioner itself described the Seventh and Ninth Circuits as applying the same standard. C.A.O.B. 31 n.9.

⁴ Contrary to petitioner’s suggestion, the Ninth Circuit’s consideration of these traits’ persistence does not somehow “violate[]” the Copyright Act’s rule that a copyright begins at the time of fixation. Pet. 20. Instead, that consideration is inherent to any standard that permits a character to be subject to copyright protection independent of a work in which it appears. It is impossible to analyze whether a character can be protected by copyright without first knowing that character’s traits. If Sherlock Holmes merely smoked a pipe once in a single work, his pipe-smoking would not be a character trait independent of that work; it would be a random incident in the story. The treads of the Batmobile’s tires in a particular drawing may amount to merely a pipe picked up once and then forgotten, but its batwing tailfins have proved akin to the pipe always kept at Holmes’s fingertips. The batwings are a character trait; the treads are not.

⁵ The Seventh Circuit went on to express doubts about the Ninth Circuit’s “story-being-told” standard for literary characters. *Gaiman*, 360 F.3d at 660.

4. As petitioner concedes, Pet. 17, the Eighth Circuit also applies the sufficient-delineation standard. Drawing from the Second, Ninth, and Seventh Circuit precedents in *Warner Bros. Entertainment v. X One X Productions*, 644 F.3d 584 (8th Cir. 2011), the Eighth Circuit agreed that “copyright protection extends to ... characters themselves, to the extent that such characters are sufficiently distinctive.” *Id.* at 597. A stock character cannot be independently protected by copyright; instead the character must “display consistent, widely identifiable visual characteristics,” though “the presence of distinctive qualities apart from visual appearance can diminish or even negate the need for consistent visual appearance.” *Id.* at 599 & n.8 (internal quotation marks and citations omitted).

5. So too do the First Circuit and Eleventh Circuit apply the sufficient-delineation standard. The First, citing *Nichols*, held that “[s]tock characters ... are not subject to copyright protection,” and that the characters at issue did not have “the delineation needed to make them subject to copyright.” *TMTV, Corp. v. Mass Prods., Inc.*, 645 F.3d 464, 469 (1st Cir. 2011). And the Eleventh, also citing *Nichols*, explained that undeveloped or generic characters are not independently copyrightable because they are merely “ideas,” but as they become “more intricately detailed” and “more idiosyncratic, they at some point cross the line into ‘expression.’” *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1266 (11th Cir. 2001). The terminology may be slightly different, but the thrust is identical—as the citation to *Nichols* confirms.

6. Confirming this harmony, the circuits freely cite each other’s decisions. Some instances were noted above. Other examples include the Seventh Circuit citing the Second and Eighth in *Klinger v. Conan Doyle*

Estate, Ltd., 755 F.3d 496, 501, 503 (7th Cir. 2014), the Second Circuit citing the Ninth in *Warner Bros. Inc. v. American Broadcasting Companies, Inc.*, 720 F.2d 231, 240-41 (2d Cir. 1983), and the Ninth Circuit citing the Second in *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978). That particular cases may use different verbiage or a more- or less-formal framework in applying the same standard does not mean that the “circuit courts are split over the standard characters must meet for copyright protection.” Pet. 13. Rather, what has unfolded in the 90 years since *Nichols* is the common law done right: opinions that apply a general standard based on the specifics of the case before the court, thereby developing a shared body of decisions to guide future courts.

7. This is the very opposite of “chaos,” Pet. 3, and the petition’s claim of a circuit split is untrue. If, as petitioner claims, the circuits were in decades-long “chaos,” Pet. 3, petitioner would have mentioned that in seeking rehearing en banc. See Ninth Circuit Rule 35-1 (rehearing en banc warranted when “the opinion of a panel directly conflicts with an existing opinion by another court of appeals”). Moreover, this Court would presumably have granted certiorari in one of the numerous petitions arising from character copyright cases over the past 90 years.⁶ If, “[f]or decades now,

⁶ See, e.g., *Towle*, 802 F.3d 1012, cert. denied 136 S. Ct. 1390 (2016); *Klinger*, 755 F.3d 496, cert. denied 574 U.S. 976 (2014); *Richlin v. Metro-Goldwyn-Mayer Pictures, Inc.*, 531 F.3d 962 (9th Cir. 2008), cert. denied, 555 U.S. 1137 (2009); *Silverman v. CBS Inc.*, 870 F.2d 40 (2d Cir. 1989), cert. denied, 492 U.S. 907 (1989); *Air Pirates*, 581 F.2d 751, cert. denied, 439 U.S. 1132 (1979); *Columbia Broadcasting Sys., Inc. v. DeCosta*, 377 F.2d 315 (1st Cir. 1967), cert. denied 389 U.S. 1007 (1967); *Warner Bros.*, 216 F.2d 945, cert. denied 348 U.S. 971 (1955); *Fleischer Studios v. Ralph A. Freundlich, Inc.*, 73 F.2d 276 (2d Cir. 1934), cert. denied, 294 U.S. 717 (1935).

commentators have sung a single chorus about the inconsistent approaches among the circuit courts about character copyrightability,” Pet. 14, a leading treatise would not state that “[t]he controlling principle here emerges from Judge Learned Hand,” and that across the circuits, only “a distinctively delineated character” can be independently protected by copyright. 1 Nimmer § 2.12[A][2].

8. In sum, the petition’s characterization of the state of the law is unfounded, and its proposal to throw out the circuits’ shared standard is unwise.

B. *Feist* Did Not Upend or Even Affect Character Copyright Law

1. According to petitioner, in 1991 this Court “announced a singular standard to qualify for a valid copyright” in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), and, over the 30 years since, *every circuit* has “deviated from this ‘touchstone’ of originality to determine when fictional characters receive copyright protection.” Pet. 13-14. Petitioner cites not a single court, nor even a dissenting judge, who has ever mentioned this purported widespread “betray[al]” of Supreme Court precedent. *See* Pet. 20. Suffice it to say, there has not been an unnoticed, three-decades-long circuit-court insurrection. Petitioner fundamentally misconstrues *Feist*, which did not address character copyright law or alter the idea/expression dichotomy on which it rests. Rather, *Feist* simply confirmed both that originality is necessary *and* that there can be no copyright over ideas (even if original) or generic expressions of those ideas.

2. *Feist* did not expand the scope of copyright, but rather limited it. Lower courts had been permitting copyright protection for *unoriginal* works based on a

theory of “sweat of the brow’ or ‘industrious collection,” under which “copyright was a reward for the hard work that went into compiling facts.” *Feist*, 499 U.S. at 352. “The ‘sweat of the brow’ doctrine had numerous flaws,” and the “[s]weat of the brow’ decisions did not escape the attention of the Copyright Office.” *Id.* at 353-54. In reports submitted to Congress, the Register of Copyrights explained “that ‘originality’ was a ‘basic requisit[e]’ of copyright,” and “[t]he Register suggested making the originality requirement explicit.” *Id.* at 355. “Congress took the Register’s advice.” *Id.*

Notably, these are the same reports in which the Register also rejected the proposal to statutorily “identify[] fictional characters as copyrightable works in themselves” because many characters, “perhaps the large majority, cannot be said to represent independent creations apart from the particular literary or pictorial works depicting them.” *See* Register Report 14.

Against this backdrop arose the *Feist* case. Feist Publications had taken, verbatim, thousands of listings from a phonebook compiled by Rural Telephone Service. Rural claimed infringement, noting the effort that went into compiling that information. But this Court rejected the relevance of hard work to a claim of copyright protection: “copyright rewards originality, not effort.” *Feist*, 499 U.S. at 364.⁷ “[T]he names, towns, and telephone numbers copied by Feist were not original to Rural and therefore were not protected by the copyright in Rural’s combined white and yellow pages directory.” *Id.* at 363.

⁷ Thus, *Feist*’s significance here is to underscore the irrelevance of the petition’s (and complaint’s) recitation of how much money and effort was expended marketing and pitching *The Moodsters*. *See* Pet. 7.

But originality was the beginning, not the end, of the inquiry because “[n]o matter how much original authorship the work displays, the facts and ideas it exposes are free for the taking.” *Feist*, 499 U.S. at 349 (internal citation and quotation marks omitted). Thus, “[t]he very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas.” *Id.* “This principle, known as the idea/expression ... dichotomy, applies to all works of authorship.” *Id.*

3. This idea/expression dichotomy was the basis of Learned Hand’s rule that only well-delineated characters can be independently protected by copyright. *See Nichols*, 45 F.2d at 121. As *Feist* itself shows, the originality standard coexists with the idea/expression dichotomy and the particular rule that a character must be well-delineated to be independently protected. The two are not in tension at all: The Register of Copyrights simultaneously pressed the originality standard *and* made clear that the “large majority” of fictional characters were not sufficiently delineated “with such breadth and depth” as to be entitled to standalone copyright.

4. Petitioner’s suggestion that *Feist*’s embrace of the originality requirement overrode the circuits’ standard for character copyright thus reveals a fundamental misunderstanding of copyright law. The petition unsurprisingly cannot cite any court for the proposition that the circuits’ shared standard “betray[s]” *Feist* and “violates basic elements of the Copyright Act.” Pet. 20. The petition’s proposal to jettison the sufficient-delineation standard would not somehow be a return to a standard from *Feist* or the Copyright Act; it would leave independent copyright protection for characters without any standard at all and would defy

the understanding of the Copyright Act shared by the Register of Copyrights, the courts, and Congress.

C. Because Petitioner’s Characters Are Not Copyrightable Under Any Legal Standard, This Case Would Be a Terrible Vehicle for Addressing the Applicable Standard

1. Even petitioner has long acknowledged that a character should not be copyrightable if it is “stock,” “generic,” or a mere idea. C.A.O.B. 19. Petitioner also specifically conceded that there should thus be no copyright over “the idea for single-emotion characters,” C.A.O.B. 6, “the idea of characters representing emotions,” C.A.O.B. 10-11, or “the idea of anthropomorphized abstract concepts,” C.A.S.E.R. 296. No matter how the standard for character copyright is articulated, the parties (and courts) agree it must preclude independently protecting such thinly sketched character concepts. But, as the district court and court of appeals recognized, petitioner is claiming copyright in just such a character concept. For that reason, this case is not a good vehicle for articulating what makes a character eligible for copyright protection. The lower courts have rightly developed the standard in the context of well-defined characters, not-thinly sketched ones.

2. Petitioner’s operative complaint actually *pleads* the undelineated nature of the characters that petitioner claims are independently protected by copyright. Take, for instance, the complaint’s description of the “Sadness character”:

[T]he Sadness character is an anthropomorphic animated character represented

by the single emotion of sadness; the application of blue as the Sadness character's core body color; the tendency to cry, slump down on the ground, and maintain a gloomy, pessimistic attitude; the role the Sadness character maintains within the ensemble of four other characters each represented by the single emotions happiness, anger, fear, and love, and each which is represented by a core body color of yellow, red, green, and pink, respectively; that the Sadness character is not human but has traits and characteristics of humans, is not androgynous, and is not an animal or object.

C.A.E.R. 133 (Second Amended Complaint ¶ 254).

As the lower courts recognized, this “Sadness character” has no name (not Sniff, Snorf, or any other moniker), no interests or job (*e.g.*, detective work), no accessories (*e.g.*, cello), and no distinctive physical attributes (*e.g.*, antennae or teddy-bear appearance), only a vaguely defined form (“characteristics of humans, is not androgynous, and is not an animal or object”).⁸ The “Sadness character” is just a “sad character,” having the generic traits of sadness (*e.g.*, a “tendency to

⁸ This is not to suggest that the “Sniff” creature in the pilot episode or the “Snorf” detective in the *Moodsters* storybook would be subject to a freestanding copyright, either. But that is not the question in this case. The issue decided below was whether petitioner’s genericized “Sadness character” *et al.* were independently copyrightable, not whether some particular more-detailed iterations of the characters were. To the extent that petitioner argues in reply that the lower courts misunderstood the traits of the characters over which petitioner was seeking copyright, that is plainly not an issue worthy of this Court’s review.

cry”) and the generic color for sadness (blue—a literal synonym for sad).

3. Even petitioner’s hand-picked authorities set forth requirements not met by petitioner’s characters as described in the complaint and by the courts below. Petitioner favorably cited the Seventh Circuit’s *Gaiman* decision for the proposition that a “character with [a] specific name and specific appearance [is] not a stock character.” C.A.O.B. 31 n.9. And the petition cites E. Fulton Brylawski, *Protection of Characters—Sam Spade Revisited*, 22 BULL. COPYRIGHT SOC’Y U.S.A. 77 (1974), which likewise states that defined characters must have two things: “[t]he first is the character name, and the second a set of physical attributes and personality traits.” *Id.* at 78. Even assuming *arguendo* that these elements are sufficient for copyrightability, petitioner’s character concepts lack both a “specific name” and a “specific appearance”:

- Petitioner conceded in the district court that, to the extent the Moodsters have character traits, an “[i]ndividual character name is not one of those traits.” C.A.S.E.R. 291 n.11. For litigation purposes, petitioner has tried to brand an “Anger character” or a “Sadness character.” But the Moodsters were never *named* Anger or Sadness. They had various transitory names like Roary or Sniff, which petitioner itself pleaded and argued were *not part of the character*.
- The characters also lack any specific appearance. Petitioner alleged that the physical traits of the “Sadness character” (aside from being blue) were “characteristics of humans, ... not androgynous, and ... not an animal or object.” That vague description was necessary to encom-

pass the very different depictions of the insectoid Sniff (with a prehensile antennae that could wipe tears and huge, furry, toe-less feet) and the teddy-bear Snorf (who wears a red deer-stalker cap and a red capelet, and has small, toed feet). See C.A.E.R. 132. But it plainly is not a *specific* appearance.

If, as petitioner argues, “by definition a character is an aggregation of the particular talents and traits his creator selected for him,” Pet. 26 (internal citation, brackets, and quotation marks omitted), then the “Sadness character” is not even a character at all. Petitioner pleaded away its name and “particular talents and traits,” leaving only a sad blue biped, with no trait beyond often acting sad in generic ways (“cry[ing],” “slump[ing],” having “a gloomy, pessimistic attitude,” feeling “melancholy” or “blue”). As the court of appeals explained, the “Sadness character” is only “the idea of color and emotions,” anthropomorphized. Pet. App. 11a, 13a.

4. By attempting to claim independent copyright protection over a nameless “Sadness character” or “Anger character” abstracted into the most general possible terms, petitioner may have hoped to sketch those characters with such broad strokes as to justify an infringement claim against *Inside Out’s* Sadness and Anger. But in doing so, petitioner failed to heed Judge Learned Hand’s warning from 90 years ago: “[T]he less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.” *Nichols*, 45 F.2d at 121. Petitioner’s own complaint pleaded a level of generality that defeated its claims that these characters were independently protected by copyright.

5. Thus, even if this Court were inclined to accept petitioner’s ill-advised invitation to throw out the

character copyright standard developed by the circuits over decades and devise some new standard based solely on “originality,” this case would be a terrible vehicle for such a revolution. The circuits developed the “sufficient-delineation” standard in cases involving characters that, indisputably, were recognizable outside of the works in which they appeared—it was precisely because those characters (Betty Boop, Mickey Mouse, the Batmobile, etc.) were so indisputably well-delineated that even the party challenging the copyright in each case was nevertheless trying to use that *specific* character. The clear, established lines of those characters were what allowed the appellate courts to elaborate the legal standard and apply it in a way that gave guidance to future courts. It would be highly ill-advised to devise a new standard that could be tested against nothing but nameless, formless bipeds that are nothing more than anthropomorphized, color-coded emotions. For that reason, too, certiorari is unwarranted here.

II. Whether Copyright Protection for Characters Is a Question of Fact, a Mixed Question, or a Question of Law Is Not Implicated by This Case

1. Petitioner next requests certiorari based on a stale, seemingly illusory split that is not implicated by this case. It is true that “[t]he 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.” Pet. 22. But that distinction makes little apparent difference in practice, and it is certainly irrelevant to this case.

Every circuit recognizes that courts can decide questions of copyrightability when the facts alleged simply cannot support a claim for copyright protection.

No circuit holds what petitioner suggests should be the rule: that courts can never “decide[] copyrightability as a matter of law” because that “eliminate[s] the jury entirely.” Pet. 25. And what the district court did here—applying the Rule 12(b)(6) standard to the allegations in, and works incorporated by, the complaint—is forbidden by no circuit. Indeed, petitioner recognized below that Rule 12(b)(6) dismissal was appropriate when non-copyrightability is “established either on the face of the complaint or through judicially noticed matters.” C.A. Docket 38. Thus, if the different nomenclature for the nature of the copyrightability question ever has any import, it has none in this case.

2. It is important to underscore how radical petitioner’s position is. If a court can never decide whether or not a character is independently protectable in copyright, then even if a plaintiff claimed a freestanding character copyright over Judge Learned Hand’s paradigmatically uncopyrightable “riotous knight who kept wassail to the discomfort of the household,” the complaint could not be dismissed; summary judgment could not be granted in defendant’s favor; and a jury verdict of copyright infringement could never be overturned on appeal. So too in the other direction: a defendant who literally copied Batman could, on petitioner’s view, fend off summary judgment merely by asserting that Batman was not independently copyrightable, since the district court would be precluded from “decid[ing] copyrightability as a matter of law.”

And petitioner does not stop there, for according to the petition, actionable *copying* can also never be decided by the court—per petitioner, “[n]either logic nor law” permits “originality” and “copying” to be treated differently in this regard. *See* Pet. 27. To accept petitioner’s view means that a plaintiff who claimed the character Dr. Zhivago copied the character Batman

could never lose on summary judgment. Conversely, a plaintiff who asserts that a bootleg literally copied his album could never win summary judgment.

3. Logic and law, fortunately, are not so fickle. This Court has already squarely resolved this issue in *Feist*. There, the district court decided at the summary judgment stage that the material in the phonebook at issue was copyrightable. 499 U.S. at 344. The court of appeals affirmed. *Id.* But this Court reversed, holding—as a matter of law, obviously, since this Court does not find facts—that “[t]he selection, coordination, and arrangement of Rural’s white pages do not satisfy the minimum constitutional standards for copyright protection.” *Id.* at 362. While recognizing that the arrangement *was* original to Rural in a sense, the Court explained that “there is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course.” *Id.* at 363. The Court thus concluded that even if the phonebook as a whole was copyrightable, its component parts and their selection and arrangement were not. *Id.*

According to petitioner’s theory, *every court* in *Feist*—the district court, the appellate court, and this Court—“usurped” the jury’s role and “ero[ded] ... the Seventh Amendment” by not recognizing that “the originality ... of the selection and arrangement ... is a fact issue for the jury.” Pet. 29-30. If adopted by this Court, petitioner’s proposed rule would sweep away not just *Feist* but literally *every* copyright decision applying the standards for copyright protection, since it would never be a court’s province to determine what is original, what is creative, what is generic, what constitutes *scènes à faire*, and so forth.

4. There is no circuit split on this issue. Petitioner notes that the Second Circuit has described copyrightability as a question of fact. But the court routinely decides issues of copyright protection and actionable copying in the Second Circuit when, as in this case, the court concludes that the underlying allegations or evidence compel the result. *E.g.*, *Warner Bros.*, 720 F.2d at 239-43; *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 910-11, 918 (2d Cir. 1980); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979-80 (2d Cir. 1980). Petitioner rightly notes that the Ninth Circuit also views the question of copyrightability as “fact-intensive.” Pet. 23. But in the Ninth Circuit, the court also routinely resolves issues of copyright protection and actionable copying when the evidence and allegations compel the result. *E.g.*, *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1073, 1076-77 (9th Cir. 2000); *Fabrica Inc. v. El Dorado Corp.*, 697 F.2d 890, 892-94 (9th Cir. 1983).

5. Petitioner next claims that the supposed “uncertainty” over whether eligibility for copyright can be decided by the court “is unique in the field of intellectual property law” because “[q]uestions of fact dominate the validity of every other form of intellectual property.” Pet. 24. But here, too, petitioner misunderstands the law, for it is well recognized that eligibility for patent and trademark can also be resolved by the court in circumstances analogous to these.

For instance, in the patent context, the Federal Circuit recently explained that, “[l]ike other legal questions based on underlying facts, this question [of eligibility for patent] may be, and frequently has been, resolved on a Rule 12(b)(6) or (c) motion where the undisputed facts, considered under the standards required by that Rule, require a holding of ineligibility under the substantive standards of law.” *SAP Am.*,

Inc. v. InvestPic, LLC, 898 F.3d 1161, 1166 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 2747 (2019). The court thus held that there was “nothing ‘inventive’ about any claim details, individually or in combination, that are not themselves in the realm of abstract ideas,” and affirmed the dismissal of the plaintiff’s suit. *Id.* at 1170.

Similarly, in the trademark context, the Second Circuit held that “Consumer Electronics Monthly” was too generic a magazine name to be trademarked, and directed the district court to dismiss the plaintiff’s suit under Rule 12(b)(6). *CES Pub. Corp. v. St. Regis Publications, Inc.*, 531 F.2d 11, 15 (2d Cir. 1975) (Friendly, J.).

Respondents could—given infinite space—continue listing such examples. But these two suffice, particularly because the limitations on eligibility for patent and trademark addressed at the motion-to-dismiss stage in those cases are so similar to the limitation on eligibility for copyright resolved here at the motion-to-dismiss stage. The district court and appellate court determined, in effect, that petitioner’s claimed “Sadness character” and his companions are “in the realm of abstract ideas,” *SAP*, 898 F.3d at 1167, and “generic,” *CES*, 531 F.2d at 13.

6. As petitioner itself noted below, the Ninth Circuit’s unremarkable application of the Rule 12(b)(6) standard to character copyrightability has not led to such cases being resolved on the pleadings as a matter of course. *See* C.A.R.B. 5-6 (contending there was not “a single case deciding the validity of a character copyright on a Rule 12 motion”). Petitioner lost here not because the Ninth Circuit denies juries any role in character-copyright cases, but because, even “accepting all non-conclusory allegations as true and drawing all reasonable inferences in favor of the plaintiff,” petitioner’s complaint failed to “allege[] a plausible claim

to relief.” Pet. App. 54a.⁹ As noted, *no circuit* holds that it is *per se* improper to make such a ruling. Any challenge to the decision below thus concerns not the *applicability* of Rule 12(b)(6), but rather its *application* to the particular allegations and exhibits before the district court in this case—an issue that does not meet this Court’s Rule 10 standard.

7. The balance of petitioner’s arguments on this issue are transparently unworthy of this Court’s review. Petitioner complains at length that the Ninth Circuit “disregarded [petitioner’s] detailed factual allegations.” Pet. 27-30. That is not true. But even if, somehow, the courts below missed some detail about the Moodsters characters, this Court’s role is not to correct such fact-bound errors.

8. In short, whatever the nature of the difference between whether copyrightability is deemed a factual question, a legal question, or a mixed question, *this* case does not present that issue. And the only rule of decision that the petition suggests could even affect the outcome of the case—a complete prohibition on courts ever deciding copyrightability—is clearly wrong. Certiorari is not warranted.

⁹ Petitioner complains that “[t]he panel did not mention plausibility,” Pet. 28, but there was no dispute that the Rule 12(b)(6) plausibility standard applied, C.A.O.B 32; C.A.R.B. 6, and nothing in the opinion holds or even suggests otherwise. Even if petitioner were correct that the panel somehow silently forgot or overlooked the Rule 12(b)(6) standard, that case-specific error would not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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