No. 19-560

IN THE

SUPREME COURT OF THE UNITED STATES

Jennie Nicassio — PETITIONER
(Your Name)

VS.

Viacom International, Inc., and
Penguin Random House, LLC — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

☐ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

☒ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☒ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____, or

☐ a copy of the order of appointment is appended.

/s/ Anthony H. Handal
(Signature)
Anthony H. Handal
Counsel to Petitioner

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Jennie Nicassio, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0	$ Not Applicable	$ 0	$ Not Applicable
Self-employment	$ 266	$ 0	$ 150	$
Income from real property (such as rental income)	$ 0	$	$	$
Interest and dividends	$ 0	$	$	$
Gifts	$ 0	$	$	$
Alimony	$ 0	$	$	$
Child Support	$ 0	$	$	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$	$	$
Disability (such as social security, insurance payments)	$ 812	$	$ 812	$
Unemployment payments	$ 0	$	$	$
Public-assistance (such as welfare)	$ 0	$	$	$
Other (specify):	$ 0	$	$	$
Total monthly income:	$ 1078	$	$ 962	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
None			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
Not Applicable			$
			$
			$

4. How much cash do you and your spouse have? $ 115
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
checking	$ 115	$
	$	$
	$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
none	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
none		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☒ No Is property insurance included? ☐ Yes ☒ No	$ 0	$
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 70	$
Home maintenance (repairs and upkeep)	$ 50	$
Food	$ 185	$
Clothing	$ 40	$
Laundry and dry-cleaning	$ 0	$
Medical and dental expenses	$ 0	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 20	$
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$
Life	$ 0	$
Health	$ 0	$
Motor Vehicle	$ 0	$
Other:	$ 0	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify):	$ 0	$
Installment payments		
Motor Vehicle	$ 0	$
Credit card(s)	$ 500	$
Department store(s)	$ 0	$
Other:	$ 0	$
Alimony, maintenance, and support paid to others	$ 0	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 75	$
Other (specify):	$ 0	$
Total monthly expenses:	$ 940	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I have been on disability since 2018, when I was injured in a car accident. Currently, I am caring for my 82 year old mother who is living on social security.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 12/31/2019, 2019

Jennie Nicassio (Signature)

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To the United States Court of Appeals for the Third Circuit

PETITION FOR REHEARING

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I. INTRODUCTION

The Petitioner recognizes the likely hesitancy of this Court to consider the conflict between the Ninth Circuit's rule for copyright infringement, on the one hand, and the Second Circuit approach laid out by Judge Learned Hand in *Nichols v. Universal Pictures Corp.*, 45 F. 2d 119 (2nd Cir. 1930). One possible result, the rejection of the Ninth Circuit schism, could be imagined as opening the floodgates to litigation in which plaintiff authors, despite differences in plot details, allege copying of a broad general plot line.

Respectfully, that concern should not compel disturbing Judge Hand's test, insofar as the copyright law provides many other safeguards against meritless litigation of that variety. Those safeguards make completely inappropriate the Ninth Circuit's jerry-rigged modification of Judge Learned Hand's holistic comparison of the original and copied works on the unfairness of the taking (in the view of a lay reader) prong of copyright infringement. The danger of this approach is highlighted by the Second Circuit's criticism of the same as logically-flawed and mechanical.

Digital technologies hold out the promise to authors of more democratic access to the media. However, they also present a heightened danger of misappropriation by, for example, corporate staffers looking for shortcuts under the pressure of weekly and monthly personal performance and creativity targets.

It was with a mindfulness of the above and a desire to serve the law that the undersigned accepted this representation and persevered for many hundreds of hours, without a single dollar of compensation, to bring the consideration of these issues to the highest Court in this Nation.

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While the Ninth Circuit rule does give judges a powerful tool to dismiss potentially meritless copyright infringement claims, given the numerous other protections in the copyright law against meritless litigation, that rule both 1) goes unnecessarily far in excising original creative expression from the fairness-based determination of copyright infringement, and 2) further suffers from logical inconsistencies characterized by the Second Circuit as "mechanical and counterintuitive," in that Circuit's repeated rejection of dissecting out original literary expression in the unfairness analysis. *Knitwaves, Inc. v. Lollytogs Ltd. (Inc.)*, 71 F. 3d 996, 1003 (2nd Cir. 1995).

Turning to the first point, the Ninth Circuit's discretionary grant to the trial court is both overly broad, unique to the motion picture and narrative publishing industries, and, most importantly, goes beyond what is necessary for the district courts to control their dockets. Troublingly, it reaches those ends by eliminating questions of fact in the context of narrative literary expression with a rule which, even in circuits which have adopted the Ninth Circuit rule at issue, conflicts with the law for other types of creative expression.

Despite paying lip service to Judge Hand's decision in *Nichols*, the Ninth Circuit, in effect, ignores *Nichols'* holding that the determination of the line between original copyrightable expression and an unprotectable idea is a factual question whose determination is based on fairness.

A. This case clearly shows that the Ninth Circuit rule goes too far in trying to insure that a meritless case never proceeds beyond the pleading stage.

Rather, under the Ninth Circuit rule a simple formulation of the plot may be declared public domain regardless of the evidence and without a consideration of fairness. Indeed, the overly harsh nature of that rule (and the fact that it flies in the face of traditional notions of what constitutes a factual question) is illustrated by the holding, in this case, that the general plot of a little evergreen tree that dreamed of becoming the Rockefeller Center holiday tree in New York City is public domain based on its simplicity alone, and despite evidence that nothing of this sort was ever written by anybody else.

Application of the Ninth Circuit rule builds from this, denying protection despite numerous copied plot elements, including, *inter alia*, being attacked and mocked by elements in its community, perseverance toward his goals after specific words of encouragement from a small female character, engaging in a contest with judges in helicopters, a trip by helicopter to New York, and, after

being crowned in Rockefeller Center, repeating to himself the exact words of encouragement. While these elements of original expression are at the heart of both the original and admittedly copied stories, under a further aspect of the Ninth Circuit rule, they are not considered in comparing the original and copied work because they "naturally flow" from the general plot. Appendix, Page 10a.

In contrast, in the Second Circuit, a clear holistic fairness comparison of the original and copied works considers the general plot, things that are necessary to the general plot, and things that naturally flow from a general plot, and without the distraction of matter added in the infringement.

B. Most seriously, the Ninth Circuit rule is inherently biased against authors and that bias is not justified by the need to winnow out meritless cases.

From a logical standpoint, it is inescapable that the Ninth Circuit comparison of two works, dissected of their central themes and everything that naturally flows from them, will only be a comparison of random disjointed elements. As such, the comparison is both meaningless and invites copiests to copy the essentials of a literary work and change the unimportant features as a path to liability free infringement upon the literary expression of others. Such a broad disqualification of original literary expression is completely unnecessary because of other protections in the copyright law.

C. The broad Ninth Circuit rule is not necessary to dismiss or summarily dispose of meritless cases.

The rejection of a holistic comparison of the original and copied works (copying was conceded in the present case) in the assessment of the fairness of the copying prong of the copyright infringement test, and the resulting removal of sometimes numerous elements of original expression from the comparison, is not necessary for the courts to control their dockets. The copyright law provides courts, *inter alia*, with the power to winnow out meritless litigation by considering, for example, evidence of independent origination of the accused work, the alleged infringer's lack of access to the original, the public domain aspects of historical facts and the exclusion of material copied into both the original and allegedly infringing works.

Moreover, all of this can be done without departing from the common sense approach of comparing the original and copied literary works as a whole. In addition, the required fairness determination will result in a balancing of other factors surrounding the similarity. Finally, without eliminating factual questions as a matter of law, courts have discretion to determine that reasonable men would not differ on the outcome of a claim under their jurisdiction.

D. Numerous other legal doctrines provide ample basis for the rejection of meritless copyright claims.

Quite simply, the Ninth Circuit approach of mechanically identifying plot elements and dissecting them out of the assessment of the fairness of the copying to remove and/or simplify factual questions is unnecessary on account of the strength and equitable nature of other provisions of the copyright law.

II. ALTERNATIVE DEFENSES TO COPYRIGHT CLAIMS

A. Subject matter not originated by the claimant is not protectable.

In *Folio Impressions, Inc. v. Byer California*, 937 F. 2d 759, 763 (2nd Cir. 1991), the Second Circuit removed an uncopyrightable element from the unfairness analysis. That element was an intricate public domain pattern, copied by the claimant and the accused infringer into both the original and accused works as a background.

B. Historical facts are not protectable.

All are free to use historical facts in their writings, provided that the creative expression of others is not wrongfully appropriated. See *Alexander v. Haley*, 460 F. Supp. 40 (SDNY 1978).

C. The Copyright Act provides numerous fair use defenses.

Section 107 of the Copyright Act gives a non-exhaustive list of fair uses not subject to a claim of infringement, including comment, news reporting, teaching, scholarship, and research. See also *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 US 539 (1985).

D. Generic plots and themes are not protected.

The Circuits agree that copyright protection does not extend to the elements of generic plot-lines. See, *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir.1986) ("… Neither does copyright protection extend to copyright or "stock" themes commonly linked to a particular genre"). If the only elements that the plots of the original and accused works share are common elements of a generic plot or stock theme, under the law of all the Circuits a copyright infringement claim will be rejected.

While this issue does nominally involve a factual issue, one may easily locate evidence of the existence of a generic plot and ascertain whether the only elements common to the original and allegedly infringing work are elements of that generic plot-line. Such evidence, by its nature, is commonly available given the present state of development of digital information resources.

E. Independent Origination

Absolutely, without regard to the literalness and number of similarities common to an original and an accused work, an independently originated work (i.e. a work that was not copied from another) cannot be found to infringe another work. See *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F. 2d 49, 53-54 (2nd Cir. 1936):

> "[I]f by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's. … But though a copyright is for this reason less vulnerable than a patent, the owner's protection is more limited, for just as he is no less an 'author' because others have preceded him, so another who follows him, is not a tort-feasor unless he pirates his work."

While the above rule may seem, at first glance, a bit striking, it stems from the basic differences between the copyright law and what may be for some the more familiar principals of patent law. More particularly, the copyright law protects against ***copying*** original expression; it does ***not*** protect ***substantive content***.

Thus, if the literary ***expression*** in an accused work can be shown to have been originated without an unfair degree of copying, then there is no copyright infringement.

Such facts as lack of access to the original, a paper trail showing the independent development of the accused work, and the like provide a basis for a

court to conclude that reasonable men would not differ with a conclusion that copying did not occur.

F. Where idea and expression have merged, there is no copyright protection.

Kay Berry, Inc. v. Taylor Gifts, Inc., 421 F.3d 199, 208 (3rd Cir., 2005) recognizes that every work is a blend of expression and idea and that where expressions and ideas merge into one, copyright is not available.

G. Copied expression is permissible where the words are stereotypical expressions.

In *Alexander v. Haley* at 46, both the Plaintiff and the Defendant had written books detailing the hardships of slaves. The Court held that phrases and expressions conveying an idea that can only be, or are typically, expressed in a limited number of stereotypical fashions cannot be protected.

See also, *Narell v. Freeman*, 872 F.2d 907, 911 (9th Cir. 1989) (phrases or ideas with limited possible methods of expression do not enjoy copyright protection absent a "sequence of creative expression").

H. Dismissal for failure to plausibly plead is a new and further tool to winnow out meritless litigation at an early stage.

In the decades since the Ninth Circuit limited Judge Hand's fairness standard with bright-line extensions (which, in many cases, including the present action, effectively took away the discretion of the District Court to make the fairness determination as to whether infringement has occurred), yet another tool for winnowing out meritless cases has been put in the hands of the trial court. Under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), district courts may dismiss a complaint for failing to plead facts plausibly supporting a claim.

In the context of a copyright claim, this means that the alleged copying must be supported by something more than speculation. Given the numerous defenses detailed above, the pleading standard, as an initial qualifier, is applied to the above set of tests that a claim must pass in order to avoid early dismissal. Thus, ample safeguards 1) protect the ability of the district courts to avoid expending substantial resources on dubious cases, and 2) spare defendants the expense and trouble of defending baseless accusations.

Accordingly, the broad, mechanical, counterintuitive and inequitable Ninth Circuit rule is unnecessary and unjustifiable.

III. ASSESSMENT

A. Concerns respecting increased litigation should be tempered by the Second Circuit experience in the which numerous suits have been dismissed without the subject Ninth Circuit studio-skewed rule.

As can be seen from the dozens of decisions from circuits following the majority Second Circuit rule, the district courts have no difficulty disposing of meritless copyright litigation on a wide variety of grounds under the copyright law without resort to the Ninth Circuit's substitution of a bright line test for the fairness judgment of the district court. Accordingly, the Ninth Circuit rule of bypassing or minimizing similarities considered in the fairness assessment, by arbitrarily classifying a simple plot as unprotectable, and then dissecting out numerous elements of original expression and considering material added by the infringer to further confuse the finder of fact is unnecessarily harsh.

B. The availability of so many means to dispose of meritless claims militates against the imposition of a dangerously inequitable rule for copyright infringement, let alone one that goes against the holdings of this Court and the uniformly followed law applicable in the case of other forms of expression.

As alluded to above, the Ninth Circuit rule makes it almost impossible for an author to succeed in a copyright case absent literal and pervasive copying.

First of all, a fair assessment of the copied portions of the two works is prevented by removing elements of original literary expression, defining them as *scènes-à-faire* or other elements of limited probative value. In contrast, in the Second Circuit such dissection only applies on the question of whether actual copying occurred, something which was admitted by the defendant below.

More particularly, the Ninth Circuit rule mandates first determining that some formulation of the work is too simple and therefore not protected, and then further removing from the comparison of the original and copied works everything that ***naturally*** flows from that simple formulation as *scènes-à-faire*. This compares with the Second Circuit approach of limiting *scènes-à-faire* to things that ***necessarily*** flow from a generic plot, and then excluding them only from the first prong proof of actual copying (a separate factually unrelated element of copyright infringement), but including them in the second prong fairness assessment (at issue in the matter before this Court).

In addition to the rough cut unfairness of the rule, it is also contrary to this Court's holding in *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) that simplicity is not a basis for finding expression unprotectable as not sufficiently creative. Rather, this Court mandates protection of original expression, except where "the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Feist* at 359. Interestingly, in *Kay Berry*, the Third Circuit, relying on *Feist* and *Arnstein v. Porter*, 154 F.2d 464 (2d Cir.1946), held

that a twenty-one word public domain phrase on a simulated rock possessed at least some minimal degree of creativity and that the case presented a question of fact for the jury.

The next step in the Ninth Circuit approach, clouds the fairness assessment of the second prong of copyright infringement by introducing extraneous matter added by the infringer (also in contravention of the Second Circuit rule in *Sheldon*, cited with approval by this Court (*Harper* at 565), that "no plagiarist can excuse the wrong by showing how much of his work he did not pirate"). The result is a "fairness" comparison, supposedly of the two works, but based only on a disjointed collection of residual elements.

C. The confused state of the law promotes bold infringement.

Indeed, as admitted by counsel to the Respondent, when Respondent copied Petitioner's book, "'Rockefeller Center' was changed to 'Empire City'" out of "a fear that NBC might take issue with the use of the term 'Rockefeller Center.'" However, given the indigency of Petitioner and the state of the law, there was no such "fear" about the admitted copying of Petitioner's book. App. 55a.

IV. CONCLUSION

The approach of the Ninth Circuit to the expeditious disposal of meritless cases is roughly-hewn and placed at the wrong point in the evaluation of a copyright infringement claim. As noted by the Second Circuit dissection and non-holistic comparison of the works at issue is "mechanical and counterintuitive." *Knitwaves* at 1003. Dangerously, it denies the district court its judgment at the very crux of the factual inquiry in copyright infringement: Was the taking by the copiest unfair?

The present case presents all aspects of the split between the Circuits, namely, the definition of "generic" as simple without evidence of genericness, the broad extension of *scènes-à-faire* to all that naturally flows, as compared to only the necessary or indispensable, and a "fairness" comparison of works dissected of overall plot and all that naturally flows, while clouding the assessment by considering added material. This also conflicts with the Second Circuit rule in *Sheldon* that "no plagiarist can excuse the wrong by showing how much of his work he did not pirate," quoted with approval by this Court. *Harper* at 565.

As such, this case presents an ideal vehicle for the long overdue resolution of the unfairness prong in the proof of copyright infringement. Reconsideration and granting of the Petition is most respectfully sought.

Respectfully,

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PETITION FOR REHEARING

Certificate of Compliance

As required by Supreme Court Rule 33.1(h), I certify that this document contains 2967 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 31, 2019.

ANTHONY H. HANDAL
Counsel of Record

No. 19-560

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Supreme Court of the United States

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v.

VIACOM INTERNATIONAL, INC., AND
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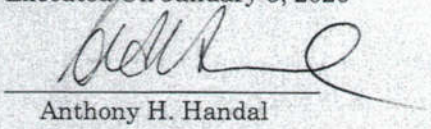
Respondents.

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

CERTIFICATION OF COUNSEL

As Required by Supreme Court Rule 44.2, I certify that this Petition is restricted to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented, the grounds specified in Rule 44.2 and that it is presented in good faith and not for delay.

Executed On January 9, 2020



Anthony H. Handal
Counsel of Record

Appendix to the Petition for Rehearing

Colloquy between Mr. Hwang and the District Court at oral argument of the subject motion, Docket No. 43, filed March 27, 2018.

Mr. Hwang: … One of the other issues that Mr. Handal alluded to, and this goes into speculation, is that "Rockefeller Center" was changed to "Empire City" to avoid a potential claim of copyright infringement..… [T]his wasn't the case at all.

NBC owns the right… and because of a fear that NBC might take issue with the use of the term "Rockefeller Center," that's why it says "Empire City" and not "Rockefeller Center."