No. 18-701

In the Supreme Court of the United States

CLAYTON PRINCE TANKSLEY,
Petitioner,

v.

LEE DANIELS, LEE DANIELS ENTERTAINMENT, DANNY STRONG, DANNY STRONG PRODUCTIONS, *et al.*,
Respondents.

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

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 44.2, Petitioner, Clayton Prince Tanksley, respectfully petitions for rehearing of this Court's Order denying certiorari on February 19, 2019. The instant Petition is justified by "intervening circumstance of a substantial or controlling effect" that could not have been addressed in Petitioner's previous filings on appeal.

In his submissions to the Third Circuit, Petitioner argued, *inter alia*, that the district court had erred by: (a) by making a determination as to substantial similarity as a matter of law based on a comparison of complex, literary artistic works without the aid of discovery or expert witness opinion; (b) by inappropriately undertaking to make a determination of protected literary works regarding substantial similarity at the pleading stage of the proceedings and thereby denying Petitioner right to a jury trial; and (c) denying Petitioner's request for leave to amend his Second Amended Complaint.[1] However, several months after Petitioner had filed his appellate briefs and argued his case before the Third Circuit, Judge Wardlaw, concurring in *Astor-White v. Strong*, 733 Fed. Appx. 407 (9th Cir. 2018) (another copyright infringement action involving the television series, *Empire*), substantively addressed these precise issues, echoing many of Petitioner's own arguments, thereby

[1] Petitioner's First Amended Complaint added a Defendant but made no other substantive changes to the pleading and was filed before Defendants were required to respond pursuant to Fed. R. Civ. P. 15(a). Accordingly, the Second Amended Complaint was, in fact, Petitioner's first substantive amendment.

calling into question the lower court's ruling. Significantly, in their submissions to both the district court and the Third Circuit, the Fox Defendants[2] repeatedly relied on the district court's holding in *Astor-White*, which was later reversed, in part, by the Ninth Circuit. Moreover, the district court relied upon the *Astor-White* case in reaching its determinations against Petitioner. *Clayton Tanksley v. Lee Daniels, et al.*, 259 F.Supp. 3d 271, 291 (E.D. Pa 2017). Had this recent authority been available to Petitioner at the time of briefing or oral argument before the Court of Appeals, the Third Circuit would likely have found Judge Wardlaw's views persuasive, resulting in a different outcome.

The protections afforded to the creators of original works by the Copyright Act, 17 U.S.C. §§ 101, *et seq,* are at stake here and a proper determination of the issues presented goes beyond Petitioner's personal interests as it will undoubtedly have an effect in other copyright infringement cases. Accordingly, Petitioner respectfully submits that this Court should reconsider its previous denial of certiorari and grant a GVR so as to permit the Third Circuit to consider the impact of *Astor-White* on Petitioner's appeal.

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[2] Lee Daniels and all of the other Respondents, other than Sharon Pinkenson and the Greater Philadelphia Film Office, are referred to herein, collectively, as the "Fox Defendants".

ARGUMENT

I. Judge Wardlaw's Concurring Opinion in *Astor-White* Could Have a Substantial Impact on Whether Petitioner Should Have Been Granted Leave to Amend and Other Substantive Issues in this Case

The Ninth Circuit's ruling on appeal in *Astor-White* is of particular interest and substantial or controlling effect here not only because, as in the instant case, it involves a copyright infringement claim relating to the television series *Empire,* but also because Judge Wardlaw's concurring opinion specifically addresses several of the precise substantive issues raised by Petitioner on appeal and calls the lower court's ruling into question. In *Astor-White*, the plaintiff appealed from the district court's Rule 12(b)(6) dismissal of his first amended complaint, in which he alleged that *Empire* infringed upon his copyrighted treatment of a TV series entitled *King Solomon*. The Ninth Circuit Court of Appeals affirmed the district court's dismissal of the plaintiff's pleading, but reversed the lower court's refusal to grant leave to amend on the basis of futility. The *Astor-White* Circuit Court stated, "Although Astor-White did not plead sufficient facts to state a claim for copyright infringement, the district court abused its discretion by denying Astor-White the opportunity to amend his pro se first amended complaint. Dismissal with prejudice is appropriate only if a complaint "could not be saved by any amendment." *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008). Here, that is not the case.". *Id.*

In the matter before this Court, the Third Circuit summarily affirmed the district court's denial of Petitioner's request for leave to amend his pleading on the grounds of futility. *Tanksley v. Daniels, et al*, 902 F.3d 165, 177 (3d. Cir. 2018). However, as precisely argued by Petitioner, Judge Wardlaw noted in his concurring opinion in *Astor-White*, that a finding of futility based on a substantial similarity determination at the pleading stage of the proceedings, particularly when involving literary works, jeopardizes the important protections provided by the Copyright Act, to wit:

> The district court and the dissent's determination of futility on the basis of the lack of substantial similarity threatens the copyright protection for treatments, long recognized as a genre of protected literary works, 17 U.S.C. § 102(a)(1), and disregards their very nature.

Id. at 408.

Concurring with the majority's reversal of the district court's denial of the plaintiff's request for leave to amend, Judge Wardlaw went on to discuss "the revolutionary nature of Astor-White's treatment at the time it was written." His observations in this regard are equally and compellingly applicable to the instant case[3].

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[3] Petitioner's work, *Cream*, is a pilot for a soap opera type television show about the trials and tribulations of an African-American male who has overcome his disadvantaged past to achieve financial success in the music recording industry only to be forced to contend with family members who are scheming to

> While diversity in television still has a long way to go, a lot has changed on primetime television in the 11 years since Astor-White wrote the treatment *for King Solomon*. In the decades prior, black families were mostly represented, if at all, on sitcoms. Only 6 years ago, in 2012, did Kerry Washington debut as Olivia Pope in *Scandal* on the ABC network as the first black female lead in almost 40 years. The rise of TV shows featuring complex, black lead characters is recent, and Astor-White created *King Solomon* on the revolution's precipice. Both *King Solomon* and *Empire* are about a black record business mogul with complex family dynamics and who competes with a rival record company owned by a white man involved in organized crime. *Empire* premiered in 2015 and is credited "as one the clear and first runaway hits for representation of black people" and "represent[s] a dynamic, that for the most part, has not been seen."

Id. at 409, citing, Britt Julious, *Family Matters: How Shows Like Empire Are Redefining Black Families on TV*, GQ (Oct. 27, 2016), https://www.gq.com/story/family-mattershow-shows-like-empire-are-redefining-black-families-on-tv and Angelica Jade Bastién, *Claiming the*

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take over 50% of his record label business and exploiting his children in the effort. *Cream,* written in 2003, was copyrighted in September 2005, certainly at a time, well before this type of genre for the black family was conceived, and ten (10) years prior to when *Empire* was televised. See, https://drive.google.com/file/d/0BwUBwSfM3yE2bDA5ZXNGMFlJdk0/view.

Future of Black TV, The Atlantic (Jan. 29, 2017),https://www.theatlantic.com/entertainment/archive/2017/01/claimingthe-future-of-black-tv/514562/. Had this precedential analysis been available to Petitioner he would undoubtedly have included this argument and cited authority which would have made a substantial and controlling difference.

Regarding the propriety of dismissing a complaint based on a finding of no substantial similarity in cases where the subject works are more complex than a simple, static, two- or three-dimensional representation, in the absence of any discovery or expert witness assistance, Judge Wardlaw also succinctly stated:

> Moreover, ***dismissal of a complaint for lack of substantial similarity before any discovery is virtually unheard of***. The dissent relies exclusively on cases decided at the summary judgment stage, with one notable exception, *Rentmeester v. Nike Inc.*, 883 F.3d 1111 (9th Cir. 2018), a case involving photographs, which fall within an entirely separate subject matter of copyright protection, pictorial, graphic and sculptural works, 17 U.S.C. § 102(a)(5). And *Rentmeester*, which justified its dismissal "because the two [works] are properly before us and thus capable of examination and comparison," *Rentmeester*, 883 F.3d at 1123 (quotation omitted), is itself under question, as its approach is not found anywhere else in Ninth Circuit precedent, except a case which did a "side-by-side" comparison of two

maps of the United States. *Christianson v. West Pub. Co.*, 149 F.2d 202 (9th Cir. 1945).

Not many laypersons, much less judges, are trained in the process of developing a short treatment into a fully developed television show. ***What the district court did here illustrates that comparing a treatment to a completed work requires specialized knowledge of how treatments are developed into completed television shows***. In its side-by-side comparison of the copyright-registered six page treatment of *King Solomon* to a full season one of *Empire*, the district court found repeated differences. But of course differences are inevitable, because change is exactly what happens as a treatment is developed into a fully realized work. *See* Thomas D. Selz et al., *Entertainment Law 3d* § 20:3 (2017) (noting that a story's development continues even after a script is completed, and as a result a film may depart from the final script). What the district court should have focused on were the similarities that remained throughout the development process.

. . .

The district court dismissed this claim on the basis that the storyline in *King Solomon* and its many similarities with *Empire* were generic. However, ***judges have no particular expertise in determining what is and is not generic in cases like these***, where the judge could not have seen a similar show at the time it

> was written. ***Discovery and the expertise of persons who understand the landscape of television at the time*** **King Solomon was written would have greatly informed the decision as to substantial similarity.**

Id. at 408-409. [Emphasis added.]

Similar to the lack of discovery in *Astor-White*, in this case, discovery had only commenced, and neither the district court nor the Third Circuit properly or fully considered the need for discovery, but instead, the Third Circuit summarily stated that "[t]he District Court properly concluded that no additional evidence or expert analysis would be relevant to the question of substantial similarity". *Tanksley,* 902 F.3d at 172. Similarly with respect to the case *sub judice*, "Discovery and the expertise of persons who understand the landscape of television at the time [*Cream*] was written [2003] would have greatly informed the decision as to substantial similarity". *Astor-White*, 733 Fed. Appx. at 409. [Emphasis added.] Clearly, this opinion and argument has a substantial impact upon how the lower courts conduct their substantial similarity analysis. See, https://drive.google.com/file/d/0BwUBwSfM3yE2bDA5ZXNGMFlJdk0/view?usp=drivesdk.

As to the issue of whether it is appropriate for courts to make substantial similarity determinations at the pleading stage of the proceedings, Judge Wardlaw concluded as follows:

> Finally, substantial similarity is "a question of fact uniquely suited for determination by the

> trier of fact." *Jason v. Fonda,*526 F.Supp. 774, 777 (C.D. Cal. 1981), *incorp'd by ref*, 698 F.2d 966 (9th Cir. 1982). Thus, summary judgment "is not highly favored on the substantial similarity issue in copyright cases," *Funky Films*, 462 F.3d 1072, 1076 (9th Cir. 2006) (quotations omitted), and should be even more disfavored on a motion to dismiss.

Id. at 410.[4]

The parallels between *Astor-White* and the instant case, where a substantial similarity determination was made by the district court on the basis of comparing Petitioner's low-budget, three-episode pilot video (*Cream*) with a fully developed major television network production (*Empire*), are apparent and striking. Accordingly, Judge Wardlaw's observations are extremely impactful to the matters at issue here as well as to the current state of the law, and moreover, would have proved persuasive had Petitioner had the benefit of this authority.

II. Recent Events Would Have a Substantial Impact on the Outcome of this Case

The district court abused its discretion in using a video produced, in response to a subpoena, of Petitioner's presentation and submissions at the 2008 Philly Pitch taken by videographer, Rob Kates, hired by one of the Defendants, as undeniable credible evidence

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[4] Judge Wardlaw's opinion is in direct contradiction to the Third Circuit's opinion stating that these type of dismissals at the 12(b)(6) stage "are now more common". *Tanksley,* 902 F.3d at 171.

that Petitioner did not present *Cream* to Lee Daniels (one of the judges at the Philly Pitch). *Clayton Tanksley v. Lee Daniels, et al*, 259 F.Supp.3d 271, 278, n.2 (E.D. Pa. 2017). However, without the benefit of the deposition of Rob Kates, and those other critical individuals with knowledge, the lower court abused its discretion by utilizing the Kates Video as authentic and reliable, while it is abundantly apparent that the Kates Video had been edited or altered in some manner. See, https://drive.google.com/file/d/1pUxkfj9lPEH-Ad4UDno-MJX0nm9xoi7X/view?usp=drivesdk.

Specifically, Petitioner argued that continued further discovery such as the deposition of Rob Kates, and the depositions of other individuals who have knowledge pertaining to the Kates Video, needed to take place to reveal the truth about the editing or altering. Furthermore, recent intervening developments that would have a substantial or controlling effect in this matter is that Petitioner, Tanksley, has informed the FBI, Philadelphia, PA, Special Agent Tyler Gagne, regarding the editing and altering of the Kates Video, and related actions, which are under investigation. *Cayuga Indian Nation of N.Y. v. Pataki,* 413 F.3d 266, 273, 280 (2d Cir. 2005); *Vicknair v. Formosa Plastics Corp.,* 98 F.3d 837, 839 (5th Cir. 1996). Under these circumstances, the recent developments, and the findings with respect to the referenced investigation, will have a substantial impact or effect on the outcome of the case, and as such, the Petition for Rehearing should be permitted.

III. This Court Should Grant the Rehearing Petition in Order to Issue a GVR

Issuance of a GVR is also warranted in this instance because a proper determination of the substantial issues under consideration here reaches beyond Petitioner's personal interests and will affect other copyright infringement claimants**.** *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457–58 (2006) (*per curiam*); *California v. Roy*, 519 U.S. 2, 4–6 (1996) (*per curiam*); *Youngblood v. West Virginia*, 547 U.S. 867 (2006) (per curiam); *Cayuga Indian Nation of N.Y.,* 413 F.3d at 273, 280; *Vicknair,* 98 F.3d at 839. See further, cases citing to *Tanksley v. Daniels, et al.,* 12 (b)(6) dismissals, *Perry v. Mary Ann Liebert, Inc.*, 18-2019 (2d Cir. March 6, 2019); *Green v. Harbach*, 18-2078 (2d Cir. February 6, 2019); *Nobile v. Watts*, 17-3752 (2d Cir. September 21, 2018). Consideration and application of Judge Wardlaw's opinion and analysis to this case, will help to clarify a conflicted area of the law while ensuring that the critical protections provided by the Copyright Act are not diminished by virtue of summary dispositions of protected literary works at the pleading stage.

CONCLUSION

For all of the reasons set forth above, the foregoing Petition for Rehearing should be granted, and the Court should issue a GVR to permit consideration of Judge Wardlaw's concurring opinion in *Astor-White*.

Respectfully submitted,

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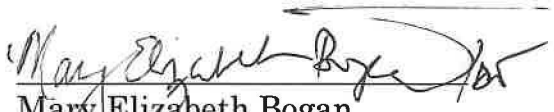
CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for Rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court of the United States and is presented in good faith and not for delay.



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