

## **APPENDIX**

## APPENDICES

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**APPENDIX A**

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

DENISE DANIELS; THE  
MOODSTERS COMPANY,

*Plaintiffs-  
Appellants,*

v.

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

*Defendants-  
Appellees.*

No. 18-  
55635

D.C. No.  
2:17-cv-04527-  
PSG-SK

ORDER AND  
AMENDED  
OPINION

Appeal from the United States District Court  
for the Central District of California  
Philip S. Gutierrez, District Judge, Presiding  
Argued and Submitted November 6, 2019  
Pasadena, California

Filed March 16, 2020  
Amended May 4, 2020

Before: Jerome Farris, M. Margaret McKeown, and  
Barrington D. Parker, Jr.,\* Circuit Judges.

Order;  
Opinion by Judge McKeown

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**SUMMARY\*\***

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**Copyright**

The panel filed (1) an order amending its opinion, denying a petition for panel rehearing, and denying on behalf of the court a petition for rehearing en banc; and (2) an amended opinion affirming the district court's dismissal of an action alleging copyright infringement by the Disney movie *Inside Out* of plaintiffs' characters called The Moodsters.

Affirming the denial of plaintiff's claim under the Copyright Act, the panel held that The Moodsters, lightly sketched anthropomorphized characters representing human emotions, did not qualify for copyright protection because they lacked consistent, identifiable character traits and attributes and were not especially distinctive. The Moodsters also did not

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\* The Honorable Barrington D. Parker, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Second Circuit, sitting by designation.

\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

qualify for copyright protection under the alternative “story being told” test.

The panel also affirmed the district court’s denial of plaintiff’s claim for breach of an implied-in-fact contract under California law, based on her disclosure of information about The Moodsters to various employees of Disney and its affiliates.

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### **COUNSEL**

Patrick Arenz, Esq.(argued), Ronald J. Schutz and Brenda L. Joly, Robins Kaplan LLP, Minneapolis, Minnesota, for Plaintiffs-Appellants.

Mark Remy Yohalem, Esq. (argued), Glenn D. Pomerantz, Erin J. Cox, Kenneth M. Trujillo-Jamison, and Anne K. Conley, Munger, Tolles & Olson LLP, Los Angeles, California, for Defendants-Appellees.

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### **ORDER**

The opinion filed on March 16, 2020, slip op. 18-55635, and appearing at 952 F.3d 1149, is hereby amended. An amended opinion is filed concurrently with this order.

With these amendments, the panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and petition for rehearing en banc are **DENIED**. No further petitions for en banc or panel rehearing shall be permitted.

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## OPINION

McKEOWN, Circuit Judge:

Literary and graphic characters—from James Bond to the Batmobile—capture our creative imagination. These characters also may enjoy copyright protection, subject to certain limitations. Here we consider whether certain anthropomorphized characters representing human emotions qualify for copyright protection. They do not. For guidance, we turn to *DC Comics v. Towle*, our court’s most recent explanation of the copyrightability of graphically-depicted characters. *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015).

Denise Daniels developed a line of anthropomorphic characters called The Moodsters, which she pitched to entertainment and toy companies around the country, including The Walt Disney Company. Under *Towle*, “lightly sketched” characters such as The Moodsters, which lack “consistent, identifiable character traits and attributes,” do not enjoy copyright protection. *Id.* at 1019, 1021. We affirm the district court’s dismissal of Daniels’s complaint.

## BACKGROUND

### I. The Moodsters

Daniels is an expert on children’s emotional

intelligence and development. She designed and promoted initiatives that help children cope with strong emotions like loss and trauma. The Moodsters were devised as a commercial application of this work. Daniels hired a team to produce and develop her idea under the umbrella of her new company, The Moodsters Company. The initial product was The Moodsters Bible (“Bible”), a pitchbook released in 2005. It provided a concise way to convey Daniels’s idea to media executives and other potential collaborators, and included a brief description of the characters, themes, and setting that Daniels envisioned for her Moodsters universe.

The Moodsters are five characters that are color-coded anthropomorphic emotions, each representing a different emotion: pink (love); yellow (happiness); blue (sadness); red (anger); and green (fear). Daniels initially named The Moodsters Oolvia, Zip, Sniff, Roary, and Shake, although these names changed in each iteration of the characters.

In 2007, Daniels and her team released a 30-minute pilot episode for a television series featuring The Moodsters, titled “The Amoodsment Mixup” (“pilot”). The pilot was later available on YouTube.

Between 2012 and 2013, Daniels and her team developed what they call the “second generation” of Moodsters products: a line of toys and books featuring The Moodsters that were sold at Target and other retailers beginning in 2015.

Daniels and The Moodsters Company pitched The Moodsters to numerous media and entertainment companies. One recurring target was The Walt

Disney Company and its affiliates, including Pixar. Daniels alleges that she or a member of her team had contact with several different Disney employees between 2005 and 2009.

The claimed contact began in 2005, when a member of The Moodsters Company shared information about The Moodsters with an employee of Playhouse Disney. Daniels alleges that in 2008 she was put in touch with Thomas Staggs, the Chief Financial Officer of the Walt Disney Company, and that Staggs later informed her that he would share materials about The Moodsters with Roy E. Disney, the son of a Disney founder, and Rich Ross, the President of Disney Channels Worldwide. Finally, Daniels alleges that she spoke by phone with Pete Docter, a director and screenwriter, and they discussed The Moodsters, although no year or context for this conversation is alleged in the Complaint.

## **II. Disney's *Inside Out***

Disney began development of its movie *Inside Out* in 2010. The movie was released in 2015, and centers on five anthropomorphized emotions that live inside the mind of an 11-year-old girl named Riley. Those emotions are joy, fear, sadness, disgust, and anger. Docter, who directed and co-wrote the screenplay, stated that his inspiration for the film was the manner with which his 11-year-old daughter dealt with new emotions as she matured.

## **III. District Court Proceedings**

Daniels filed suit against Disney in 2017 for breach of an implied-in-fact contract, arising from Disney's

failure to compensate Daniels for the allegedly disclosed material used to develop *Inside Out*. Daniels then filed an amended complaint, joining The Moodsters Company as a co-plaintiff and alleging copyright infringement of both the individual Moodsters characters and the ensemble of characters as a whole.

Disney filed a motion to dismiss, asserting that Daniels failed to meet the legal standard for copyright in a character, and that the copyright “publication” of the Bible and pilot doomed Daniels’s implied-in-fact contract claim. The district court granted Disney’s motion to dismiss, and granted Daniels leave to file an amended complaint on the copyright claims. Disney filed a motion to dismiss the Amended Complaint, which the district court granted on the ground that The Moodsters are not protectable by copyright.

## ANALYSIS

### I. Copyright Protection for The Moodsters

Although characters are not an enumerated copyrightable subject matter under the Copyright Act, *see* 17 U.S.C. § 102(a), there is a long history of extending copyright protection to graphically-depicted characters. *See, e.g., Olson v. Nat’l Broad. Co.*, 855 F.2d 1446, 1452 (9th Cir. 1988); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978). However, “[n]ot every comic book, television, or motion picture character is entitled to copyright protection.” *Towle*, 802 F.3d at 1019. A character is entitled to copyright protection if (1) the character has “physical as well as conceptual qualities,” (2) the

character is “sufficiently delineated to be recognizable as the same character whenever it appears” and “display[s] consistent, identifiable character traits and attributes,” and (3) the character is “especially distinctive” and “contain[s] some unique elements of expression.” *Id.* at 1021 (internal citations and quotation marks removed).

### **A. Application of the *Towle* Test to The Moodsters**

Disney does not dispute that the individual Moodster characters meet the first prong of the *Towle* test: each has physical as well as conceptual qualities. Because they have physical qualities, The Moodsters are not mere literary characters.

The second prong presents an insurmountable hurdle for Daniels. *Towle* requires that a character must be “sufficiently delineated to be recognizable as the same character whenever it appears.” *Id.* Although a character that has appeared in multiple productions or iterations “need not have a consistent appearance,” it “must display consistent, identifiable character traits and attributes” such that it is recognizable whenever it appears. *Id.*

Consistently recognizable characters like Godzilla or James Bond, whose physical characteristics may change over various iterations, but who maintain consistent and identifiable character traits and attributes across various productions and adaptations, meet the test. *See Tono Co. v. William Morrow & Co.*, 33 F. Supp. 2d 1206, 1215 (C.D. Cal. 1998) (finding that Godzilla is consistently a “pre-historic, fire-breathing, gigantic dinosaur alive and

well in the modern world”), *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Corp.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995) (noting that James Bond has consistent traits such as “his cold-bloodedness; his overt sexuality; his love of martinis ‘shaken, not stirred;’ his marksmanship; his ‘license to kill’ and use of guns; his physical strength; his sophistication”). By contrast, a character that lacks a core set of consistent and identifiable character traits and attributes is not protectable, because that character is not immediately recognizable as the same character whenever it appears. *See, e.g., Olson*, 855 F.2d at 1452–53 (holding that television characters from “Cargo” are too “lightly sketched” to be independently protectable by copyright).

In addressing *The Moodsters*, we first distinguish between the idea for a character and the depiction of that character. The notion of using a color to represent a mood or emotion is an idea that does not fall within the protection of copyright. *See* 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.”); *see also Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344–45 (1991) (internal quotation marks and citation removed) (“The most fundamental axiom of copyright law is that no author may copyright his ideas . . .”); *Frybarger v. Int’l Bus. Mach. Corp.*, 812 F.2d 525, 529 (9th Cir. 1987) (“[I]deas themselves are not protected by copyright and cannot, therefore, be infringed.”). So it is no surprise that the idea of color psychology is involved in everything from decorating books to marketing and color therapy. Color and emotion are also frequent themes in children’s books,

such as Dr. Seuss's classic, *My Many Colored Days*, and Anna Llenas's *The Color Monster: A Story of Emotions*.

Notably, colors themselves are not generally copyrightable. *Boisson v. Banian*, 273 F.3d 262, 271 (2d Cir. 2001) ("Color by itself is not subject to copyright protection."); *see also* 38 C.F.R. § 202.1(a) ("[M]ere variations of . . . coloring" are not copyrightable). Nor is the "idea" of an emotion copyrightable. *See Feist*, 499 U.S. at 350. Taken together, these principles mean that Daniels cannot copyright the idea of colors or emotions, nor can she copyright the idea of using colors to represent emotions where these ideas are embodied in a character without sufficient delineation and distinctiveness.

In analyzing whether The Moodster characters are "sufficiently delineated," we carefully examine the graphic depiction of the characters and not the ideas underlying them. We look first to the physical appearance of The Moodsters. Unlike, for example, the Batmobile, which "maintained distinct physical and conceptual qualities since its first appearance in the comic books," the physical appearance of The Moodsters changed significantly over time. *Towle*, 802 F.3d at 1021. In the 2005 Bible and 2007 television pilot, the five Moodsters have an insect-like appearance, with skinny bodies, long ears, and tall antennas that act as "emotional barometers" to form a distinctive shape and glow when an emotion is strongly felt. By the second generation of toys, The Moodsters look like small, loveable bears. They are round and cuddly, have small ears, and each dons a detective's hat and small cape.

Mindful that physical appearance alone is not decisive, we also consider whether The Moodsters have maintained consistent character traits and attributes. Across the various iterations The Moodsters have consistently represented five human emotions, and those emotions have not changed. But other than the idea of color and emotions, there are few other identifiable character traits and attributes that are consistent over the various iterations. In the 2005 Bible, each character is described in a few short paragraphs. For example, the Zip character is described as having “an infectious laugh and wakes up each morning with a smile on his face and a friendly attitude.” By the 2007 pilot, these characteristics are not mentioned and are not evident from the depiction of Zip. The other four Moodsters similarly lack consistent characteristics and attributes in the 2005 Bible and 2007 pilot. “Lightly sketched” characters of this kind, without identifiable character traits, are not copyrightable under the second prong of *Towle*. See *id.* at 1019 (citing *Olson*, 855 F.3d at 1452–53).

Perhaps the most readily identifiable attribute of The Moodsters is their relationship to emotions. The 2005 Bible explains that each character relates to emotions in its own way when something new happens—the “anger” Moodster might become angry, whereas the “sad” Moodster might become sad. The Moodsters behave in a similar fashion in the 2007 pilot, where each character is especially prone to a particular emotion such as anger or sadness. But by 2015, the five Moodsters are “mood detectives,” and help a young boy uncover how he feels about situations in his life.

Finally, in every iteration the five Moodsters each have a completely different name. For example, the red/anger Moodster was originally named Roary in the 2005 Bible, then Rizzi in the 2007 pilot, and as of 2015 was named Razy in Moodsters toys and the *Meet the Moodsters* storybook. The other four characters have gone through similar name changes over the three iterations. While a change of name is not dispositive in our analysis, these changes across each iteration further illustrate that Daniels never settled on a well-delineated set of characters beyond their representation of five human emotions.

The Batmobile in *Towle* again provides a useful contrast to this case. There, we recognized that from the time of the 1966 television series to the 1989 motion picture, the Batmobile had numerous identifiable and consistent character traits and attributes. It was always a “crime-fighting car” that allowed Batman to defeat his enemies. *Towle*, 802 F.3d at 1021. It consistently had jet-engines and far more power than an ordinary car, the most up-to-date weaponry, and the ability to navigate through landscapes impassible for an ordinary vehicle. *Id.* at 1021–22. Beyond the emotion it represents, each Moodster lacks comparable identifiable and consistent character traits and attributes across iterations, thus failing the second prong of the *Towle* test.

Finally, even giving Daniels the benefit of the doubt on *Towle*’s second prong, we conclude that The Moodsters fail the third prong—they are not “especially distinctive” and do not “contain some unique elements of expression.” *Id.* (internal quotation marks and citations removed). Daniels

identifies The Moodsters as unique in that they each represent a single emotion. But this facet is not sufficient to render them “especially distinctive,” particularly given their otherwise generic attributes and character traits. In contrast, the Batmobile in *Towle* had a “unique and highly recognizable name,” unlike each Moodster, which had three entirely different names. *Id.* at 1022. Developing a character as an anthropomorphized version of a specific emotion is not sufficient, in itself, to establish a copyrightable character. *See Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003) (declining to extend copyright protection to “the magician ... dressed in standard magician garb—black tuxedo with tails, a white tuxedo shirt, a black bow tie, and a black cape with red lining” whose role is “limited to performing and revealing magic tricks”). Taken together, The Moodsters are not “especially distinctive,” and do not meet the third prong of the *Towle* test.

### **B. The Story Being Told Test**

Since the 1950s, we have also extended copyright protection to characters—both literary and graphic—that constitute “the story being told” in a work. *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954); *see also Rice*, 330 F.3d at 1175–76; *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008). A character is not copyrightable under this test where “the character is only the chessman in the game of telling the story.” *Warner Bros. Pictures*, 216 F.2d at 950. This is a high bar, since few characters so dominate the story such that it becomes essentially a character study.

*Warner Brothers* and *Towle* are two different tests for character copyrightability. See *Rice*, 330 F.3d at 1175 (“characters that are ‘especially distinctive’ or the ‘story being told’ receive protection apart from the copyrighted work” (emphasis added)). Thus, we do not embrace the district court’s view that *Towle* represents the exclusive test for copyrightability.

The *Warner Brothers* test is therefore available, but it affords no protection to *The Moodsters*. Neither the Bible nor the pilot episode exhibits any prolonged engagement with character development or a character study of *The Moodsters*. Although the characters are introduced in the Bible, along with short descriptions, these pithy descriptions do not constitute the story being told. The pilot contains even less character development—rather, each of *The Moodsters* serves primarily as a means by which particular emotions are introduced and explored. *The Moodsters* are mere chessmen in the game of telling the story.

Daniels’s final argument is that even if the individual *Moodsters* are not protectable under the *Towle* or “story being told” regimes, the ensemble of five characters *together* meets one or both of those tests. Daniels’s ensemble claim does not change the distinctiveness or degree of delineation of the characters, and so *The Moodsters* as an ensemble are no more copyrightable than the individual characters.

The district court did not err in dismissing Daniels’s claims for copyright infringement.

## II. Implied-in-Fact Contract

Daniels also puts forth a claim for breach of an implied- in-fact contract. Under California law, a plaintiff can recover compensation for an idea conveyed to a counter- party where no explicit contract exists only where (1) “before or after disclosure he has obtained an express promise to pay,” or (2) “the circumstances preceding and attending disclosure, together with the conduct of the offeree acting with knowledge of the circumstances, show a promise of the type usually referred to as ‘implied’ or ‘implied-in- fact.’” *Desny v. Wilder*, 46 Cal. 2d 715, 738 (1956). The Ninth Circuit has developed a multi-part test to evaluate *Desny* claims, asking whether (1) the plaintiff prepared or created the work in question, (2) the work was disclosed to the defendant for sale, and (3) the disclosure was made “under circumstances from which it could be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered and the reasonable value of the work.” *Grosso v. Miramax Film Corp.*, 383 F.3d 965, 967 (9th Cir. 2004).

Daniels’s implied-in-fact contract claim is based on the disclosure of information about The Moodsters to various employees of Disney and its affiliates between 2005 and 2009. These discussions were a part of Daniels’s effort to find a partner with whom she could develop and grow the Moodsters brand and commercial opportunities.

There is no dispute that Daniels created the characters in question, and we accept as true that the alleged conversations took place. But the existence of

a conversation in which an idea is disclosed is, by itself, an insufficient basis to support an implied-in-fact contract.

Daniels alleges that “she was aware and relied on customs and practices in the entertainment industry when she approached Disney·Pixar about a partnership,” and that “Disney·Pixar accepted the disclosure of the ideas in *The Moodsters* with an expectation that it would have to compensate Daniels and The Moodsters Company if Disney·Pixar used this idea in any television, motion picture, merchandise, or otherwise.”

But we are told no more. Daniels offers only bare allegations, stripped of relevant details that might support her claim for an implied-in-fact contract. No dates are alleged, and no details are provided. There is no basis to conclude that Disney either provided an express offer to pay for the disclosure of Daniels’s idea or that the disclosure was made “under circumstances from which it could be concluded that [Disney] voluntarily accepted the disclosure knowing the conditions on which it was tendered and the reasonable value of the work.” *Id.*

To survive a motion to dismiss, Daniels is required under California law to do more than plead a boilerplate allegation, devoid of any relevant details. The district court did not err in dismissing Daniels’s claim for an implied-in-fact contract.

## CONCLUSION

There is no dispute that the 2005 Moodsters Bible and the 2007 pilot television episode are protected by

copyright. But Daniels cannot succeed on her copyright claim for The Moodsters characters, which are “lightly sketched” and neither sufficiently delineated nor representative of the story being told. Daniels also fails to allege sufficient facts to maintain an implied-in-fact contract claim against Disney under California law.

**AFFIRMED.**

**APPENDIX B**

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
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DENISE DANIELS; THE  
MOODSTERS COMPANY,

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THE WALT DISNEY  
COMPANY; DISNEY  
ENTERPRISES, INC.; DISNEY  
CONSUMER PRODUCTS AND  
INTERACTIVE MEDIA INC.;  
DISNEY INTERACTIVE  
STUDIOS, INC.; DISNEY  
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No. 18-55635

D.C. No.  
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OPINION

Appeal from the United States District Court  
for the Central District of California  
Philip S. Gutierrez, District Judge, Presiding

Argued and Submitted November 6, 2019  
Pasadena, California

Filed March 16, 2020

Before: Jerome Farris, M. Margaret McKeown, and  
Barrington D. Parker, Jr.,\* Circuit Judges.

Opinion by Judge McKeown

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**SUMMARY\*\***

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**Copyright**

The panel affirmed the district court's dismissal of an action alleging copyright infringement by the Disney movie *Inside Out* of plaintiffs' characters called The Moodsters.

Affirming the denial of plaintiff's claim under the Copyright Act, the panel held that The Moodsters, lightly sketched anthropomorphized characters representing human emotions, did not qualify for copyright protection because they lacked consistent, identifiable character traits and attributes and were not especially distinctive. The Moodsters also did not qualify for copyright protection under the alternative "story being told" test.

The panel also affirmed the district court's denial of plaintiff's claim for breach of an implied-in-fact contract under California law, based on her

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\* The Honorable Barrington D. Parker, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Second Circuit, sitting by designation.

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### COUNSEL

Patrick Arenz, Esq.(argued), Ronald J. Schutz and Brenda L. Joly, Robins Kaplan LLP, Minneapolis, Minnesota, for Plaintiffs-Appellants.

Mark Remy Yohalem, Esq. (argued), Glenn D. Pomerantz, Erin J. Cox, Kenneth M. Trujillo-Jamison, and Anne K. Conley, Munger, Tolles & Olson LLP, Los Angeles, California, for Defendants-Appellees.

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### OPINION

McKEOWN, Circuit Judge:

Literary and graphic characters—from James Bond to the Batmobile—capture our creative imagination. These characters also may enjoy copyright protection, subject to certain limitations. Here we consider whether certain anthropomorphized characters representing human emotions qualify for copyright protection. They do not. For guidance, we turn to *DC Comics v. Towle*, our court’s most recent explanation of the copyrightability of graphically-depicted characters. *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015).

Denise Daniels developed a line of anthropomorphic characters called The Moodsters, which she pitched to entertainment and toy companies around the country, including The Walt

Disney Company. Under *Towle*, “lightly sketched” characters such as The Moodsters, which lack “consistent, identifiable character traits and attributes,” do not enjoy copyright protection. *Id.* at 1019, 1021. We affirm the district court’s dismissal of Daniels’s complaint.

## **BACKGROUND**

### **I. The Moodsters**

Daniels is an expert on children’s emotional intelligence and development. She designed and promoted initiatives that help children cope with strong emotions like loss and trauma. The Moodsters were devised as a commercial application of this work. Daniels hired a team to produce and develop her idea under the umbrella of her new company, The Moodsters Company. The initial product was The Moodsters Bible (“Bible”), a pitchbook released in 2005. It provided a concise way to convey Daniels’s idea to media executives and other potential collaborators, and included a brief description of the characters, themes, and setting that Daniels envisioned for her Moodsters universe.

The Moodsters are five characters that are color-coded anthropomorphic emotions, each representing a different emotion: pink (love); yellow (happiness); blue (sadness); red (anger); and green (fear). Daniels initially named The Moodsters Oolvia, Zip, Sniff, Roary, and Shake, although these names changed in each iteration of the characters.

In 2007, Daniels and her team released a 30-minute pilot episode for a television series featuring

The Moodsters, titled “The Amoodsment Mixup” (“pilot”). The pilot was later available on YouTube.

Between 2012 and 2013, Daniels and her team developed what they call the “second generation” of Moodsters products: a line of toys and books featuring The Moodsters that were sold at Target and other retailers beginning in 2015.

Daniels and The Moodsters Company pitched The Moodsters to numerous media and entertainment companies. One recurring target was The Walt Disney Company and its affiliates, including Pixar. Daniels alleges that she or a member of her team had contact with several different Disney employees between 2005 and 2009.

The claimed contact began in 2005, when a member of The Moodsters Company shared information about The Moodsters with an employee of Playhouse Disney. Daniels alleges that in 2008 she was put in touch with Thomas Staggs, the Chief Financial Officer of the Walt Disney Company, and that Staggs later informed her that he would share materials about The Moodsters with Roy E. Disney, the son of a Disney founder, and Rich Ross, the President of Disney Channels Worldwide. Finally, Daniels alleges that she spoke by phone with Pete Docter, a director and screenwriter, and they discussed The Moodsters, although no year or context for this conversation is alleged in the Complaint.

## **II. Disney’s *Inside Out***

Disney began development of its movie *Inside Out* in 2010. The movie was released in 2015, and centers

on five anthropomorphized emotions that live inside the mind of an 11-year-old girl named Riley. Those emotions are joy, fear, sadness, disgust, and anger. Docter, who directed and co-wrote the screenplay, stated that his inspiration for the film was the manner with which his 11-year-old daughter dealt with new emotions as she matured.

### **III. District Court Proceedings**

Daniels filed suit against Disney in 2017 for breach of an implied-in-fact contract, arising from Disney's failure to compensate Daniels for the allegedly disclosed material used to develop *Inside Out*. Daniels then filed an amended complaint, joining The Moodsters Company as a co-plaintiff and alleging copyright infringement of both the individual Moodsters characters and the ensemble of characters as a whole.

Disney filed a motion to dismiss, asserting that Daniels failed to meet the legal standard for copyright in a character, and that the copyright "publication" of the Bible and pilot doomed Daniels's implied-in-fact contract claim. The district court granted Disney's motion to dismiss, and granted Daniels leave to file an amended complaint on the copyright claims. Disney filed a motion to dismiss the Amended Complaint, which the district court granted on the ground that The Moodsters are not protectable by copyright.

## ANALYSIS

### I. Copyright Protection for The Moodsters

Although characters are not an enumerated copyrightable subject matter under the Copyright Act, *see* 17 U.S.C. § 102(a), there is a long history of extending copyright protection to graphically-depicted characters. *See, e.g., Olson v. Nat'l Broad. Co.*, 855 F.2d 1446, 1452 (9th Cir. 1988); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978). However, “[n]ot every comic book, television, or motion picture character is entitled to copyright protection.” *Towle*, 802 F.3d at 1019. A character is entitled to copyright protection if (1) the character has “physical as well as conceptual qualities,” (2) the character is “sufficiently delineated to be recognizable as the same character whenever it appears” and “display[s] consistent, identifiable character traits and attributes,” and (3) the character is “especially distinctive” and “contain[s] some unique elements of expression.” *Id.* at 1021 (internal citations and quotation marks removed).

#### A. Application of the *Towle* Test to The Moodsters

Disney does not dispute that the individual Moodster characters meet the first prong of the *Towle* test: each has physical as well as conceptual qualities. Because they have physical qualities, The Moodsters are not mere literary characters.

The second prong presents an insurmountable hurdle for Daniels. *Towle* requires that a character must be “sufficiently delineated to be recognizable as

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Consistently recognizable characters like Godzilla or James Bond, whose physical characteristics may change over various iterations, but who maintain consistent and identifiable character traits and attributes across various productions and adaptations, meet the test. See *Tono Co. v. William Morrow & Co.*, 33 F. Supp. 2d 1206, 1215 (C.D. Cal. 1998) (finding that Godzilla is consistently a “pre-historic, fire-breathing, gigantic dinosaur alive and well in the modern world”), *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Corp.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995) (noting that James Bond has consistent traits such as “his cold-bloodedness; his overt sexuality; his love of martinis ‘shaken, not stirred;’ his marksmanship; his ‘license to kill’ and use of guns; his physical strength; his sophistication”). By contrast, a character that lacks a core set of consistent and identifiable character traits and attributes is not protectable, because that character is not immediately recognizable as the same character whenever it appears. See, e.g., *Olson*, 855 F.2d at 1452–53 (holding that television characters from “Cargo” are too “lightly sketched” to be independently protectable by copyright).

In addressing *The Moodsters*, we first distinguish between the idea for a character and the depiction of that character. The notion of using a color to represent a mood or emotion is an idea that does not

fall within the protection of copyright. See 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.”); see also *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344–45 (1991) (internal quotation marks and citation removed) (“The most fundamental axiom of copyright law is that no author may copyright his ideas . . .”); *Frybarger v. Int’l Bus. Mach. Corp.*, 812 F.2d 525, 529 (9th Cir. 1987) (“[I]deas themselves are not protected by copyright and cannot, therefore, be infringed.”). So it is no surprise that the idea of color psychology is involved in everything from decorating books to marketing and color therapy. Color and emotion are also frequent themes in children’s books, such as Dr. Seuss’s classic, *My Many Colored Days*, and Anna Llenas’s *The Color Monster: A Story of Emotions*.

Notably, colors themselves are not generally copyrightable. *Boisson v. Banian*, 273 F.3d 262, 271 (2d Cir. 2001) (“Color by itself is not subject to copyright protection.”); see also 38 C.F.R. § 202.1(a) (“[M]ere variations of . . . coloring” are not copyrightable). Nor is the “idea” of an emotion copyrightable. See *Feist*, 499 U.S. at 350. Taken together, these principles mean that Daniels cannot copyright the idea of colors or emotions, nor can she copyright the idea of using colors to represent emotions where these ideas are embodied in a character without sufficient delineation and distinctiveness.

In analyzing whether The Moodster characters are “sufficiently delineated,” we carefully examine

the graphic depiction of the characters and not the ideas underlying them. We look first to the physical appearance of The Moodsters. Unlike, for example, the Batmobile, which “maintained distinct physical and conceptual qualities since its first appearance in the comic books,” the physical appearance of The Moodsters changed significantly over time. *Towle*, 802 F.3d at 1021. In the 2005 Bible and 2007 television pilot, the five Moodsters have an insect-like appearance, with skinny bodies, long ears, and tall antennas that act as “emotional barometers” to form a distinctive shape and glow when an emotion is strongly felt. By the second generation of toys, The Moodsters look like small, loveable bears.<sup>1</sup> They are round and cuddly, have small ears, and each dons a detective’s hat and small cape. This physical transformation over time was not insubstantial, and it would be difficult to conclude that the 2005 Moodsters are the same characters as those sold at Target in 2015.

Mindful that physical appearance alone is not decisive, we also consider whether The Moodsters have maintained consistent character traits and attributes. Across the various iterations The Moodsters have consistently represented five human emotions, and those emotions have not changed. But other than the idea of color and emotions, there are few other identifiable character traits and attributes

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<sup>1</sup> Although the second generation of toys was developed between 2012 and 2013—after Disney began to develop *Inside Out* in 2010—that iteration remains relevant because the *Towle* test asks whether a character has displayed “consistent, identifiable character traits and attributes” whenever it appears. 802 F.3d at 1021.

that are consistent over the various iterations. In the 2005 Bible, each character is described in a few short paragraphs. For example, the Zip character is described as having “an infectious laugh and wakes up each morning with a smile on his face and a friendly attitude.” By the 2007 pilot and the second generation of toys, these characteristics are not mentioned and are not evident from the depiction of Zip. “Lightly sketched” characters of this kind, without identifiable character traits, are not copyrightable under the second prong of *Towle*. See *id.* at 1019 (citing *Olson*, 855 F.3d at 1452–53).

Perhaps the most readily identifiable attribute of The Moodsters is their relationship to emotions. The 2005 Bible explains that each character relates to emotions in its own way when something new happens—the “anger” Moodster might become angry, whereas the “sad” Moodster might become sad. The Moodsters behave in a similar fashion in the 2007 pilot, where each character is especially prone to a particular emotion such as anger or sadness. But by 2015, the five Moodsters are “mood detectives,” and help a young boy uncover how he feels about situations in his life.

Finally, in every iteration the five Moodsters each have a completely different name. For example, the red/anger Moodster was originally named Roary in the 2005 Bible, then Rizzi in the 2007 pilot, and as of 2015 was named Razy in Moodsters toys and the *Meet the Moodsters* storybook.

The other four characters have gone through similar name changes over the three iterations. While a change of name is not dispositive in our analysis,

these changes across the three iterations further illustrate that Daniels never settled on a well-delineated set of characters beyond their representation of five human emotions.

The Batmobile in *Towle* again provides a useful contrast to this case. There, we recognized that from the time of the 1966 television series to the 1989 motion picture, the Batmobile had numerous identifiable and consistent character traits and attributes. It was always a “crime-fighting car” that allowed Batman to defeat his enemies. *Towle*, 802 F.3d at 1021. It consistently had jet-engines and far more power than an ordinary car, the most up-to-date weaponry, and the ability to navigate through landscapes impassible for an ordinary vehicle. *Id.* at 1021–22. Beyond the emotion it represents, each Moodster lacks comparable identifiable and consistent character traits and attributes across iterations, thus failing the second prong of the *Towle* test.

Finally, even giving Daniels the benefit of the doubt on *Towle*’s second prong, we conclude that The Moodsters fail the third prong—they are not “especially distinctive” and do not “contain some unique elements of expression.” *Id.* (internal quotation marks and citations removed). Daniels identifies The Moodsters as unique in that they each represent a single emotion. But this facet is not sufficient to render them “especially distinctive,” particularly given their otherwise generic attributes and character traits. In contrast, the Batmobile in *Towle* had a “unique and highly recognizable name,” unlike each Moodster, which had three entirely different names. *Id.* at 1022. Developing a character

as an anthropomorphized version of a specific emotion is not sufficient, in itself, to establish a copyrightable character. See *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003) (declining to extend copyright protection to “the magician ... dressed in standard magician garb—black tuxedo with tails, a white tuxedo shirt, a black bow tie, and a black cape with red lining” whose role is “limited to performing and revealing magic tricks”). Taken together, The Moodsters are not “especially distinctive,” and do not meet the third prong of the *Towle* test.

### **B. The Story Being Told Test**

Since the 1950s, we have also extended copyright protection to characters—both literary and graphic—that constitute “the story being told” in a work. *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954); see also *Rice*, 330 F.3d at 1175–76; *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008). A character is not copyrightable under this test where “the character is only the chessman in the game of telling the story.” *Warner Bros. Pictures*, 216 F.2d at 950. This is a high bar, since few characters so dominate the story such that it becomes essentially a character study.

*Warner Brothers* and *Towle* are two different tests for character copyrightability. See *Rice*, 330 F.3d at 1175 (“characters that are ‘especially distinctive’ or the ‘story being told’ receive protection apart from the copyrighted work” (emphasis added)). Thus, we do not embrace the district court’s view that *Towle* represents the exclusive test for copyrightability.

The *Warner Brothers* test is therefore available, but it affords no protection to *The Moodsters*. Neither the Bible nor the pilot episode exhibits any prolonged engagement with character development or a character study of *The Moodsters*. Although the characters are introduced in the Bible, along with short descriptions, these pithy descriptions do not constitute the story being told. The pilot contains even less character development—rather, each of *The Moodsters* serves primarily as a means by which particular emotions are introduced and explored. *The Moodsters* are mere chessmen in the game of telling the story.

Daniels’s final argument is that even if the individual *Moodsters* are not protectable under the *Towle* or “story being told” regimes, the ensemble of five characters *together* meets one or both of those tests. Daniels’s ensemble claim does not change the distinctiveness or degree of delineation of the characters, and so *The Moodsters* as an ensemble are no more copyrightable than the individual characters.

The district court did not err in dismissing Daniels’s claims for copyright infringement.

## **II. Implied-in-Fact Contract**

Daniels also puts forth a claim for breach of an implied- in-fact contract. Under California law, a plaintiff can recover compensation for an idea conveyed to a counter- party where no explicit contract exists only where (1) “before or after disclosure he has obtained an express promise to pay,” or (2) “the circumstances preceding and attending disclosure, together with the conduct of the

offeree acting with knowledge of the circumstances, show a promise of the type usually referred to as ‘implied’ or ‘implied-in- fact.’” *Desny v. Wilder*, 46 Cal. 2d 715, 738 (1956). The Ninth Circuit has developed a multi-part test to evaluate *Desny* claims, asking whether (1) the plaintiff prepared or created the work in question, (2) the work was disclosed to the defendant for sale, and (3) the disclosure was made “under circumstances from which it could be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered and the reasonable value of the work.” *Grosso v. Miramax Film Corp.*, 383 F.3d 965, 967 (9th Cir. 2004).

Daniels’s implied-in-fact contract claim is based on the disclosure of information about The Moodsters to various employees of Disney and its affiliates between 2005 and 2009. These discussions were a part of Daniels’s effort to find a partner with whom she could develop and grow the Moodsters brand and commercial opportunities.

There is no dispute that Daniels created the characters in question, and we accept as true that the alleged conversations took place. But the existence of a conversation in which an idea is disclosed is, by itself, an insufficient basis to support an implied-in-fact contract.

Daniels alleges that “she was aware and relied on customs and practices in the entertainment industry when she approached Disney.Pixar about a partnership,” and that “Disney.Pixar accepted the disclosure of the ideas in *The Moodsters* with an expectation that it would have to compensate Daniels

and The Moodsters Company if Disney.Pixar used this idea in any television, motion picture, merchandise, or otherwise.”

But we are told no more. Daniels offers only bare allegations, stripped of relevant details that might support her claim for an implied-in-fact contract. No dates are alleged, and no details are provided. There is no basis to conclude that Disney either provided an express offer to pay for the disclosure of Daniels’s idea or that the disclosure was made “under circumstances from which it could be concluded that [Disney] voluntarily accepted the disclosure knowing the conditions on which it was tendered and the reasonable value of the work.” *Id.*

To survive a motion to dismiss, Daniels is required under California law to do more than plead a boiler-plate allegation, devoid of any relevant details. The district court did not err in dismissing Daniels’s claim for an implied-in- fact contract.

### CONCLUSION

There is no dispute that the 2005 Moodsters Bible and the 2007 pilot television episode are protected by copyright. But Daniels cannot succeed on her copyright claim for The Moodsters characters, which are “lightly sketched” and neither sufficiently delineated nor representative of the story being told. Daniels also fails to allege sufficient facts to maintain an implied-in-fact contract claim against Disney under California law.

**AFFIRMED.**

APPENDIX C

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 17-CV-4527 PSG (SKx) Date May 9, 2018

Title Denise Daniels and The Moodsters Company v.  
The Walt Disney Company, et al

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Present: The Honorable Philip S. Gutierrez, United  
States District Judge

Wendy Hernandez  
Deputy Clerk

Not Reported  
Court Reporter

Attorneys Present for  
Plaintiff(s):  
Not Present

Attorneys Present for  
Defendant(s):  
Not Present

**Proceedings (In Chambers):     The Court  
GRANTS Defendants’ Motion to Dismiss**

Before the Court is Defendants Walt Disney Company, Disney Enterprises, Inc., Disney Consumer Products and Interactive Media, Inc., Disney Interactive Studios, Inc., Disney Shopping, Inc., and Pixar’s (“Defendants” or “Disney”) motion to dismiss Plaintiffs Denise Daniels and The Moodsters Company’s (“Plaintiffs”) second amended complaint. *See* Dkt. # 55 (“*Mot.*”). Plaintiffs timely opposed, *see* Dkt. # 59 (“*Opp.*”) and Defendants replied, *see* Dkt. # 62 (“*Reply*”). The Court finds the matter appropriate

for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. After considering the moving papers, the Court **GRANTS** Defendants' motion.

## I. Background

Plaintiff Denise Daniels is a nationally recognized child development expert with over 40 years of experience working in the field of children's social and emotional development. *See* Dkt. # 51, *Second Amended Complaint* ("SAC") ¶¶ 26-35. She co-founded the national non-profit National Childhood Grief Institution and she has been called upon to help children cope with grief and loss, after such events as Desert Storm, Hurricane Katrina, Columbine, and September 11. *Id.* ¶ 28. She has appeared on national television and has published nine children's self-help books relating to emotional wellbeing. *Id.* ¶¶ 31, 35.

Daniels developed *The Moodsters*, a cartoon world populated by characters that embody individual emotions, to help children understand and regulate their emotions. *Id.* ¶ 36. Each Moodster is color-coded and anthropomorphic, and each represents a single emotion: happiness (yellow), sadness (blue), anger (red), fear (green), and love (pink). *Id.* ¶ 53. Plaintiffs recruited top industry talent and emotional intelligence experts to develop and produce *The Moodsters*. *Id.* ¶¶ 40-46. In November 2005, Plaintiffs published a "bible" for *The Moodsters*, a contemplated "animated TV show for preschoolers." *Id.* ¶ 48. In 2007, Plaintiffs created the pilot episode for *The Moodsters*. *Id.* ¶ 49.

Between 2006 and 2009, Plaintiffs allege they pitched *The Moodsters* to Disney every year; many high-ranking Disney executives received the pitch materials, allegedly passing them around to other division heads. *Id.* ¶¶ 67-69. Ultimately, Plaintiffs allege that a conversation about *The Moodsters* occurred between Daniels and Pete Docter, subsequently director of *Inside Out*. *Id.* ¶ 71. In 2010, Disney Pixar began development on *Inside Out*, a feature film about the anthropomorphized emotions that live inside the head of an 11-year-old girl. The film features five color-coded emotions as characters—joy (yellow), sadness (blue), anger (red), fear (purple), and disgust (green). *Id.* ¶¶ 86-90. *Inside Out* grossed more than \$350,000,000 domestically and over \$850,000,000 worldwide. *Id.* ¶ 93.

Plaintiff Daniels filed suit on June 19, 2017, alleging breach of implied-in-fact contract arising from Plaintiffs' disclosure of *The Moodsters* to Disney, which Disney then allegedly used without compensating Plaintiffs, and copyright infringement of the individual characters and the ensemble of characters. *See* Dkt. # 1, *Complaint*. Plaintiffs subsequently filed a first amended complaint on September 20, 2017. *See* Dkt. # 27, *First Amended Complaint* (“*FAC*”). Defendants filed a motion to dismiss the implied-in-fact contract claim and all of the copyright infringement claims, *see* Dkt. # 32, which the Court granted. *See* Dkt. # 47 (“*Order*”). Plaintiffs then filed a second amended complaint, which Defendants again move to dismiss.

## II. Legal Standard

To survive a motion to dismiss under Rule 12(b)(6), a complaint must “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In assessing the adequacy of the complaint, the court must accept all pleaded facts as true and construe them in the light most favorable to the plaintiff. *See Turner v. City & Cty. of S.F.*, 788 F.3d 1206, 1210 (9th Cir. 2015); *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). The court then determines whether the complaint “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. However, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* Accordingly, “for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks omitted).

## III. Discussion

The Court notes at the outset that Plaintiffs were not granted leave to amend their implied-in-fact contract breach claim (the first cause of action), but it remains in the amended complaint “in order to preserve the claim for appellate review.” SAC 24 n. 6. The Court will therefore not address it here. What remains are Plaintiffs’ copyright infringement claims

regarding each individual character and the ensemble of characters.

A. Claims Three through Six: Individual Characters

Plaintiffs allege that Defendants infringed their copyrights in the Happy (count 3), Sadness (count 4), Anger (count 5), and Fear (count 6) characters. *See generally SAC*. In its prior Order, the Court determined that Plaintiffs' characters did not meet the Ninth Circuit's rigorous standard for copyrightability of a stand-alone character outside of the work it inhabits. *See Order* at 9. Characters standing alone "are not ordinarily entitled to copyright protection." *Blizzard Entm't, Inc. v. Lilith Games (Shanghai) Co.*, 149 F. Supp. 3d 1167, 1173-74 (N.D. Cal. 2015). To be copyrightable independent of the underlying work in which the character appears, the character must (1) have "physical as well as conceptual qualities," (2) "be 'sufficiently delineated' to be recognizable as the same character whenever it appears," and (3) be "especially distinctive" and "contain some unique elements of expression." *DC Comics v. Towle*, 802 F.3d 1012, 1020-21 (9th Cir. 2015). The test is conjunctive; Plaintiffs must establish that all three elements are met. The parties agreed that the first element of the test was met, because *The Moodsters* characters are graphically depicted in both the bible and pilot. The Court previously determined, however, that the characters were neither sufficiently delineated nor especially distinctive, and therefore not independently protectable. *See Order* at 6-9. The Court determined that the characters lacked "specific traits on par with

those of the iconic characters” that had achieved independent copyrightability, such as Sherlock Holmes, Tarzan, Superman, and James Bond. *Id.* at 7. The Court distinguished those characters, who are “instantly recognizable as the same character[s] whenever they appear,” from the Moodsters. *Id.* The Court further stated,

Plaintiffs’ characters have been distributed only twice: once in *The Moodsters* bible, and once in the YouTube pilot. With a viewership of only 1,400, the pilot did not likely engender the kind of “widely identifiable” recognition of the characters’ traits envisioned by the Ninth Circuit; that court denied protection for a character that had “appeared in only one home video that sold approximately 17,000 copies,” for lack of “consistent, widely identifiable traits.” *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003). More problematic for Plaintiffs is the requirement that such traits be persistent enough, over time or over multiple iterations, to produce such recognition. Here, the characters have appeared only twice—and their names had all changed from the first appearance to the second.

*Id.* at 7-8.

That the first element of the three-part test is met is again undisputed. *See generally Mot., Opp.*

Plaintiffs' amended complaint, and the factual allegations regarding each specific character, contain two new arguments: that the existence of the "second generation" of characters demonstrates the characters are sufficiently delineated, and the development process for each character demonstrates they are especially distinctive. The Court will address each new argument in turn.

*i. Sufficiently Delineated: "Second Generation" Moodsters*

Plaintiffs continue to assert that the characters, "as reflected in *The Moodsters Bible* and *Pilot*, sufficiently delineate these characters so they are recognizable whenever they appear." SAC ¶¶ 143, 205, 242, 279, 315. To bolster this claim, Plaintiffs now contend that there is a "second generation" of Moodsters that was developed in 2012-13 by a company called JellyJam. SAC ¶ 156; *Mot.* 4. Merchandise based on the second generation characters was sold at Target and later through many online retailers. SAC ¶ 156. Plaintiffs did not mention the second generation Moodsters in their first two complaints; nevertheless, Plaintiffs now argue that this second generation of characters is evidence that *The Moodsters* characters "have persisted over time." *Opp.* 10. Plaintiffs allege that "both Moodsters iterations"—the bible and pilot being the first iteration, and the JellyJam characters being the second iteration—"retain core characteristics and traits." SAC ¶ 158; *Opp.* 16.

Defendants begin by arguing that Plaintiffs are not even the copyright owners of the second generation

characters; JellyJam is. *Mot.* 4. Plaintiffs assert that JellyJam is simply “another company owned by Ms. Daniels,” and as owner of the copyright in the original characters, she retains certain rights to the JellyJam characters as well. *Opp.* 16; *see also Towle*, 802 F.3d at 1023 (“The owner of the underlying work retains a copyright in that derivative work with respect to all elements that the derivative creator drew from the underlying and employed in the derivative work.”). Defendants also argue that it is “misleading and impermissible” for Plaintiffs to allege copyright infringement of JellyJam’s products, which were developed *after Inside Out*. *Mot.* 7. Neither of Defendants’ arguments are relevant, however, because Plaintiffs are not alleging that Defendants infringed the JellyJam characters. Rather, they present the second generation characters as evidence that traits and attributes which appeared in the 2005 bible and 2007 pilot have persisted over time, in additional works and media (the second generation), and “continue to this day.” *SAC* ¶ 156; *Opp.* 10.

Plaintiffs assert that the second generation characters bolster their claim that *The Moodsters* are instantly “recognizable wherever they appear,” because their traits “have persisted from creation through—and beyond—the pilot episode in 2007.” *SAC* ¶ 243. The second generation characters, however, undermine that very argument. In its prior Order, the Court noted that the (first generation) characters’ names had not even remained constant from the bible to the pilot. *See Order* at 7-8. The JellyJam characters *again* have new names, constituting the third set of names in as many

iterations. *See* SAC ¶¶ 57; *Mot.* 3.<sup>1</sup> The fear character, for instance, began as Shake in the bible and became Scootz in the pilot; in the JellyJam products, he is called Quigly. SAC ¶ 57; *Mot.* 3. Additionally, the first generation of Moodsters lived in a world called Moodsterville, which had its own geographic landmarks and destinations, while the new characters live in a magician’s top hat under a child’s bed. *Mot.* 3. The characters are now “mood detectives” and “little detectives,” and wear detective hats and capelettes. *Id.* 3; SAC ¶ 156.

In addition to these basic biographical changes, the second generation characters bear little *physical* resemblance to the first. The first set of characters have an alien- or insect-like appearance, with elaborate antennae and eyes, and sometimes horns, sitting atop their heads. *See* SAC ¶ 53. They are very thin with large, furry feet, and arms that reach nearly to the ground.

*See id.* The JellyJam characters have a wholly different look. They are plump and round, with traditional placement of the eyes in the face. They have no antennae or horns; they wear glasses, hats, and costumes. *See id.* ¶ 156. They have regularly-

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<sup>1</sup> Defendants request that the Court take judicial notice of the “Meet the Moodsters” storybook in which the second generation characters are described. *See* Dkt. # 56, Request for Judicial Notice, Ex. C. Plaintiffs do not object. *See* Dkt. # 60, Plaintiffs’ Opposition to Disney’s Request for Judicial Notice at 3. The storybook is also referenced in the complaint. *See* SAC ¶¶ 156, 194. Defendants’ request for judicial notice of the “Meet the Moodsters” Storybook is therefore GRANTED.

proportioned arms, hands, and feet. *See id.* Their hands are now humanoid, while their feet are no longer covered in large fur tufts. *See id.* They have a soft, teddy-bear-like shape and appearance, unlike the bug or alien-like appearance of the first characters. Only each character's color is the same as in the first generation of characters. *See id.* ¶¶ 53, 156.

Characters that courts *have* found sufficiently delineated despite changes in appearance over time include James Bond and Godzilla. The Ninth Circuit explained,

The character “James Bond” qualifies for copyright protection because, no matter what the actor who portrays this character looks like, James Bond always maintains his “cold-bloodedness; his overt sexuality; his love of martinis ‘shaken, not stirred;’ his marksmanship; his ‘license to kill’ and use of guns; his physical strength; [and] his sophistication.” Similarly, while the character “Godzilla” may have a different appearance from time to time, it is entitled to copyright protection because it “is always a pre-historic, fire-breathing, gigantic dinosaur alive and well in the modern world.”

*Towle*, 802 F.3d at 1020.

The Court is unpersuaded that the second generation Moodsters could be “widely” or “instantly” recognized as being the same characters as those in

the bible and pilot despite their wholesale changes in appearance. The inclusion in the amended complaint of the second generation characters undermines Plaintiffs' argument; it demonstrates that the majority of the characters' traits, including such basic qualities as their names, are fluid. The underlying traits that remain the same do not give rise to the instant recognition enjoyed by James Bond or Godzilla.

Plaintiffs further argue that if this second generation of characters is "relevant to the copyrightability of *The Moodsters*," it would confirm that copyright arose in 2005 when the original characters were "sufficiently fixed." *Opp.* 16. Where character traits change or develop over time, however, courts look to when the character first "displayed *consistent, widely identifiable* traits" and "attributes [that are] *consistently* portrayed" to assess when copyright arose. *Fleisher Studios, Inc. v. A.V.E.L.A., Inc.*, 772 F. Supp. 2d 1135, 1147 (C.D. Cal. 2008) (emphasis added). Therefore, even if the second generation characters *did* render *The Moodsters* characters distinctive enough for independent copyrightability, the characters would become protectable at the point when they displayed consistent, widely identifiable traits—in other words, when the second generation characters were developed. As Defendants note, "it would not have retroactive effect to make the 'first generation' characters independently protectable *at the time of the alleged copying*." *Reply* 6 (emphasis added). A derivative work is "independent of, and does not affect or enlarge the scope . . . of, any copyright protection in the preexisting material." 17 U.S.C. § 103(b). The

Court agrees that even if the second generation characters “could have helped the Moodsters cross the threshold into independent copyrightability,” *Reply 6*, the first generation characters, who had not yet demonstrated consistent, widely identifiable traits, would not retroactively become protectable—and thus would not have been subject to copyright at the time of the alleged infringement.

*ii. Especially Distinctive: Development Process*

Plaintiffs have also added facts surrounding the development of the characters, which Plaintiffs point to as evidence that the characters are especially distinctive. The Court begins by noting that the specific traits and attributes of each character, which the Court in its prior Order found were *not* especially distinctive—and thus did not meet the third element of the test—remain the same from the first to the second amended complaint. *Compare, e.g., FAC* ¶¶ 168, 169, 170 *with SAC* ¶¶ 199, 200, 205 (describing the Happy character), and *FAC* ¶¶ 182, 183, 184 *with SAC* ¶¶ 236, 237, 242 (describing the Sadness character). Plaintiffs allege that development of *The Moodsters* characters was aided by emotional intelligence experts who advised Plaintiffs “about the script and attributes and traits of the characters, including suggesting facial expressions and dialogue for particular characters based on their review and interpretation of scientific research on emotions.” *SAC* ¶¶ 147, 209, 246, 283, 310. Plaintiffs also used “focus groups with children and their parents,” led by “leading professors at Yale University,” in developing the characters. *Id.* ¶¶ 146, 148, 210, 247, 284, 320. The

children “understood, recognized, and enjoyed the characters,” and 96% of children polled liked the show. *Id.* ¶ 148. Moreover, the pilot “cost over a third of the \$3.3 million invested in The Moodsters Co.” *Id.* ¶ 146. Finally, Plaintiffs add that “[l]eading entertainment companies reviewed” *The Moodsters*, including PBS, Toys “R” Us, and Nickelodeon, and none of them remarked that the characters lacked detail. *Id.* ¶ 154.

Plaintiffs assert that these new facts are “objective evidence that the characters are not so lightly sketched.” *Opp.* 9. The Court disagrees. None of the new contentions bear on the finished product: the characters that appeared in *The Moodsters* bible and pilot, which the Court has already considered. For instance, the Court has already noted that characters must be especially distinctive “vis-à-vis *other characters*, outside of the work in which they appear.” *Order* at 8 (emphasis in original). That children in a focus group recognized the characters as distinct from one another (rather than from other characters outside of the pilot) is immaterial; similarly, that the children enjoyed the show or that their focus group was led by leading professors has no bearing on the Court’s analysis of the characters themselves and how they were represented in the bible and pilot once Plaintiffs’ extensive development process was complete.

The Court in its prior Order assessed the distinctiveness of the characters and determined that they fell short of the Ninth Circuit’s rigorous test for independent copyrightability. The process by which those characters were developed does not change the finished result.

The Court determines that Plaintiffs' amended complaint suffers from the same deficiencies as the first amended complaint, and the characters are not independently copyrightable. Plaintiffs have failed to meet both the second and third prongs of the Ninth Circuit's three-part test. Accordingly, the Court **GRANTS** Defendants' motion to dismiss Plaintiffs' third, fourth, fifth, and sixth causes of action.

B. Claim Two: Ensemble of Characters

Plaintiffs also include a claim for infringement of the ensemble of characters. SAC ¶ 135. Plaintiffs begin by devoting numerous paragraphs to detailing Disney's past efforts to protect their own copyrights, such as by lobbying for the "Mickey Mouse Protection Act," which extended the term of copyright protection, and noting that Disney "recognizes the importance of copyrights to its business," and "provides notice to the world that [the *Inside Out*] characters are protected by copyright." *Id.* ¶¶ 126, 124, 128. That "Disney-Pixar is famous for aggressively protecting its works—and specifically its animated characters—by copyright" has no bearing on the Court's analysis. *Id.* ¶ 125.

In its prior Order, the Court determined that "Plaintiffs have failed to advance an argument" as to how the ensemble of "lightly sketched" characters merits copyright protection. *Order* at 9. Plaintiffs now allege that *The Moodsters* ensemble of characters is independently copyrightable under either the Ninth Circuit's three-part test, or the "story being told" standard. *Id.* ¶ 140; *Opp.* 7, 12. They first argue that the three-part test is met because the "traits and

attributes of the ensemble of Moodsters characters, as reflected in *The Moodsters Bible* and *Pilot*, sufficiently delineate these characters so that they are recognizable whenever they appear.” *Id.* ¶ 143. Plaintiffs also allege that the characters are “unique” and “individual,” and “no previously animated works featured a collection of five characters each represented by a single emotion.” *Id.* ¶ 164. The “originality of these characters” renders them “especially distinctive.” *Id.* Plaintiffs’ amended complaint regarding the ensemble claim includes the same new contentions regarding the characters’ development and the second generation characters to support their argument that the ensemble merits copyright protection under the Ninth Circuit test. The Court has already addressed the three-part test as to the individual characters, and agrees with Defendant that the characters are neither delineated nor distinctive “to a degree ‘sufficient to afford copyright protection to a character taken alone,’” and thus as an ensemble, under the Ninth Circuit test.

Plaintiffs next allege, in the alternative, that the ensemble is protectable as “the story being told” because “*The Moodsters only* exists because of *The Moodsters* characters.” *Id.* ¶¶ 166-67. Defendants argue that there is no longer any such standard after *Towle*, which consolidated relevant precedent when it established the three-part test. *Mot.* 7. Plaintiffs disagree, countering that “courts have not hesitated to apply the [story being told] standard,” and that Defendants therefore have offered “no substantive response” to Plaintiffs’ “story being told” claim. *Opp.* 12. Defendants are correct, however, that the cases cited by Plaintiffs were decided *before Towle*, not after

it; furthermore, in cases that dealt with visually depicted characters (rather than literary characters), “the story being told test’ [was] inapplicable.” *Anderson v. Stallone*, No. 87–0592 WDKGX, 1989 WL 206431, at \*6-7 (C.D. Cal. Apr. 25, 1989); *see also Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1295-96 (C.D. Cal. 1995) (questioning the continued viability of the story being told test as applied to graphic characters). As Defendants note, after *Towle*, copyright in graphically depicted characters “is available only ‘for characters that are especially distinctive.’ To meet this standard, a character must be ‘sufficiently delineated’ and display ‘consistent, widely identifiable traits.’” *Towle*, 820 F. 3d at 1019 (quoting *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170 (9th Cir. 2003)).

Because the Court has determined that Plaintiffs’ characters, either individually or as an ensemble, do not meet this standard, it **GRANTS** Defendants’ motion to dismiss Plaintiffs’ second cause of action.

#### IV. Leave to Amend

Whether to grant leave to amend rests in the sound discretion of the trial court. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). The Court considers whether leave to amend would cause undue delay or prejudice to the opposing party, and whether granting leave to amend would be futile. *See Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996). Generally, dismissal without leave to amend is improper “unless it is clear that the complaint could not be saved by any amendment.” *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003).

Because the Court has already granted Plaintiffs leave to amend their complaint and they have failed to alleviate the Court's concerns, the Court determines that amendment would be futile. Leave to amend is therefore **DENIED**.

V. Conclusion

For the foregoing reasons, the Court **GRANTS** Defendants' motion to dismiss Plaintiffs' second, third, fourth, fifth, and sixth causes of action. Plaintiffs' first cause of action has already been dismissed, but remains in the amended complaint to preserve it for appellate review. This order therefore closes the case.

**IT IS SO ORDERED.**

APPENDIX D

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 17-4527 PSG (SK) Date January 31, 2018

Title Denise Daniels and The Moodsters Company v.  
Walt Disney Company, et al.

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Present: The Honorable Philip S. Gutierrez, United  
States District Judge

Wendy Hernandez  
Deputy Clerk

Not Reported  
Court Reporter

Attorneys Present for  
Plaintiff(s):  
Not Present

Attorneys Present for  
Defendant(s):  
Not Present

**Proceedings (In Chambers): The Court  
GRANTS Defendants' Motion to Dismiss**

Before the Court is Defendants Walt Disney Company, Disney Enterprises, Inc., Disney Consumer Products and Interactive Media, Inc., Disney Interactive Studios, Inc., Disney Shopping, Inc., and Pixar's ("Defendants" or "Disney") motion to dismiss Plaintiffs Denise Daniels and The Moodsters Company's ("Plaintiffs") complaint. Dkt. # 32 ("*Mot.*"). Plaintiffs timely opposed, *see* Dkt. # 40 ("*Opp.*") and Defendant replied, *see* Dkt. # 41 ("*Reply*"). The Court

heard oral arguments on January 29, 2018. See Fed. R. Civ. P. 78; L.R. 7–15. After considering the parties’ papers and arguments, the Court **GRANTS** Defendants’ motion.

### I. Background

Plaintiff Denise Daniels is a nationally recognized child development expert with over 40 years of experience working in the field of children’s social and emotional development. See Dkt. # 27, *First Amended Complaint* (“FAC”) ¶¶ 26-35. She co-founded the national non-profit National Childhood Grief Institution; she has been called upon to help children cope with grief and loss, after such events as Desert Storm, Hurricane Katrina, Columbine, and September 11. *Id.* ¶¶ 28-29. She has appeared on national television and has published nine children’s self-help books relating to emotional wellbeing. *Id.* ¶ 35.

Daniels developed *The Moodsters*, a cartoon world populated by characters that embody individual emotions, to help children understand and regulate their emotions. *Opp.* 3. Each Moodster is color-coded and anthropomorphic—happiness (yellow), sadness (blue), anger (red), fear (green), and love (pink). *Id.* ¶ 53. Daniels and The Moodsters Company recruited top industry talent and emotional intelligence experts to develop and produce *The Moodsters*. *Opp.* 3. In November 2005, Plaintiffs published a “bible” for *The Moodsters*, a contemplated “animated TV show for preschoolers.” *FAC*, Ex. 3 at 69. In 2007, Plaintiffs

posted the pilot episode for *The Moodsters* to YouTube. *FAC*, Ex. 4 (2007 pilot).

Between 2006 and 2009, Plaintiffs allege they pitched *The Moodsters* to Disney every year; many high-ranking Disney executives received the pitch materials, allegedly passing them around to other division heads. *Id.* ¶¶ 67-69. Ultimately, Plaintiffs allege a conversation between Daniels and Pete Docter, director of *Inside Out*, about *The Moodsters* (the “Docter Phone Call”). *Id.* ¶ 71. In 2010, Disney Pixar began development on *Inside Out*, a feature film about the anthropomorphized emotions that live inside the head of an 11-year-old girl. The film features five color-coded emotions as characters—joy (yellow), sadness (blue), anger (red), fear (purple), and disgust (green). *Id.* ¶¶ 86-90. *Inside Out* grossed more than \$350,000,000 domestically and over \$850,000,000 worldwide. *Id.* ¶ 93.

Plaintiff Daniels filed suit on June 19, 2017, alleging breach of implied-in-fact contract arising from Plaintiffs’ disclosure of *The Moodsters* to Disney, which Disney then allegedly used without compensating Plaintiffs. *See* Dkt. # 1, *Complaint*. Daniels amended her complaint on September 20, 2017, adding Plaintiff The Moodsters Company and adding five copyright infringement claims. *See* Dkt. # 27, *First Amended Complaint* (“*FAC*”). Plaintiffs do not allege that *Inside Out* infringes *The Moodsters* as a work; rather, they allege Defendants infringed their copyright in four of the Moodsters characters and in the ensemble of characters. *See id.* Defendant now

moves to dismiss the implied-in-fact contract claim and all of the copyright infringement claims. *See Mot.*

## II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a claim may be dismissed if plaintiff fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). To survive a 12(b)(6) motion to dismiss, a complaint must “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When deciding a Rule 12(b)(6) motion, the court must first accept the facts pleaded in the complaint as true, and construe them in the light most favorable to the plaintiff. *Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013); *Cousins v. Lockyer*, 568 F.3d 1063, 1067–68 (9th Cir. 2009). The court, however, is not required to accept “legal conclusions . . . cast in the form of factual allegations.” *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *see Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555.

After accepting all non-conclusory allegations as true and drawing all reasonable inferences in favor of the plaintiff, the court must then determine whether the complaint alleges a plausible claim to relief. *See Iqbal*, 556 U.S. at 679–80. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a

‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* at 678. “Generally, the scope of review on a motion to dismiss for failure to state a claim is limited to the contents of the complaint.” *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006); *see also Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002) (“Ordinarily, a court may look only at the face of the complaint to decide a motion to dismiss.”). Courts may also, however, consider “attached exhibits, documents incorporated by reference, and matters properly subject to judicial notice.” *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014), *cert. denied sub nom. Cohen v. Nvidia Corp.*, 135 S. Ct. 2349 (2015).

### III. Judicial Notice

Under Federal Rule of Evidence 201, the court “can take judicial notice of ‘[p]ublic records and government documents available from reliable sources on the Internet,’ such as websites run by governmental agencies.” *Gerritsen v. Warner Bros. Entm’t Inc.*, 112 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015) (quoting *Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 08-CV-1166-IEG (POR), 2009 WL 6598891, at \*2 (S.D. Cal. Dec. 23, 2009)); *see also L’Garde, Inc. v. Raytheon Space & Airborne Sys.*, 805 F. Supp. 2d 932, 937-38 (C.D. Cal. 2011) (noting that public records from the Internet are “generally considered not to be subject to reasonable dispute”) (internal quotation marks omitted). Further, “[p]ublic records and government documents are generally considered ‘not to be subject to reasonable dispute.’”

*United States ex rel. Dingle v. BioPort Corp.*, 270 F. Supp. 2d 968, 972 (W.D. Mich. 2003) (citing *Jackson v. City of Columbus*, 194 F. 3d 737, 745 (6th Cir.1999)). Rule 201(b) of the Federal Rules of Evidence permits judicial notice of facts that can be “accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).

Defendant requests judicial notice of over 200 exhibits comprising over 1,300 pages of documents; the Court will consider only those which figure into its analysis below. *See* Dkt. # 33, *Defendants’ Request for Judicial Notice* (“RJN”).

### III. Discussion

#### A. Implied-in-Fact Contract Claim

Plaintiffs allege that Defendants used ideas from *The Moodsters* in creating *Inside Out* without compensating Plaintiffs for the use. *FAC* ¶¶ 112-21. Defendants argue that this claim is time-barred and that it fails as a matter of law. The Court determines that the second issue is dispositive, so it need not address the first.

A plaintiff cannot predicate an implied-in-fact contract claim on a work that was publicly disclosed *before* plaintiff disclosed it to defendant in exchange for payment if it is used. The California Supreme Court established the principle underlying this type of claim in *Desny v. Wilder*, 46 Cal. 2d 715 (1956), holding that “after voluntary communication to

others, [ideas are] free as the air to common use.” *Id.* at 731-32. However, a duty to pay compensation may arise where a person has clearly conditioned the disclosure upon an obligation to pay, and the offeree, with knowledge of that duty, voluntarily accepts the information and uses the idea. *Id.* at 738-39. The court further stated that “[t]he law will not imply a promise to pay for an idea from the mere facts that the idea has been conveyed, is valuable, and has been used for profit; this is true even though the conveyance has been made with the hope or expectation that some obligation will ensue.” *Id.* at 739. The *Desny* court cautioned that “[t]he law will not in any event, from demands stated subsequent to the unconditioned disclosure of an abstract idea, imply a promise to pay for the idea, for its use, or for its previous disclosure.” *Id.*

Citing *Desny*, the court in *Quirk v. Sony Pictures Ent., Inc.*, No. C 11-3773 RS, 2013 WL 1345075, at \*12 (N.D. Cal. Apr. 2, 2013), held that a plaintiff’s publication of a work prior to defendant’s acquisition of the work constituted “unconditional disclosure,” and no implied promise to pay for freely available ideas could be implied. *Id.* at \*11-12. That court held that the “touchstone” of such a claim is “whether the plaintiff can be said to be disclosing something that is not otherwise freely available to the defendant.” *Id.* at \*12. The issue, then, is whether Plaintiffs made *The Moodsters* freely available prior to their disclosure of the work to Disney.

Daniels and her team “contacted Disney Pixar in 2006, 2007, 2008, and 2009 about *The Moodsters*.”

*FAC* ¶ 61. Plaintiffs allege that they submitted *The Moodsters* to Disney, and did so “as is custom and common in the entertainment industry, with a reasonable expectation that Disney Pixar would compensate Daniels if Disney Pixar used their ideas. Thus, Daniels . . . provided ideas and materials to Disney Pixar for sale in exchange for compensation and credit if Disney Pixar used such ideas or materials.” *FAC* ¶ 114. They further allege that Disney “accepted the disclosure of the ideas in *The Moodsters* with an expectation that it would have to compensate Daniels and The Moodsters Company if Disney Pixar used this idea in any television, motion picture, merchandise, or otherwise.” *Id.* ¶ 115. Plaintiffs have offered limited facts in support of the assertion that Disney affirmatively accepted disclosure or had an expectation that it would compensate Daniels; certainly, they have alleged no conversation or writing between the parties to that effect. Plaintiffs’ *FAC* alleges that Daniels “contacted a number of individuals” at Disney, and those individuals “received information” about *The Moodsters*. *FAC* ¶¶ 62-69. Plaintiffs do not provide details of what “sharing the materials” entailed, such as whether there were live discussions, meetings, or simply mailings, and what those discussions entailed. Nonetheless, Plaintiffs have alleged that in 2006 and 2007, Plaintiffs shared *The Moodsters* with Playhouse Disney; that in 2008, Daniels shared the materials with Thomas Staggs (CFO of Walt Disney Company); and that in 2008 Staggs shared them with Roy E. Disney and Rich Ross (President of Disney Channels Worldwide). *Id.* ¶¶ 66-69. Additionally, Plaintiffs have alleged that Daniels spoke directly by telephone

to Pete Docter, walking him “through in detail the characters, curriculum, and concept underlying *The Moodsters*.” *Id.* ¶ 71.

However, Plaintiffs registered *The Moodsters* bible with the Copyright Office in 2005, and registered *The Moodsters* pilot on July 27, 2007 (as well as posting it to YouTube in 2007). *FAC* ¶¶ 131, 132, 61; *RJN*, Ex. B-1, B-2. The Court takes judicial notice of Plaintiffs’ copyright registration in *The Moodsters* bible, as ‘[p]ublic records and government documents available from reliable sources on the Internet,’ such as websites run by governmental agencies” are properly subject to judicial notice.

Defendants argue that the 2005 registration constitutes “publication” of the work, which “dooms [Plaintiffs’] implied-in-fact contract claim.” Indeed, Plaintiffs’ copyright registration in *The Moodsters* bible asserts that the “date of publication” of the bible was November 8, 2005. *RJN*, Ex. B-2. “Publication” refers to “the distribution of copies or phonorecords of a work to the public . . .” or “offering to distribute copies or phonorecords to a group of persons for purposes of further distribution.” 17 U.S.C. § 101. A work is “published” if it is distributed with “no explicit or implicit restrictions with respect to [the] disclosure of [the] contents” of the work. H.R. Rep. No. 94-1476 at 138 (1976). Plaintiffs’ registration states that the work was published in 2005 with no implicit or explicit restrictions, thus constituting publication. Having been unconditionally disclosed both in 2005 and 2007 (with the pilot’s copyright registration and posting online), *The Moodsters* work was freely available

when Plaintiffs made contact with Disney. Any contact the parties had after November 2005 cannot, therefore, give rise to an implied-in-fact contract claim.

Accordingly, the Court **GRANTS** Defendants' motion to dismiss the implied-in-fact contract claim.

B. Copyright Infringement: *The Moodsters* Characters

Plaintiffs registered *The Moodsters* pilot with the United States Copyright Office on July 27, 2007. *FAC* ¶ 131. They also registered *The Moodsters* bible. *Id.* ¶ 132. Plaintiff claims copyright protection in—and infringement by Defendants of—the individual Moodsters (the characters), not *The Moodsters* work itself. *See generally FAC*. Defendants argue that Plaintiffs' copyright infringement claims fail because the characters are not protectable in the first instance, either independently or as an ensemble, and because the *Inside Out* characters are not substantially similar to *The Moodsters*. *See generally Mot*. Because the Court finds the first issue dispositive, it need not reach the second.

Plaintiffs assert infringement claims only with respect to the individual characters and the ensemble of characters, rather than in the work itself, so the Court analyzes Plaintiffs' copyright protection claims through the lens of the Ninth Circuit's three-part test to determine whether a character deserves copyright protection independent of the work in which it appears.

Characters standing alone “are not ordinarily entitled to copyright protection.” *Blizzard Entm’t, Inc. v. Lilith Games (Shanghai) Co.*, 149 F. Supp. 3d 1167, 1173-74 (N.D. Cal. 2015). To be copyrightable independent of the underlying work in which the character appears, a character must (1) have “physical as well as conceptual qualities,” (2) “be ‘sufficiently delineated’ to be recognizable as the same character whenever it appears,” and (3) be “‘especially distinctive’ and ‘contain some unique elements of expression.’” *DC Comics v. Towle*, 802 F.3d 1012, 1020-21 (9th Cir. 2015).

*i. Physical Qualities*

*The Moodsters* have physical as well as conceptual qualities, as they have appeared graphically in both the bible and the pilot. They are not “mere literary character[s],” as they have physical attributes embodied in the 2-dimensional renderings of the characters. Indeed, Defendants argue only that the second and third elements of the three-part test are not met. *See Mot.* 1. The characters therefore meet the first element.

*ii. Sufficiently Delineated*

“[C]ourts have deemed the *persistence of a character’s traits* and attributes to be key to determining whether the character qualifies for copyright protection.” *Id.* (emphasis added). To be protectable, a character must be “recognizable as the same character whenever it appears.” *DC Comics*, 802 F.3d at 1020-21. Characters such as Sherlock Holmes,

Tarzan, Superman, and James Bond have been deemed to have “certain character traits that have been developed over time, making them instantly recognizable wherever they appear.” *MGM, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995). In finding James Bond sufficiently delineated, the court looked to his “character traits that have been developed over time through the sixteen films in which he appears,” finding that his “cold-bloodedness; his overt sexuality; his love of martinis ‘shaken, not stirred;’ his marksmanship; his ‘license to kill’ and use of guns; his physical strength; [and] his sophistication” so delineated the character that his “specific qualities remain constant despite the change in actors.” *Id.* Similarly, in finding the character of Batman protectable, the court cited to Batman’s 63 years of fighting crime, and his “unique, protectable characteristics, such as the iconographic costume elements and his unique life story.” *Sapon v. DC Comics*, No. 00 CIV. 8992(WHP), 2002 WL 485730, at \*3-4 (S.D.N.Y. Mar. 29, 2002).

Where, on the other hand, characters are “lightly sketched through only short summaries and ‘whatever insight into their characters may be derived from their dialogue and action,’” they are not entitled to protection. *Fun with Phonics, LLC v. LeapFrog Enterprises, Inc.*, CV 09-916- GHK (VBXx), 2010 WL 11404474, at \*5-6 (C.D. Cal. Sept. 10, 2010). Plaintiffs’ characters have been sketched through the short summaries contained in *The Moodsters* bible, and in the pilot episode. The description of the character Zazz (the happy character), for instance, states that he “wakes up each morning with a smile on his face and

a friendly attitude,” “he’s usually quite optimistic and enthusiastic,” and “he spreads cheer wherever he goes.” Dkt. 27-3 Ex. 3, *The Moodsters Bible* at 3. The anger character is described as “the most likely Moodster to get frustrated and ‘blow her top,’” she’s “very generous,” and “she’s determined to do her best.” *Id.* at 4. The sadness character is “prone to doom and gloom,” “weeps copiously,” and is “a totally sweet guy” who feels “particularly dejected when he’s left out of things.” *Id.* at 6. These are not specific traits on par with those of the iconic characters noted above, such that they would be “instantly recognizable wherever they appear.”

Further, Plaintiffs’ characters have been distributed only twice: once in *The Moodsters* bible, and once in the YouTube pilot. With a viewership of only 1,400, the pilot did not likely engender the kind of “widely identifiable” recognition of the characters’ traits envisioned by the Ninth Circuit; that court denied protection for a character that had “appeared in only one home video that sold approximately 17,000 copies,” for lack of “consistent, widely identifiable traits.” *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003). More problematic for Plaintiffs is the requirement that such traits be persistent enough, over time or over multiple iterations, to produce such recognition. Here, the characters have appeared only twice—and their names had all changed from the first appearance to the second. See *FAC* ¶¶ 54-59.

*iii. Especially Distinctive*

Courts look at “visual depictions, name, dialogue, relationships with other characters, actions and conduct, personality traits, and written descriptions—to determine whether [a character] is sufficiently delineated such that it is a unique expression.” *Fun with Phonics*, 2010 WL 11404474, at \*5-6. Characters are “not particularly distinctive” when they “fit general, stereotypical categories . . . . Consequently, these characters are not entitled to copyright protection.” *McCormick v. Sony Pictures Entm’t*, 2009 WL 10672263, at \*14 (C.D. Cal. July 20, 2009), *aff’d*, 411 F. App’x 122 (9th Cir. 2011).

In their analysis of the “especially distinctive” prong, Plaintiffs originally pointed to the *Fun with Phonics* case, calling the court’s analysis of character copyright protection “particularly relevant to this case” where it concluded that “a yellow letter I dripping with green slime to illustrate the word ‘icky’ was a copyrighted character.” *Opp.* 8. They further argued that the “icky” character was found to be “protectable expression,” which “supports the conclusion that . . . so are the expressions of *The Moodsters* characters.” *Id.* In fact, the court in that case came to the *opposite* conclusion, finding “Plaintiff’s ‘characters’ *do not* warrant independent copyright protection.” *Fun with Phonics*, 2010 WL 11404474, at \*6 (emphasis added). Plaintiffs submitted a notice of errata conceding this mistake, *see* Dkt. # 45, *Notice of Clarification/Errata*, but continue to argue that “the principle of law in *Leapfrog* . . . supports the conclusion that certain

expressive elements are protectable expression.” *Id.* 2. Though that may be so, *characters* must nevertheless meet the elements of the Ninth Circuit’s test to be independently protectable.

Plaintiffs claim that their characters are “recognizable as the same character whenever they appear because they are identified by individual colors and emotions” such that “there is no confusion which character is which when one comes on scene.” *Opp.* 7. As Defendants correctly note, distinguishing the characters from one another when they appear within the work itself “is not the Ninth Circuit’s standard for copyright protection of a character.” *Reply* 4. Rather, the characters’ actions and conduct, personality traits, and other characteristics must do more than “fit general, stereotypical categories” such that they are especially distinctive vis-à-vis *other characters*, outside of the work in which they appear.

Defendants note that “Plaintiffs’ efforts to draw parallels between the Moodsters and [the *Fun with Phonics*] characters—rather than characters with adequately developed and especially distinctive traits—only confirm that the Moodsters are lightly-sketched characters that fail to satisfy the Ninth Circuit’s test.” *Reply* 3. The Court agrees.

The Court determines that the characters within *The Moodsters* do not meet the Ninth Circuit’s rigorous test for granting independent copyright protection to characters. Accordingly, Plaintiffs’ copyright infringement claim for each character fails,

and Defendants' motion to dismiss them is **GRANTED**.

C. Copyrightability of the Moodsters Ensemble

Having found the individual characters unprotectable, the Court now turns to whether the ensemble of the characters is copyrightable. Plaintiffs cite to *Paramount Pictures Corp. v. Axanar Prod., Inc.*, No. 2:15-CV-09938-RGK-E, 2017 WL 83506 (C.D. Cal. Jan. 3, 2017), for the position that unprotectable characters can, as an ensemble, be protected. *Opp.* 9. Plaintiffs' reading of this case, however, is incorrect. Plaintiffs contend that the court "found groups of characters to be protected by copyright." *Id.* In fact, the court expressly declined to decide whether the ensemble of Klingons and Vulcans characters was protectable, because "Plaintiffs' allegation [wa]s that Defendants infringe[d] the Star Trek Copyrighted Works as a whole." The court stated that such characters "may be entitled to copyright protection," but discussed the issue only in the context of the characters as one point of comparison, along with plot, costumes, setting, and other elements, in the substantial similarity analysis. *Id.* at \*4-5.

Plaintiffs also point to the "more general" proposition that "[o]riginal selection, coordination, and arrangement of unprotectable elements may be protectable expression." *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 849 (9th Cir. 2012) (holding that "selecting, coordinating, and arranging floral elements in stylized fabric designs" may be

protectable expression). While it is indeed black letter law that original selection and arrangement of unprotectable elements can render the configuration of those elements protectable, Plaintiffs have failed to advance an argument as to how that principle supports protection of the ensemble of “lightly sketched” characters here, offering only the conclusion that “the combination of those unique characters only further adds to the originality and copyrightability.” *Opp.* 9.

Accordingly, the Court **GRANTS** Defendants’ motion to dismiss Plaintiffs’ Second cause of action, infringement of the ensemble of characters.

#### IV. Leave to Amend

Whether to grant leave to amend rests in the sound discretion of the trial court. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). The Court considers whether leave to amend would cause undue delay or prejudice to the opposing party, and whether granting leave to amend would be futile. *See Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996). Generally, dismissal without leave to amend is improper “unless it is clear that the complaint could not be saved by any amendment.” *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003).

At the January 29 hearing, Plaintiffs requested leave to amend their complaint, thus indicating to the Court that the FAC could be saved by amendment. Leave to amend is therefore **GRANTED**, only as to the copyright infringement claims.

V. Conclusion

For the forgoing reasons, the Court **GRANTS** Defendant's motion to dismiss the First cause of action (implied-in-fact contract) **WITHOUT LEAVE TO AMEND**, and **GRANTS** Defendants' motion to dismiss Plaintiffs' Second (ensemble of characters), Third (Happy character), Fourth (Sadness character), Fifth (Anger character), and Sixth (Fear character) causes of action **WITH LEAVE TO AMEND**. Plaintiffs' second amended complaint is due no later than **March 1, 2018**.

**IT IS SO ORDERED.**