No. _____

In the
Supreme Court of the United States

H&M HENNES & MAURITZ, LP,
a New York limited partnership,
Petitioner,

v.

MALIBU TEXTILES, INC., a New York corporation,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

STACI JENNIFER RIORDAN
Counsel of Record
NEAL J. GAUGER
NIXON PEABODY LLP
300 South Grand Avenue, 41st Floor
Los Angeles, California, 90071
(213) 629-6000
sriordan@nixonpeabody.com

Counsel for Petitioner

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. In light of the "plausibility" standard established by this Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), where a plaintiff has not made any factual allegations regarding access, are conclusory statements that "striking similarity" exists between two works insufficient to plead a claim of copyright infringement, or do such allegations meet the pleading standard, as the Ninth Circuit held in this case?

2. Even if a pleading of striking similarity is permissible absent any pleading of access, are plaintiffs required to plead reliable evidence of copyright ownership and evidence as to what work is allegedly protected by that copyright (including official copies of the works' copyright registrations and copies of the deposit materials submitted to the Copyright Office) in light of *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC* ("*Fourth Estate*"), 139 S. Ct. 881 (2019), or are such materials not required to meet the pleading standard, as the Ninth Circuit held in this case?

3. On a motion to dismiss, are a defendant's copyrights *prima facie* evidence of the copyrights' validity, the ownership of the work, and the work's independent creation, and thus sufficient to bar a pleading of striking similarity, or is consideration of such materials inappropriate before summary judgment or trial, as the Ninth Circuit held in this case?

PARTIES TO THE PROCEEDING

Petitioner H&M Hennes & Mauritz LP, who was respondent before the United States Court of Appeals for the Ninth Circuit, and defendant before the district court, is a New York limited partnership, and is not publicly held.

On information and belief, Respondent Malibu Textiles, Inc., who was petitioner before the United States Court of Appeals for the Ninth Circuit, and plaintiff before the district court, is a New York corporation and is not publicly held.

RELATED PROCEEDINGS

There are no proceedings that are directly related to this case.

RULE 29.6 STATEMENT

H & M Hennes & Mauritz LP, a privately held company, has no corporate parent, and no publicly held company has an ownership interest of more than ten percent.

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PETITION FOR WRIT OF CERTIORARI

Petitioner H & M Hennes & Mauritz LP ("H&M") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion addressing the questions presented (App. 1) is reported at 922 F.3d 946. The district court's opinions granting H&M's 2014 and 2017 motions to dismiss (App. 18, 22), and denying Respondent Malibu Textiles, Inc.'s 2014 motion for reconsideration (App. 28) are unreported. The Ninth Circuit's 2016 opinion affirming the grant of H&M's 2014 motion to dismiss (App. 33) is unreported. The Ninth Circuit's opinion denying H&M's 2019 petition for rehearing en banc (App. 37) is unreported.

JURISDICTION

The Ninth Circuit entered judgment on April 24, 2019. App. 1. On May 31, 2019, the Ninth Circuit denied H&M's request for rehearing *en banc*. App. 37. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Copyright Act include 17 U.S.C. § 102, 17 U.S.C. § 103, 17 U.S.C. § 501, and 17 U.S.C. § 104. App. 39-45.

STATEMENT

A. Background and Summary

In a pair of epoch-defining cases, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), this Court took bold, decisive and critical action to reel in litigants and circuit courts who had stretched the limits of Federal Rule of Civil Procedure 8(a)(2) beyond recognition and rationality. *Iqbal* and *Twombly* are unwavering, requiring that all plaintiffs must file complaints consisting of well-pleaded factual allegations, which, when accepted as true, "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. *Iqbal* and *Twombly* further affirmed that courts "are not bound to accept as true a legal conclusion couched as a factual allegation," and that "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 550 U.S. 555; *Iqbal*, 556 U.S. at 679.

The time has come to instruct the circuit courts once more. Earlier this year, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") used the instant case to dramatically expand the scope of acceptable copyright infringement pleading beyond the well-settled requirements of this Court's precedent and circuit court law. Without precedent in circuit court jurisprudence, the Ninth Circuit has held that a complaint containing speculative, conclusory allegations of striking similarity – accompanied only by speculative, conclusory allegations as to access – is sufficient to plead a claim for copyright infringement. Notably, the Ninth Circuit's 2019 decision is even

inconsistent with its 2016 orders previously issued in this litigation, when it instructed Respondent Malibu Textiles, Inc. ("Malibu") to plead fact-based, substantive, and plausible access allegations. App. 35-36.

It is sacrosanct that, at the start of litigation, a plaintiff must plead facts — not mere legal conclusions — establishing: (1) the plaintiff's ownership of a copyright registration for its work; (2) the defendant's access to the copyrighted work; and (3) substantial similarity between the copyrighted work and the allegedly infringing material. *Berkic v. Crichton*, 761 F. 3d 1289, 1291-92 (9th Cir. 1985). Where a claim has merit, each of these elements should be pled without difficulty – including access. As noted by the Ninth Circuit when this case first rose on appeal in 2016, evidence supporting access through widespread dissemination is, by its very nature, known to the plaintiff at the start of litigation; such facts can be derived from a plaintiff's own sales records. App. 36. But now, the Ninth Circuit believes that even this is too great a burden for copyright plaintiffs to bear. If this new standard remains, the courts of the Ninth Circuit (and undoubtedly others) will be flooded with complaints based only on insufficient, self-serving, and conclusory striking similarity allegations such as those offered by Malibu here.

The loophole is broad; the Ninth Circuit's new test essentially allows plaintiffs to ignore the access requirement entirely, stating only unsupported allegations of copyright ownership and striking similarity to survive the pleading bar. Then, absent

adjudication at summary judgment (disfavored in copyright infringement cases), defendants will be obligated to litigate through trial or to pay a settlement, regardless of merit. This is deeply unfair, and far from the equal footing that should be enjoyed by plaintiffs and defendants alike in the litigation process.

The practice of girding an insufficient complaint in order to launch a discovery fishing expedition is the exact act warned against by *Iqbal* and *Twombly*'s central holding – that a plaintiff may not "unlock the doors of discovery . . . armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678-79 (2009). In *Twombly*, this Court recognized that a lowered pleading bar would unfairly burden defendants with substantial and unnecessary discovery costs, and that the resulting abuse of discovery by the plaintiff's bar would likely not be controlled:

> It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management, given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side . . . And it is self-evident that the problem of discovery abuse cannot be solved by careful scrutiny of evidence at the summary judgment stage, much less lucid instructions to juries; the threat of discovery expense will push cost-conscious defendants to

> settle even anemic cases before reaching those proceedings.

Twombly, 550 U.S. at 559 (citations and quotations omitted).

This is not an abstract concern, as district courts already provide examples where pleadings that allege striking similarity without access have been defeated at summary judgment and trial – but not until after the defendants in those cases were made to needlessly expend hundreds of thousands of dollars demonstrating the futility of the plaintiffs' claims. *Batiste v. Lewis*, No. CV 17-4435, 2018 WL 2268173 (E.D. La. May 17, 2018) (finding no infringement at summary judgment); *Thunder Studios, Inc. v. Kazal*, No. 217CV00871ABSSX, 2018 WL 5099726 (C.D. Cal. Mar. 22, 2018) (finding no infringement for two out of three defendants at trial, and only "innocent" infringement for a third, resulting in minimal statutory damages). This petition offers an opportunity to halt the harmful, illogical, and unlawful practices endorsed by the Ninth Circuit before they spread.

The unreasonableness of the Ninth Circuit's holding is illuminated by a circuit split on a related topic: whether ***proof*** of striking similarity is sufficient to abrogate the requirement of proving access at summary judgment or trial. The circuit courts are split on the issue of proof, with the majority rule generally requiring some standard of access to be satisfied in order to prove copying – even if striking similarity is established. *Bouchat v. Baltimore Ravens, Inc.*, 241 F.3d 350, 356 (4th Cir. 2001); *Takeall v. Pepsico, Inc.,* 14 F.3d 596 at *4 (4th Cir. 1993); *Gaste v. Kaiserman*,

863 F.2d 1061, 1068 (2d Cir. 1988); *Selle v. Gibb*, 741 F.2d 896, 901-02 (7th Cir. 1984); *Stewart v. Wachowski*, 574 F. Supp. 2d 1074, 1100 (C.D. Cal. 2005); *Takeall v. Pepsico, Inc.*, 809 F. Supp. 19, 22 (D.Md. 1992).

This is the very essence of absurdity: if the circuit courts cannot agree whether access is required at summary judgment or trial – and the majority still maintain the prerequisite – certainly it cannot be reasonable to ignore the access requirement at the pleading stage. Certiorari should be granted to stem the Ninth Circuit's ill-advised expansion of the copyright pleading standard and to ensure that *Iqbal* and *Twombly* are not violated.

The instant case also presents an excellent vehicle to provide clarity on two additional issues, each of which concerns the legal standard for copyright ownership and the weight that such evidence should be afforded at the pleading stage.

The first issue concerns the amount of information deemed sufficient to place a defendant on notice as to what work is at issue and whether a plaintiff has secured a valid copyright registration. In light of this Court's recent unanimous decision in *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com*, LLC ("*Fourth Estate*"), 139 S. Ct. 881 (2019), which requires that a plaintiff possess a registration from the Copyright Office prior to instituting an infringement suit, it follows that plaintiffs should be required to provide copies of their actual registration certificates – and copies of the deposit materials presumptively protected by the registration – as part of their complaint at the

time of instituting suit. We urge this Court to rule that pleading of such materials is now mandatory.

The second copyright ownership issue concerns the weight, if any, that a defendant's copyrights should be given at the pleading stage, including whether such registrations are considered *prima facie* evidence of validity, ownership, and independent creation sufficient to bar a pleading of striking similarity. In the instant case, H&M presented the district court with United States and Chinese copyright registrations for its work. This case affords this Court an opportunity to clarify the role of foreign and domestic copyrights in defense of copyright infringement claims, and whether such copyrights may be properly considered by courts at the pleading stage to bar a pleading of striking similarity.

B. Procedural History and Prior Court Orders

H&M is a leading United States retailer of fashion-forward clothing for men, women, and children. Dkt. 1, p. 4.[1] H&M is not a designer or manufacturer – the products it sells are designed and manufactured in countries around the world by other companies. *Id.* Malibu filed the Complaint on February 10, 2014. *Id.* In doing so, Malibu was required to plead facts establishing: (1) Malibu's ownership of a valid copyright for its work (the "Flower Pattern");

[1] Citations to "Dkt." numbers within this petition refer to documents located on the district court docket, *Malibu Textiles, Inc. v. H&M Hennes & Mauritz LP*, Central District of California Case No. 2:14-cv-01018-R-E.

(2) H&M's access to the Flower Pattern; and (3) substantial similarity between the protectable elements of the Flower Pattern and H&M's work (the "H&M V-Neck"). *Berkic*, 761 F.2d at 1291.

Malibu's initial Complaint failed to meet this standard. First, Malibu did not allege any facts or provide any evidence to support that it owns a copyright registration for the Flower Pattern. Rather, Malibu alleged the legal conclusion that it is "the exclusive owner of [the Flower Pattern] . . . and has registered [the Flower Pattern] with the United States Copyright Office." Dkt. 1, p. 3. Malibu also attached a picture of a fabric swatch that it purported to be the "1967" pattern. *Id.*, p. 4. No documented copyright registration, deposit materials, or copyright registration number was provided to H&M or the district court. *Id.*

Second, Malibu's Complaint did not allege any facts or provide any evidence to suggest that H&M had access to the Flower Pattern. Instead, Malibu pled generic, boilerplate, and speculative allegations, namely that the particular defendant, here H&M, *could have* accessed the Flower Pattern by, *inter alia*, viewing Malibu's design library, interacting with unnamed third-party vendors, or by viewing garments manufactured by Malibu. *Id.*, p. 5-6. With respect to alleging widespread dissemination, Malibu merely pleaded the unsupported and conclusory statement that "[Malibu] sampled and sold fabric bearing the [Flower Pattern] to numerous parties in the apparel industry." *Id.*, p. 4.

On March 25, 2014, H&M filed its initial motion to dismiss. Dkt. 8, p. 1. On June 3, 2014, the district court granted H&M's motion with prejudice, holding, among other findings, that Malibu failed to allege ownership of a valid copyright for the Flower Pattern, that Malibu failed to allege facts supporting H&M's access, and that Malibu "failed to allege any protectable elements that are substantially similar between [the Flower Pattern] and [the H&M V-Neck]," as "[Malibu's] allegation that the works are similar is a mere legal conclusion." App. 20.

On June 16, 2014, rather than file a motion for leave to file an amended complaint or directly appeal the district court's order, Malibu filed a Motion for Reconsideration. On July 22, 2014, the district court denied Malibu's Motion for Reconsideration, elaborating at length on Malibu's failure to plead facts regarding either striking or substantial similarity:

> The [Works] are not actually the same despite Malibu's claim that H&M's is an exact replica. Malibu's pattern is two-tone, H&M's pattern has one tone. The stigmas of the clockvine flower are shaped differently. The vines themselves are shaped differently, and the spacing between the various elements are of different proportions. Malibu's pattern has vine segments that are not in H&M's pattern. They are clearly not exact or identical as Malibu's bare legal assertion claims. Malibu failed to plead substantial similarity, because once the uncopyrightable depictions of

> nature and public domain elements of its work are removed, there is little left.

App. 31.

The court also held that "Malibu plead[ed] no facts that the work was widely disseminated," and that "if Malibu had any facts to support [widespread dissemination], they would have been included in the complaint." App. 30. The district court further declared that the Flower Pattern and the H&M V-Neck were not actionably similar as a matter of law, and made factual findings that the Flower Pattern is comprised of public domain elements, including artistic depictions of naturally-occurring flowers and *scènes à faire* lace elements. App. 30-31.

On July 24, 2014, Malibu filed a notice of appeal to the Ninth Circuit regarding the district court's order granting H&M's motion to dismiss and the denial of Malibu's Motion for Reconsideration. Dkt. 32, p. 1. On September 13, 2016, the Ninth Circuit affirmed the grant of H&M's initial motion to dismiss. App. 33. In doing so, the Ninth Circuit held that Malibu needed to "allege facts plausibly showing that H&M copied the protected elements in Malibu's work." App. 35. The Ninth Circuit also helpfully offered that Malibu could "satisfy this element by showing either that the two works in question are strikingly similar, or by showing that they are substantially similar and that the defendant had access to the plaintiff's work," but held that "Malibu's complaint did not adequately allege copying of a protected work under any of these theories." *Id.* The Ninth Circuit further found that Malibu's access pleading was insufficient, instructing

that "Malibu could have pleaded facts showing a chain of events that linked the pattern with H&M, or provided sales figures accompanied by dates and geographic distribution information plausibly showing access via widespread dissemination." *Id.* Despite these failures, the Ninth Circuit instructed the district court to provide leave to amend. App. 36.

On February 6, 2017, Malibu filed its First Amended Complaint ("FAC"). Dkt. 44, p. 1. Despite this second chance to plead – and over three years to develop its allegations – the FAC contains only minimal differences from the Complaint.

With respect to ownership of a valid copyright, Malibu managed to directly controvert the factual representations it made in its Complaint. In the FAC, Malibu represents that the Flower Pattern is "collectively" created out of both "Design 1967" and another work, "Design 1717," and that "1967" and "1717" are "essentially the same artwork with slight variations due to the production of the pattern on a 48-gauge machine (for Design 1717) versus a 36-gauge machine (for Design 1967)." *Id.*, p. 3. Malibu has never explained this glaring inconsistency between its pleadings. With respect to substantial similarity, Malibu's FAC failed to identify or distinguish what, if any, protectable similarities exist between the Flower Pattern and the H&M V-Neck. Instead, in an attempt to give the perception that it was complying with the Ninth Circuit's directions, Malibu added to the FAC a list of the Flower Pattern's unprotectable elements (including, *inter alia*, a natural, unprotectable depiction of the Bengal Clockvine, "small petaled flower

elements," and "leaf-like elements"), along with the conclusory statement that "[t]he design appearing on the [H&M V-Neck] is a copy of the [Flower Pattern]." *Id.*, p. 3-5. Finally, Malibu presented nearly identical access allegations to those found in the Complaint. *Id.*, p. 5-6. The FAC omits the Complaint's insufficiently pled theory of widespread dissemination; otherwise, the access pleadings are exactly the same. *Id.*, p. 5-6; Dkt. 1, p. 5-6.

On March 15, 2017, H&M moved to dismiss the FAC. Dkt. 51, p. 1. On June 29, 2017, the district court granted H&M's second Motion to Dismiss with prejudice, building upon the holdings of its prior orders granting H&M's initial motion to dismiss and denying Malibu's motion for reconsideration. App. 22. In doing so, the district court held that Malibu had "failed to plead access and striking similarity," and recognized that "[t]he FAC and complaint contain virtually identical allegations regarding access," constituting "nothing more than a speculative list of guesses as to how [H&M] may have accessed the subject work." App. 24-25. With respect to similarity, the district court again found "objective differences" between the Flower Pattern and the H&M V-Neck, holding that the works "do not contain strikingly similar protectable elements." App. 26. On July 12, 2017, Malibu appealed the district court's order to the Ninth Circuit. Dkt. 62, p. 1.

On April 24, 2019, the Ninth Circuit held that Malibu had sufficiently alleged copyright ownership in the H&M case, despite Malibu's failure to provide any registration or deposit materials, and despite the

material changes to its story as to how and if the Flower Pattern was registered. App. 6-8. Instead, the Ninth Circuit accepted Malibu's bald pleading of two different copyright numbers, along with its assurance that the two copyrights covered "essentially the same artwork" with only "slight variations." App. 7.

In direct contravention of its 2016 order, the Ninth Circuit next held that Malibu had demonstrated striking similarity between the Flower Pattern and the H&M V-Neck, despite having found no such similarity with respect to the exact same patterns in 2016. App. 12. In holding that striking similarity had been established, the Ninth Circuit relied on Malibu's generic, non-protectable, and *scènes à faire* "floral, leaf, boteh, and dot elements," as well as Malibu's conclusory statements that the works "are 'identically arranged' and that the elements 'are arranged exactly the same in relation to each other.'" App. 11. The Ninth Circuit also relied on Malibu's non-deposit image of the Flower Pattern and an unverified photograph of the alleged H&M V-Neck, stating that the heavily edited "side-by-side pictures that make the similarities apparent" were Malibu's "most important[]" evidence of similarity – despite "some minor differences" between the parties' works. App. 11.

Finally, in *dicta*, the Ninth Circuit addressed Malibu's pleading of access, as access is required to plead substantial similarity.[2] *Berkic*, 761 F.2d at 1291.

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[2] Even if, *arguendo*, this Court elects not to grant certiorari in this case, it should issue an order directing the Ninth Circuit to depublish the portion of its order discussing access and substantial similarity.

In discussing access, the Ninth Circuit relied on allegations contained in an unfiled, proposed Second Amended Complaint ("SAC") offered to the Court by Malibu, rather than the actual allegations pled in the FAC:

> Here, the proposed amended Complaints allege several ways Defendants had access to the [Flower Pattern]. Malibu first alleges that Defendants do business in California and that they had access to the [Flower Pattern] through Malibu's California showrooms. Malibu next states that, since 1998, it has produced "approximately 1 million yards of lace bearing the [Flower Pattern]," which have been manufactured in "over twenty mills, including numerous mills in China." Those mills' libraries of patterns, containing the [Flower Pattern], have since been acquired by other mills, who in turn "have offered those patterns to customers without regard to whether those patterns were protected by copyright law." Malibu further alleges that its customers have "sold garments and other products featuring the [Flower Pattern] ... in the same markets (domestically and internationally) as Defendants." Finally, Malibu specifies several clothing retailers "operating in the same market as Defendants" that collectively "have sold hundreds of thousands of garments featuring reproductions of the [Flower Pattern]."

App. 13-14.

Of the above access allegations, only one – Malibu's allegation that H&M does business in California – appears in Malibu's FAC. Dkt. 44, p. 2. All of the other theories identified by the Ninth Circuit remain unpled, and Malibu has since notified the Court that it intends to rely on the FAC, rather than filing the SAC that it proposed to file prior to the Ninth Circuit's 2019 order. Dkt. 46, p. 1-2; Dkt. 79, p. 1. Malibu's current FAC is actually worse on access than the Complaint rejected by the Ninth Circuit in 2016; the FAC does not offer any factual allegations as to widespread dissemination or other theories – only the same generic assumptions and guesswork offered in its initial Complaint. *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 51 (2d Cir. 2003) ("Access cannot be based on mere speculation or conjecture"); *see also McKain v. Estate of Rhymer*, 166 F. Supp. 3d 197, 201 (D. Conn. 2015) (rejecting "allegations [that] amount to nothing more than speculation and conjecture"). There is no basis for the Ninth Circuit to declare these allegations sufficient now after dismissing them in 2016, nor for it to rely on unpled pleadings.

On the basis of the above factual errors and contraventions of its own 2016 order, the Ninth Circuit reversed the district court's dismissal of Malibu's FAC and remanded the case to the district court for further proceedings. This petition follows.

REASONS FOR GRANTING THE PETITION

The Court should grant the writ to decide the three important questions presented by this case, as doing so will provide much needed clarity, uniformity, and reliability to copyright infringement pleading in this nation's courts. Without resolution of these questions, inconsistent and insufficient pleading standards will be further perpetuated, and copyright defendants across the country will be made to unfairly bear the burden of litigating poorly investigated and undeserving claims.

I. A PLEADING OF STRIKING SIMILARITY SHOULD NOT BE PERMITTED ABSENT A PLEADING OF ACCESS

At the pleading stage, no circuit court has accepted a pleading of striking similarity, absent a pleading of access – until now. Instead, the doctrine has only been accepted at summary judgment or trial, when "proof" is required. Proof of striking similarity first emerged as an alternative to proving access in *Wilkie v. Santly Bros.*, 91 F.2d 978, 979 (2d Cir. 1937), *on reargument sub nom. Wilkie v. Santly Bros.*, 94 F.2d 1023 (2d Cir. 1938): "Internal proof of access may rest in an identity of words or in the parallel character of incidents or in a striking similarity which passes the bounds of mere accident." In 1946, the Second Circuit sharpened the doctrine, announcing that striking similarity could be utilized to demonstrate access where evidence of access was unresolved; not where evidence of access had been foreclosed: "The evidence by no means compels the conclusion that there was access; on the other hand, it does not compel the conclusion that there was not. Consequently, copying might still be proved by showing

striking similarity." *Heim v. Universal Pictures Co.*, 154 F.2d 480, 487 (2d Cir. 1946). Determination of striking similarity has historically been reserved for the trier of fact, with some courts requiring expert testimony to apply the doctrine. "[W]hen a plaintiff seeks to dispense with direct proof of access and attempts to establish that two works are "strikingly similar," [expert] testimony is required." *Testa v. Janssen*, 492 F. Supp. 198, 203 (W.D. Pa. 1980); *Baxter v. MCA, Inc.*, 812 F.2d 421, 424 (9th Cir. 1987) (holding that expert testimony was not required as "access was conceded and is thus not in issue," but admitting that "expert testimony and analytic dissection offered as to 'striking similarity' would certainly merit submission to a jury as to the substantial similarity of general ideas as between the two works").

Until the Ninth Circuit's 2019 holding in this case, all published circuit court cases dealing with the striking similarity doctrine invoke the same language – the requirement to "prove" striking similarity, not plead it; this is because application of the striking similarity doctrine has been widely recognized only at summary judgment or trial – not at the pleading stage. *See*, *e.g.*, *Selle*, 741 F.2d at 905 ("[T]he burden of proving 'striking similarity,' which, by definition, includes taking steps to minimize the possibility of common source, is on the plaintiff"); *Bouchat*, 241 F.3d at 356 ("[T]he striking similarity of the works was a proper factor for the jury to consider, in conjunction with all other evidence, to determine whether the plaintiff had proven copying by circumstantial evidence"). Indeed, the very case cited by the Ninth Circuit to justify Malibu's pleading is an appeal

following a jury's trial verdict, *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) ("Furthermore, in the absence of any proof of access, a copyright plaintiff can still make out a case of infringement by showing that the songs were "strikingly similar").

Examples of district courts accepting a pleading of striking similarity without a pleading of access are few and far between. Other than the instant case, H&M has found only two examples of such a complaint surviving a 12(b)(6) motion: *Batiste* and *Thunder Studios*.[3] In *Batiste*, a jazz musician, Paul Batiste, accused an internationally famous hip-hop duo of copyright infringement with respect to eleven songs. 2018 WL 2268173 at *1. In doing so, Mr. Batiste accused the defendants of "sampling," a process where small segments of music are directly copied and incorporated into a larger, secondary musical work. *Id.*

Mr. Batiste's pleading did not contain any allegations of access; in the words of the district court, "[T]he complaint does not contain a single reference as

[3] H&M has been able to locate one additional case, *All About Network, LLC v. York* ("*York*"), No. 612CV1374ORL37KRS, 2013 WL 12387590, at *1 (M.D. Fla. June 14, 2013), *report and recommendation adopted*, No. 612CV1374ORL37KRS, 2013 WL 12387585 (M.D. Fla. July 8, 2013), in which a pleading of striking similarity was found sufficient to render judgment in favor of the plaintiff at the pleading stage. In *York*, however, judgment was awarded to the plaintiff through default judgment, rather than adjudication on the merits. Moreover, the plaintiff in in *York* provided fact-based, non-speculative allegations that created a presumption of access by the defendant in addition to its striking similarity pleading.

to how the defendants accessed his compositions . . .[it] does vaguely contend that access should be "inferred" because it is "presumed" that the defendants committed copyright infringement." *Id.* at 4. Instead, Mr. Batiste accused the defendants of a striking similarity violation – specifically, "willfully cop[ying] several protectable elements of his copyrights," including the "introduction," "beat," "drums," "hook" and "bass line" of several works. *Id.* This was enough to satisfy the district court: "Taken as true, Batiste pleads that the defendants unlawfully copied large portions of his compositions. If proven, Batiste would meet his burden to show striking similarity." *Id.* In filing their motion to dismiss, the defendants asked the district court "to engage in a side-by-side analysis, comparing the musical elements of Batiste's works to the defendants' songs to determine whether Batiste has stated a claim." *Id.* The district court declined, stating it would not "act[] as a fact finder." *Id.* Instead, it held that Mr. Batiste had "me[t] his burden to allege copyright infringement," and denied the defendants' motion. *Id.*

Nearly a year passed. In the interim, the defendants accrued substantial expense with respect to discovery, including depositions, discovery motion practice, preparation of expert reports, and the filing of a motion for summary judgment. *Batiste*, E.D. Louisiana, Case 2:17-cv-04435-MLCF-KWR, Dkt. No. 145-1. The district court ultimately granted the defendants' motion for summary judgment in full, holding that "Mr. Batiste ha[d] presented no evidence that is 'significantly probative of a reasonable opportunity for access,' and that he had "failed to

demonstrate 'striking similarity' or any instances of sampling with respect to the twelve song pairings identified in his complaint." *Batiste*, 2019 WL 1790454, at *9. The defendants were vindicated – they had not stolen Mr. Batiste's work. But in order to prove this, they were forced to incur $145,594.50 in attorneys' fees and endure months of meaningless, wasteful litigation. *Batiste*, E.D. Louisiana, Case 2:17-cv-04435-MLCF-KWR, Dkt. No. 145-1.

In *Thunder Studios*, a media production studio accused three individuals of stealing a series of photographs and posting them on a website without permission. *Id.* at *1. The production studio was meticulous in pleading copyright ownership, attaching official copies of the photographs' copyright registrations to its pleading. *Id.* With respect to copying, the production studio alleged that the defendants "directly copied photographs and posted them on the[ir] website, as well as on various social media sites." *Id.* at *3. The district held that this was sufficient to plead striking similarity and allowed the case to proceed to trial. *Id.* At trial, the jury held in favor of two out of the three defendants, finding them innocent of copyright infringement. Ninth Circuit Case No. 19-55413, Dkt. No. 4. The third was found liable only for innocent infringement, and assessed minimum statutory damages of $2,600. *Id.* An appeal is currently pending. *Id.*

Batiste and *Thunder Studios* each tell the same tale – for three of the four defendants involved, the district courts' acceptance of the plaintiffs' conclusory pleadings lead to a substantial and unnecessary waste

of resources for the parties and courts alike. For the remaining defendant in *Thunder Studios*, any copyright liability was vastly outweighed by the cost and burden of litigation. These are unjust, unwarranted, and preventable outcomes, and the pleading practices that lead to such outcomes should be halted by this Court.

Malibu's current striking similarity pleading is decidedly conclusory, containing only two heavily edited images – purported without further evidence to be the Flower Pattern and the H&M V-Neck, along with repeated statements as to how the two images' elements are "identical," identically arranged," "exactly the same," "strikingly similar," "a near exact facsimile," and "mirror each other exactly." Dkt. 44, p. 3-5. Notably, while the FAC does mention specific elements of the works, they do not differentiate between protectable and unprotectable elements, as directly ordered by the Ninth Circuit's 2016 order. App. 36 ("To allege striking or substantial similarity, Malibu could have described the pattern's protectable elements—such as the selection, coordination, and arrangement of flowers, leaves, and branches—and identified those same elements in the defendants' patterns, perhaps with reference to photos showing a side-by-side comparison of the works"). Instead, Malibu has wrongfully chosen to claim that the entirety of its work should be afforded copyright protection, and the conclusory language of its pleading directly contravenes *Iqbal*, *Twombly*, and the guidance of the Ninth Circuit's 2016 panel:

> "Well, tell me if I'm wrong on this: Wouldn't you say though that in this context, just using the word copy or copied, isn't that just equivalent to a legal conclusion, and you've got to give us, give the Court, the sort of factual underpinning for that so that we can conclude that it's plausible that you're going to be right when it comes time to proving this up?"

Hon. Paul J. Watford, Sept. 1, 2016, *Malibu Textiles, Inc. v. H&M Hennes & Mauritz LP*, https://www.youtube.com/watch?v=FavTDmhOAPM, at 20:26-20:45.

The facts and procedural history of this case all lead to the same conclusion: there is a clear and present danger that an outcome similar to *Batiste* and *Thunder Studios* is likely to occur in the instant case. On three separate occasions, the district court held that Malibu had failed to satisfy the standard of substantial similarity, much less striking similarity. In granting H&M's initial motion to dismiss in 2014, the district court held that Malibu "failed to allege any protectable elements that are substantially similar between [the Flower Pattern] and [the H&M V-Neck]," as "[Malibu's] allegation that the works are similar is a mere legal conclusion." App. 20. In denying Malibu's 2014 motion for reconsideration, the district court made specific factual findings as to the works' differences:

> The [Works] are not actually the same despite Malibu's claim that H&M's is an exact replica. Malibu's pattern is two-tone, H&M's pattern has one tone. The stigmas of the clockvine flower are shaped differently. The vines themselves are

> shaped differently, and the spacing between the various elements are of different proportions. Malibu's pattern has vine segments that are not in H&M's pattern. They are clearly not exact or identical as Malibu's bare legal assertion claims. Malibu failed to plead substantial similarity, because once the uncopyrightable depictions of nature and public domain elements of its work are removed, there is little left.

App. 31.

And in 2017, when granting H&M's second motion to dismiss, the district court went even further, dedicating a lengthy portion of its order to the many differences between the Flower Pattern and the H&M V-Neck:

> Here, the protectable elements of the Subject Work include the arrangement, selection, coordination of the Bengal Clockvine flower featured in the lace design. However, the "floral pattern depicting bouquets and branches is not protectable [sic]" nor is the "combination of open flowers and closed buds in a single bouquet or the green color of stems and leaves." [Citation omitted]. The Subject Work contains both protectable and non-protectable elements. The majority of the similarity between the Subject Work and the allegedly infringing work come from non-protectable elements. For example, Plaintiff alleges that the five-petaled flower in both works contain the same leaf elements with the same patterns and indentations in the petals. The flower and its petals are non-

> protectable because they are merely the natural appearance of a Bengal Clockvine flower. The Bengal Clockvine flower contains five-petal leaf elements with indentations at the tips of each petal in its natural form. The non-protectable five-petal flowers make up the majority of the similarities between the two works. Plaintiff does point to additional similarities, but like the Bengal Clockvine, most are non-protectable. Furthermore, there are objective differences between the two works. For example, the two pictures examined in Paragraph 12 of the FAC reveal marked differences. The Subject Work contains thicker, more sloped boteh shapes to the left of the image whereas the Defendant's design contain thin, more vertical boteh shapes. Additionally, the lace netting is much tighter in the Subject Work than in the Defendant's design. Accordingly, the Court finds that the two works do not contain strikingly similar protectable elements. As such, the FAC has failed to allege copying.

App. 25-26.

The district court's findings are not an anomaly. Despite being provided plenty of opportunity to countermand the district court's factual findings in 2016, the Ninth Circuit remained silent on the issue of similarity in affirming the dismissal of Malibu's initial pleading. The Ninth Circuit's current order is a jarring shift from its prior guidance; despite focusing Malibu on the issues of access and substantial similarity in 2016, the Ninth Circuit is now all too eager to anoint

the Flower Pattern and the H&M V-Neck as identical. In any event, the district court's factual findings and the Ninth Circuit's 2016 silence demonstrate that, at minimum, reasonable minds could find that neither striking or substantial similarity exists here – raising the frightening and likely prospect of H&M being unwillingly and unfairly dragged through the discovery process (and the substantial costs associated with it), only to be vindicated at summary judgment or trial. A moral victory and an empty pocket will be a poor outcome for H&M here, as they would be for any defendant.

The Ninth Circuit's elimination of the access pleading requirement is particularly unreasonable in light of the fact that the circuit courts still cannot agree on a related issue: whether proof of striking similarity eliminates the requirement to prove access at summary judgment or trial. The circuits are not only split on this issue; as discussed below, the majority rule still requires at least some standard of access to be satisfied, no matter how robust a plaintiff's showing of striking similarity. In the Fifth Circuit and Eleventh Circuit, proof of striking similarity may overcome a lack of evidence demonstrating access – or even an outright denial by a defendant. *See, e.g.*, *Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 113 (5th Cir.1978) ("If a party is able to show a 'striking similarity' between the protected work and the infringing work, the party need not prove access to prevail"); *see also Arthur Rutenberg Homes, Inc. v. Berger*, 910 F. Supp. 603, 608 (M.D. Fla. 1995) ("[A]ccess can be shown indirectly from striking

similarity despite the existence of uncontradicted sworn denial of access by the other party").

In the Second and Fourth Circuits, at least some standard of access is required in order to demonstrate copying – even if striking similarity is established. *Bouchat*, 241 F.3d at 356 ("Unlike the Fifth Circuit, this court does not favor the wholesale abandonment of the access requirement in the face of a striking similarity"); *Gaste*, 863 F.2d at 1068 ("Though striking similarity alone can raise an inference of copying, that inference must be reasonable in light of all the evidence"); *Takeall*, 809 F. Supp. at 22 (striking similarity, alone, is insufficient to support a finding of access, as a plaintiff must present additional "independent evidence" to establish a reasonable probability of access, not mere "speculation and conjecture"); *Takeall*, 14 F.3d at *4 ("In effect, [the plaintiff] invites this Court to adopt a *per se* rule regarding the elimination of the need for proof of access in cases involving "striking similarity." Even assuming, as did the district court, that this is a case of striking similarity, in our view, such a *per se* rule is inadvisable and unsupported by law").

And finally, in the Seventh Circuit and Ninth Circuits, an adaptable, case-by-case standard is applied, with at least a minimum requirement of "reasonableness" regarding the issue of access:

> As a threshold matter, therefore, it would appear that there must be at least some other evidence which would establish a reasonable possibility that the complaining work was available to the alleged infringer . . . Thus,

> although it has frequently been written that striking similarity alone can establish access, the decided cases suggest that this circumstance would be most unusual. The plaintiff must always present sufficient evidence to support a reasonable possibility of access because the jury cannot draw an inference of access based upon speculation and conjecture alone . . . the plaintiff must still meet some minimum threshold of proof which demonstrates that the inference of access is reasonable.

Selle, 741 F.2d at 901-02; *Stewart*, 574 F. Supp. 2d at 1100 ("[T]he Ninth Circuit follows the majority rule that striking similarity will support an inference of access only when such an inference is reasonable in light of the totality of the evidence in the record"). Where the majority rule still requires evidence of access at summary judgment or trial, the requirement to plead access must be maintained; to do so otherwise, as the Ninth Circuit has done here, violates the very standard of proof that must be met.

Finally, as discussed below in Section 3, the existence of domestic and foreign copyrights for the H&M V-Neck's pattern are *prima facie* evidence of the copyrights' validity, the ownership of the pattern, and the pattern's independent creation. And, unlike Malibu, H&M has actually provided its proof of registration and deposit materials to the district court. If, *arguendo*, Malibu's poorly pled copyright registration allegations are considered plausible enough to plead a copyright claim, then certainly H&M's robust pleading of its own copyright ownership

should be sufficient to bar Malibu from relying on striking similarity as a means to overcome the pleading bar. *Seals-McClellan v. Dreamworks, Inc.*, 120 Fed. Appx. 3, 4 (9th Cir. 2004); *Gaste*, 863 F.2d at 1068; *Testa*, 492 F. Supp. at 203; *Stratchborneo v. Arc Music Corp.*, 357 F. Supp. 1393, 1403 (S.D. N.Y 1973). At minimum, in this circumstance, Malibu should be required to meet the traditional requirement of pleading access. It has not.

The Ninth Circuit's decision to find Malibu's pleading of striking similarity without access sufficient presents a particularly keen and infectious danger with respect to copycat claims; the sheer volume of copyright litigation in the Ninth Circuit – and the Circuit's reputation as a leader in intellectual property matters – will undoubtedly open the floodgates to a plethora of poorly pled pleadings, both in the Circuit and beyond. As demonstrated by *Batiste* and *Thunder Studios*, if the Ninth Circuit's new pleading rule is allowed to stand, it is increasing likely that copyright plaintiffs in the Ninth Circuit will entirely abandon any pre-litigation examination or investigation with respect to access, much less attempt to provide a pleading of facts sufficient to make access plausible. Striking similarity has always been an alternative means of proving access, absent proof of the defendant's independent creation. Now, in the Ninth Circuit, a conclusory pleading of striking similarity is all that is needed to ensure a case will survive into discovery; the requirement to plead access no longer exists. Certiorari should be granted to halt this new, radical, and reckless practice before it spreads.

II. INFRINGEMENT CLAIMS SHOULD REQUIRE FILING OF REGISTRATION CERTIFICATES AND DEPOSIT MATERIALS AT TIME OF PLEADING

A certificate of registration is *prima facie* evidence of the validity of the copyright. 17 U.S.C. § 410(c) "(In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court"); *Rogers v. Koons*, 960 F.2d 301, 306 (2d Cir.1992) ("The Copyright Act makes a certificate of registration from the U.S. Register of Copyrights *prima facie* evidence of the valid ownership of a copyright"); *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.,* 684 F.2d 821, 826 (11th Cir. 1982). Congress' decision to focus on the registration certificate as evidence of validity – rather than the registration number, or any other ancillary evidence of registration – is no mistake, as witnessed by this Court's recent jurisprudence. In March 2019, in a watershed case, this Court unanimously held that a plaintiff may commence an infringement suit only after the Copyright Office has officially registered a copyright, and not prior. *Fourth Estate*, 139 S. Ct. at 886. *Fourth Estate* ended the practice in many courts (including the Ninth Circuit) wherein copyright plaintiffs routinely filed suit while the registration application for their work remained pending and unconfirmed by the Copyright Office. *Id.* Central to 17 U.S.C. § 410(c) and *Fourth Estate* is the truth that

while "the vast majority of applications are granted," not all works are protectable, and that a certificate of registration is the only proof of copyright registration acceptable to pursue a claim of infringement. *Fourth Estate*, 139 S. Ct. at 890. Indeed, in *Fourth Estate*, the Copyright Office ultimately refused to register the plaintiff's work. *Id.* at 887.

From 17 U.S.C. § 410(c) and *Fourth Estate*, it follows that if copyright infringement litigation is to occur, the pleading of an actual registration certificate – and what is protected by that registration – must be provided to the parties and to the court at the time the suit commences. Often, including the instant case, plaintiffs plead only a copyright number or other meager information without any notice as to what work that number allegedly covers. *See*, *e.g.*, *Election Sys. & Software, LLC v. RBM Consulting, LLC,* No. 8:11-CV-438, 2015 WL 13484484, at *5 (D. Neb. Feb. 4, 2015) (finding that "[the plaintiff] has not produced a certificate of registration—the typical way that registration is demonstrated," holding the plaintiff's pleading of "applicable copyright numbers" to be insufficient evidence of possessing a copyright registration, and instructing that, "the Court is somewhat perplexed as to how, if [the plaintiff] had actually registered a copyright, it could not, after 3 years into this lawsuit, have obtained a certificate of registration. Lacking any proof of registration, [plaintiff's] copyright claim must be dismissed").

In the instant case, Malibu's FAC contains a byzantine, paragraph long statement involving two registration numbers, two separate works, and a

declaration that the work at issue is a "collectively" created third work – one without a separate registration number, as is required for copyright protection. Dkt. 44, p. 3. Notably, this registration information directly contravenes what was previously provided in Malibu's initial complaint, further casting doubt on the validity of Malibu's copyright ownership and what, if anything, it protects. Dkt. 1, p. 3. Moreover, Malibu has never provided any Copyright Office certificate or deposit material in its pleadings; instead, different grainy, changing images, obviously cropped and edited, have been presented as the alleged Flower Pattern.[4] *Id.*, p. 3-4; Dkt. 44, p. 4.

Malibu has never pled ownership of a copyright registration certificate, nor has it ever informed H&M and the Court as to the actual work its registration allegedly protects. This is far short of the notice required by 17 U.S.C. § 410(c) and *Fourth Estate*. Malibu's failure to plead copyright ownership fails the first and most essential prong of any infringement claim, as it leaves H&M and this Court in the dark as to what Malibu's Flower Pattern actually looks like and whether it has been registered with the Copyright Office. It further follows that the doctored evidence Malibu has offered as to the Flower Pattern's image is unreliable, unverified, and insufficient to establish striking similarity. A court cannot reasonably declare that two works are identical if it does not know what one of them looks like.

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[4] When H&M inquired after Malibu's alleged deposit materials, it was informed that the materials had been "misplaced/misfiled" by the Copyright Office. Dkt. 51-1, pp. 4, 37. Thus, such evidence is in Malibu's sole possession, adding to the necessity that it be pled.

Nevertheless, the Ninth Circuit has held that Malibu's FAC satisfies the requirements of the Copyright Act and *Fourth Estate* to demonstrate ownership of a registration certificate, and to provide notice as to what its work looks like. Such insufficient copyright pleading is endemic in our courts and requires correction.

To that end, we urge this Court to grant certiorari and issue a clarifying rule requiring copyright plaintiffs to attach official registration copies and Copyright Office deposit materials to their complaints. This simple step would ensure that actual registration of works is verified and that defendants and courts alike receive actual notice as to what works are at issue. In the wake of *Fourth Estate*, such information is already required to be in the possession of all copyright plaintiffs, and its inclusion at the pleading stage therefore presents no additional burden.

III. DISTRICT COURTS SHOULD BE AUTHORIZED TO WEIGH A DEFENDANT'S COPYRIGHTS ON A MOTION TO DISMISS

In moving to dismiss Malibu's pleading, H&M offered the district court comprehensive copyright registration materials for the lace portion of the H&M V-Neck – a formal copyright registration certificate from the Copyright Office's equivalent in China, as well as evidence of registration issued by the Copyright Office for the same work, recognizing its origins in China. Dkt. 51-1, pp. 4, 49-55. Each of these registrations was made within five years after first publication of the lace on the H&M V-Neck, and the

registration certificates are thus *prima facie* evidence of the validity of the copyright, the facts stated in the certificates, and, as discussed below, the independent creation of the lace portion of the H&M V-Neck. 17 U.S.C. § 410(c). H&M's copyright ownership pleading far surpasses that of Malibu, as H&M has actually provided Malibu and the Court with a copyright registration certificate in compliance with 17 U.S.C. § 410(c) and *Fourth Estate*. Dkt. 51-1, pp. 54-55.

Striking similarity cannot be established unless any possibility of independent creation has been eliminated as the origin of a defendant's works: "To show striking similarity between works, a plaintiff must produce evidence that the accused work could not possibly have been the result of independent creation." *Seals-McClellan*, 120 Fed. Appx. at 4; *Gaste*, 863 F.2d at 1068 ("A plaintiff has not proved striking similarity sufficient to sustain a finding of copying if the evidence as a whole does not preclude any reasonable possibility of independent creation"); *Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1254 (11th Cir. 2007) (affirming a lack of striking similarity in light of independent creation); *Testa*, 492 F. Supp. at 203 (works are properly found not to be strikingly similar when perceived similarities are explained by independent creation); *Stratchborneo*, 357 F. Supp. at 1403 (striking similarity is only demonstrated if defendant's work is not a result of independent creation).

The rule is clear: ***any possibility*** of independent creation is an absolute bar to infringement based on striking similarity. Furthermore, ***evidence*** of independent creation – as offered by H&M here – is an

absolute bar to infringement under any theory (including substantial similarity), even if the works appear to be identical. *Yurman Design, Inc. v. PAJ*, Inc., 262 F.3d 101, 110 (2d Cir. 2001) *citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991) ("Under the Copyright Act, one may market a product identical to a copyrighted work so long as the second comer designed his product independently . . . [o]riginality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying").

Thus, it follows that where a defendant has presented verifiable, reliable, and valid evidence that their work has been independently created – such as through H&M's presentation of copyright registration certificates for the lace portion of the H&M V-Neck as part of its 12(b)(6) motion – a plaintiff should be barred from relying on a theory of striking similarity in order to overcome the pleading bar. *Johnson v. Gordon*, 409 F.3d 12, 17 (1st Cir. 2005) ("A certificate of copyright constitutes prima facie evidence of ownership and originality of the work as a whole"); *Kenbrooke Fabrics, Inc. v. Holland Fabrics*, Inc., 602 F. Supp. 151, 153 (S.D. N.Y. 1984) ("[The] plaintiff's copyright certificate is accepted as valid and thus constitutes prima facie evidence of ownership"); *Gordon v. DreamWorks Animation SKG, Inc.*, 935 F. Supp. 2d 306, 314 (D. Mass. 2013) "[A] certificate of copyright serves as prima facie that the registrant independently created the work"). Here, the registrations for the lace of the H&M V-Neck should bar Malibu's reliance on a theory

of striking similarity to plead a claim of copyright infringement.

Possession of a United States copyright registration is, by itself, sufficient evidence of independent creation. But the Chinese copyright registration certificate and deposit material is owed equal deference. The United States and China are signatories to the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"). *CYBERsitter, LLC v. People's Republic of China*, No. CV 10-38-JST SHX, 2010 WL 4909958, at *4 (C.D. Cal. Nov. 18, 2010). Under the Berne Convention, the United States and China have agreed to protect each other's copyrighted works and afford them the same protections as domestic works. *Golan v. Holder*, 565 U.S. 302, 132 S. Ct. 873, 874 (2012); *Creative Tech., Ltd. v. Aztech Sys. Pte., Ltd.*, 61 F.3d 696, 700 (9th Cir. 1995) (holding that the Berne Convention mandates "a policy of national treatment in which copyright holders are afforded the same protection in foreign nations that those nations provide their own authors"). The United States and China are also member states of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"), under which the United States and China must give each other treatment that is "no less favourable that that it accords to its own nationals with regard to the protection of intellectual property." TRIPS Agreement, Art. 3(1), *available at* https://www.wto.org/english/docs_e/legal_e/27-trips.pdf. Thus, as the United States and Chinese registrations for were filed within five years of the work's creation, the presumptions of validity, ownership, and independent creation attach.

The Ninth Circuit's holding that these copyrights and their consideration "are better suited for summary judgment" is imprudent. App. 8. A defendant's copyright registration should be treated the same as that of a plaintiff. If a copyright defendant can present proof of registration for its work, that registration must be given equal weight in the pleading process, and should at minimum prevent a plaintiff from relying on striking similarity to survive the pleading bar – particularly, where, as here, a plaintiff fails to plead any facts supporting its affirmative case. We urge this Court to grant certiorari for the purpose of formalizing this bar, and to rule that consideration of a defendant's copyright registrations is appropriate in adjudicating a Rule 12(b)(6) motion to dismiss and should be granted equal weight to that of a plaintiff.

CONCLUSION

For the foregoing reasons, H&M respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

STACI JENNIFER RIORDAN
Counsel of Record
NEAL J. GAUGER
NIXON PEABODY LLP
300 South Grand Avenue, 41st Floor
Los Angeles, California, 90071
(213) 629-6000
sriordan@nixonpeabody.com

Counsel for Petitioner