

No. 20-132

In The Supreme Court of the United States

THE MOODSTERS COMPANY,
PETITIONER,

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF SOUTHWESTERN LAW STUDENT
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ROBERT C. LIND AND MICHAEL M. EPSTEIN, IN
ASSOCIATION WITH THE AMICUS PROJECT AT
SOUTHWESTERN LAW SCHOOL, AS AMICI
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QUESTION PRESENTED

Can characters be denied copyright protection under the U.S. Circuit Courts of Appeals' tests that require more than a modicum of creativity in order for a character to be copyrightable, in violation of the plain language of the Copyright Act of 1976 and the Court's decision in *Feist*?

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INTEREST OF THE AMICI CURIAE¹

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Petitioner. Orly Ravid is an associate professor at Southwestern Law School and the Director of the Biederman Entertainment and Media Law Institute. Robert C. Lind is a professor emeritus at Southwestern Law School and the author of numerous treatises on copyright and entertainment law. Michael M. Epstein is a professor of law and the Director of the pro bono Amicus Project at Southwestern Law School. He is the Supervising Editor of the Journal of International Media & Entertainment Law, published by the Biederman Institute in cooperation with the American Bar Association. Amicus Suna Izgi is an upper-division J.D. candidate at Southwestern Law School with an extensive academic and professional interest in entertainment and copyright law. Amici have no interest in any party to this litigation, nor do they have a stake in the outcome of this case other than their interest in the correct and consistent

¹ All parties have received timely notice and have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Southwestern Law School provides financial support for activities related to faculty members' research and scholarship, which helped defray the cost of preparing this brief. (The school is not a signatory to the brief, and the views expressed here are those of the *amici curiae*.) Otherwise, no person or entity other than the *amici curiae* or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

interpretation of copyright law. Amici share a strong interest in there being clarity and certainty in the U.S. Circuit Courts of Appeals' evaluation of character copyrightability following the Ninth Circuit's decision in *Daniels v. Walt Disney Co.*, 958 F.3d 767 (9th Cir. 2020).

SUMMARY OF THE ARGUMENT

The parties in this case argue whether originality is the proper standard to determine character copyrightability. In support of Petitioner, The Moodsters Company, this brief argues that the appropriate standard for determining the copyrightability of characters should be originality as dictated by this Court in *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

In *Feist*, recognizing that originality is both a constitutional and a statutory requirement, and the touchstone of copyright, this Court held that a work is original so long as it is a product of independent creation and minimal creativity. *Id.* at 345. “[T]he requisite level of creativity is extremely low; even a slight amount will suffice.” *Id.* The level of creativity that is required for a work to be original should apply to characters, just as it applies to any other type of work. Applying *Feist* to characters would create a much needed, unified standard across the circuits that would protect creative expression consistent with the Constitution and the Copyright Act. U.S. Const. art. I, § 8, cl. 8; 17 U.S.C.A. §102(a).

The law governing character copyrightability is incoherent because of the circuits' inconsistent standards. For example, the Ninth Circuit uses two tests to determine character copyrightability: (1) "the story being told test," which requires a character to be the very core of a story, *Warner Bros. Pictures v. CBS*, 216 F.2d 945, 950 (9th Cir. 1954), and (2) the *Towle* test, which requires a character to have physical and conceptual qualities, be sufficiently delineated, and especially distinctive. *DC Comics v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015). The Second Circuit uses the "sufficient delineation" test, which requires a character to be well-developed in order to be protected. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931). The Seventh Circuit requires a character to be distinctive in order to be protected. *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004). The remaining circuit courts use the tests established by the Ninth, Second, or Seventh Circuit. Each test demands more than the minimal creativity standard defined in *Feist*, contributing to the pervasive ambiguities in the law governing character copyrightability. The current range of circuit approaches indicates that a character can be protected in one circuit, but not in the other.

There is a pressing need for a consistent national standard for character copyrightability, and this standard should be consistent with the basic framework for originality set forth in *Feist*. The diverging standards are harmful to independent creators because the varying approaches have evolved into favoring widely disseminated characters owned by companies with vast resources. The continuous

departure from this Court's standard in *Feist* deprives independent creators of the limited monopoly granted to them by the Constitution, and of their right in gross granted to them by the Copyright Act.

ARGUMENT

I. THIS COURT SET THE APPROPRIATE STANDARD FOR EVALUATING CHARACTER COPYRIGHTABILITY IN *FEIST*

The appropriate standard for evaluating the threshold question of whether a character is copyrightable should be originality, just as it is for any category of work subject to copyright protection. 17 U.S.C.A. § 102(a). In 1991, this Court set the standard for originality when it defined that a work is original if it has been independently created and contains a “modicum of creativity.” *Feist*, 499 U.S. at 346. Independent creation requires a work to owe its origin to an author as opposed to being copied from another source. *Id.* “[T]he requisite level of creativity is extremely low; even a slight amount [of creativity] will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be.” *Id.* at 345. Only works “in which a creative spark is utterly lacking or so trivial as to be nonexistent” fail to pass the creativity threshold. *Id.* at 359. Applying this standard to the white pages of a telephone directory in *Feist*, this Court held that a compilation of names, phone numbers, and addresses could be copyrighted so long as they were selected independently, and there was a modicum of creativity in the arrangement, selection, and coordination of

those names, numbers, and addresses. *Id.* Therefore, copyrightability does not depend on a significant showing of originality. *Id.*; *Eldred v. Ashcroft*, 537 U.S. 186, 211 (2003) (citing *Feist*, 499 U.S. at 359) (restating that copyright protection is only unavailable to works that are “utterly lacking” of creativity); *Keeling v. Hars*, 809 F.3d 43, 51 (2d Cir. 2015); *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 302 (7th Cir. 2011); *Schrock v. Learning Curve Int’l, Inc.*, 586 F.3d 513, 519 (7th Cir. 2009); *Ets-Hokin v. Skyway Spirits, Inc.*, 225 F.3d 1068, 1076 (9th Cir. 2000); *Savant Homes, Inc. v. Collins*, 809 F.3d 1133, 1139 (10th Cir. 2016).

The copyrightability of a character should be evaluated under *Feist*’s standard for originality because there is no justification based in statute, case law, or policy to support an alternate standard that treats characters differently from other types of works. A character should be protected so long as it is an independent creation that is minimally creative. Even though characters are not enumerated in the Copyright Act, courts have recognized characters as copyrightable. *Walt Disney Prods., v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978) (protecting cartoon characters); *Gaiman*, 360 F.3d at 660 (protecting a comic book character); *Detective Comics, Inc. v. Bruns Publications, Inc.*, 111 F.2d 432 (2d Cir. 1940) (protecting Superman). The fact that characters are not enumerated in the statute has no effect on copyrightability. *Warner Bros. Inc. v. ABC (Warner Bros. III)*, 720 F.2d 231, 235 (2d Cir. 1983). This Court was clear about the threshold for creativity in *Feist*, yet the circuit courts continue to require more than a mere modicum. *See, e.g., Towle*, 802 F.3d at 1021

(requiring a character to have physical and conceptual qualities that are widely recognizable and especially distinctive); *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388, 391 (S.D.N.Y. 1981) (requiring that a character must be sufficiently delineated in order to be protected), *aff'd*, 683 F.2d 610 (2d Cir. 1982); *CBS*, 216 F.2d at 950 (requiring a character to be the heart of the work). There is a pressing need for a unifying standard for character copyrightability that falls in line with *Feist*.

II. THE TESTS USED BY THE CIRCUIT COURTS VIOLATE *FEIST*

A. THE NINTH CIRCUIT'S "STORY BEING TOLD" AND *TOWLE* TESTS

The Ninth Circuit uses two tests to evaluate whether a character is copyrightable: (1) the "story being told" test, *CBS*, 216 F.2d 945 at 950, and (2) the three-part *Towle* test. *Towle*, 802 F.3d at 1021. While the "story being told" test had seemingly been abandoned, the Ninth Circuit has revived it in Petitioner's case as an available method to evaluate character copyrightability. *Daniels*, 958 F.3d at 774 ("[W]e do not embrace the district court's view that *Towle* represents the exclusive test for copyrightability. The *Warner Brothers* test is therefore available...").

1. THE "STORY BEING TOLD" TEST

The "story being told" test requires a character to "constitute the story being told" and not be a mere "chessman in the game of telling a story" in order to

be copyrightable. *CBS*, 216 F.2d at 950. This test requires the character to be the heart of the story. *Id.*; *See, e.g., Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1176 (9th Cir. 2003) (“Mystery Magician” was not protected because he was merely a chessman in the game of telling the story of how tricks are performed). The Ninth Circuit articulated this standard in 1954 when it held that the character Sam Spade,² a detective leading a search for a valuable bird figurine, was not copyrightable. *CBS*, 216 F.2d at 950. Despite his notoriety as an iconic Los Angeles private eye,³ the Ninth Circuit held that Sam Spade was not copyrightable because he was merely a vehicle for the story being told of the search for the figurine. *Id.* at 950. In doing so, the court established a high bar for character copyrightability that is inconsistent with *Feist*.

The application of the “story being told test” was limited to literary characters in 1978, when the Ninth Circuit held that graphic characters are copyrightable so long as they are sufficiently delineated. *Air Pirates*,

² Detective Sam Spade is a “clever, laconic, rangy-looking man whose morals and practices are none too idyllic, and well if not too favorable known to the police.” 216 F.2d at 950 n.8. He is prominently featured in the novel and film ‘The Maltese Falcon,’ where he leads a search for a valuable bird figurine. *Id.* at 950.

³ In the 1941 film, Spade is portrayed by Humphrey Bogart, whose acclaimed performance established the film as a film noir classic. Connor Letendre, *A Case for the Classics: The Maltese Falcon*, THE GEORGETOWN VOICE (Aug. 28, 2014) <https://georgetownvoice.com/2014/08/28/a-case-for-the-classics-the-maltese-falcon/> (last visited Aug 22, 2020); Bosley Crowther, ‘The Maltese Falcon,’ a Fast Mystery-Thriller With Quality and Charm, at the Strand, THE NEW YORK TIMES (Oct. 4, 1941).

581 F.2d at 755. Although this decision limited the use of the test to literary characters, it nonetheless reinforced the notion that “characters ordinarily are not copyrightable.” *Id.* The court justified the distinction because graphic characters have physical and conceptual traits that are more likely to “contain some unique elements of expression,” making it easier for them to appear in the mind of a reader as opposed to a literary character that “may [only] embody little more than an unprotected idea.” *Id.* The Ninth Circuit never abrogated the “story being told” test but did refrain from using it in the decades following *Air Pirates*. This changed in Petitioner’s case when the court revived the test as an available method to determine character copyrightability. *Daniels*, 958 F.3d at 774. It is now apparent that the test is no longer limited to literary characters, seeing as the Ninth Circuit did not address the *Air Pirates* distinction in its decision on the copyrightability of the graphic characters in Petitioner’s case. *Id.*

The “story being told test” violates *Feist* because a character being the heart of a work requires a degree of creativity that is much higher than a mere modicum. The test has also been twisted to require an audience’s approval and adoration of a character, which is not a requirement for originality. *See e.g., Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co., Inc.*, 900 F. Supp. 1287, 1296 (C. D. Cal. 1995) (holding that James Bond was copyrightable under the Ninth Circuit’s “story being told” test because “audiences do not watch Tarzan, Superman, Sherlock Holmes, or James Bond for the story, they watch these films to see their heroes at work”). Moreover, a character that would be protected in

another circuit using a more lenient standard may not be protected using this test in the Ninth Circuit. For example, in *Warner Bros. v. ABC*, a district court in New York held, and the Second Circuit affirmed, that Superman was a copyrightable character under the “sufficient delineation” test because he had become more than “merely a word portrait” through his portrayal in comic books and films. *Warner Bros., Inc. v. ABC (Warner Bros. II)*, 530 F. Supp. 1187, 1193 (S.D.N.Y. 1982), *aff’d*, 720 F.2d 231 (2d Cir. 1983). Under this logic, the character of Sam Spade should be seen as similar to Superman because he arguably became more than a mere word portrait when he was given life on the screen by Humphrey Bogart in a critically acclaimed and popular film, ‘The Maltese Falcon.’ In the Second Circuit, Sam Spade would likely be protected, while in the Ninth Circuit, he is not. Various circuit courts, and even the Ninth Circuit itself, have recognized the high bar that the “story being told” test places on character copyrightability. *See, e.g., Olson v. National Broadcasting Co.*, 855 F.2d 1446, 1451-52 (9th Cir. 1988); *Goodis v. United Artists Television, Inc.*, 425 F.2d 397, 406 n.1 (2d Cir. 1970) (“[S]uch a conclusion would be clearly untenable from the standpoint of public policy, for it would effectively permit the unrestrained pilfering of characters”); *Gaiman*, 360 at 660 (“That decision is wrong...”). “[The test] seems to envisage a ‘story’ devoid of plot wherein character study constitutes all, or substantially all, of the work. There may be rare examples of such works, but for most practical purposes such a rule if followed would effectively exclude characters from the orbit of copyright protection.” 1 Nimmer on Copyright § 30 (1973) (footnote omitted). This test dooms characters, *Olson*,

855 F.2d at 1451-52 (stating that an evaluation under the “story being told” test doomed the characters at issue and treated the court’s reasoning in the Sam Spade case as dicta), and should not be used in the wake of *Feist*.

2. THE *TOWLE* TEST

The *Towle* test requires a character to (1) have physical and conceptual qualities, (2) be sufficiently delineated such that it has consistently identifiable character traits and attributes, and (3) be especially distinctive such that it contains some unique elements of expression in order to be copyrightable. *Towle*, 802 F.3d at 1021. The Ninth Circuit articulated this test in 2015, when it held that the Batmobile was a copyrightable character. *Id.* The court consolidated the preexisting approaches being used in the circuit to determine character copyrightability and articulated these three requirements. *Id.* at 1019-21. The first requirement of the test came from *Air Pirates*, which established that graphic characters have “physical as well as conceptual qualities” that are more likely to be protectable expression. *Id.* at 1019; *Air Pirates*, 581 F.2d at 755. The second and third requirements were derived from a string of cases that recognized sufficient delineation as a product of a character being widely identifiable and having consistent, distinctive traits. *Towle*, 802 F.3d at 1019-20; *Rice*, 330 F.3d at 1175; *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008); *Metro-Goldwyn-Mayer*, 900 F. Supp. at 1295-96 (C. D. Cal. 1995); *Toho v. William Morrow & Co.*, 33 F. Supp. 2d 1206, 1216 (C. D. Cal. 1998). Most notably, the *Towle* test requires a character to be “especially distinctive” and

to have “unique” elements, which taken together constitute a more heightened standard than what the Ninth Circuit had been using, and what *Feist* allows.

The *Towle* test sets the highest bar for copyrighting characters, representing the most flagrant violation of *Feist*, because it completely ignores the low threshold for creativity that this Court defined nearly three decades ago. First, requiring a character to have physical as well as conceptual qualities reinforces the notion from the “story being told” test that literary characters cannot be copyrighted unless they constitute the entire story. *Air Pirates*, 581 F.2d at 755 (distinguishing between literary and graphic characters). Second, requiring a character to exhibit consistent character traits and attributes suggests that a character must have persisted over time and in multiple works before it can be protected. *Rice*, 330 F.3d at 1175; *See also, Metro-Goldwyn-Mayer, Inc.*, 900 F. Supp. at 1296-97. Neither a work’s persistence over time, nor its commercial value are requirements for copyrightability under the Copyright Act. 17 U.S.C.A §102(a) (“Copyright protection subsists....in original works of authorship fixed in any tangible medium of expression...”). Finally, providing that a character must be “especially distinctive” requires more than a mere modicum of creativity. The Ninth Circuit’s rationale in *Towle* for deeming the Batmobile distinctive is illustrative of the problem: “In addition to its status as Batman’s loyal bat-themed sidekick complete with the character traits and physical characteristics described above, the Batmobile also has its unique and highly recognizable name.” *Towle*, 802 F.3d 1012 at 1022. A name being unique and recognizable is a trademark

concept that has no place in a copyrightability analysis. Moreover, this line of reasoning implies that courts should consider the quality of the work in their analysis, which this Court has expressly held is not a factor in determining copyrightability. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903). Therefore, taken together, the three requirements of the *Towle* test set a high barrier to character copyrightability that should not exist in the presence of *Feist*.

B. THE SECOND CIRCUIT’S “SUFFICIENT DELINEATION” TEST

The Second Circuit requires a character to be sufficiently delineated in order to be copyrightable. This principle was established by Judge Learned Hand, in the case *Nichols v. Universal Pictures Corp.* 45 F.2d at 121. While discussing literary works and characters, Judge Hand noted that it is difficult to determine exactly when an idea becomes protectable expression and recognized that the dividing line can never truly be drawn. *Id.* However, instead of ruling out the possibility of a character being copyrightable altogether, Judge Hand stated that a character *could* be copyrighted if it was developed *enough*. *Id.*

In order to determine whether a character is sufficiently delineated, the Second Circuit considers the character’s physical attributes, traits and background. *See, e.g., Salinger v. Colting*, 607 F.3d 68, 71 (2d Cir. 2010) (considering a character’s anti-social attitude); *Williams v. Crichton*, 84 F.3d 581, 589 (2d Cir. 1996) (considering the interpersonal relationships, passions and intelligence of the

characters); *Bruns*, 111 F.2d at 433-34 (considering the totality of Superman and Wonder Woman's traits). Under this test, a character that has common and general characteristics is not sufficiently delineated, and therefore constitutes a stock character. *See, e.g., Warner Bros. Inc. v. ABC (Warner Bros. I)*, 654 F.2d 204, 209 (2d Cir. 1981); *Smith v. Weinstein*, 578 F. Supp. 1297, 1303 (S.D.N.Y.1984) (“A ‘city boy,’ a ‘top hand,’ or a black protagonist ... are characterizations too general to deserve protection”), *aff'd mem.*, 738 F.2d 419 (2d Cir.1984).

The “sufficient delineation” test violates *Feist* because it requires a character to be more than an independently created work that is minimally creative. *Feist* defined that “the requisite level of creativity is extremely low.” *Feist*, 499 U.S. at 345. Requiring a well-developed character amounts to more than a modicum of creativity. Furthermore, there are no objective guidelines to determining when a character becomes sufficiently delineated. Factfinders have made conclusory findings without explaining *why* a character qualifies, apart from listing the character's traits in an abstract manner. *See, e.g., Burroughs*, 519 F. Supp. at 391 (“It is beyond cavil that the character “Tarzan” is delineated in a sufficiently distinctive fashion to be copyrightable... Tarzan is the ape-man. He is an individual closely in tune with his jungle environment, able to communicate with animals yet able to experience human emotions. He is athletic, innocent, youthful, gentle and strong. He is Tarzan.”), *aff'd*, 683 F.2d 610 (2d Cir. 1982); *See also, Silverman v. CBS Inc.*, 870 F.2d 40, 50 (2d Cir. 1989) (stating “[w]ith respect to the “Amos ‘n’ Andy” characters...we have no doubt

that they were sufficiently delineated...” without providing any additional analysis); *Williams*, 84 F.3d at 589 (“Such can be said of Peter, Wendy, and Jake, all of whom are much less developed than their alleged counterparts”). This test allows factfinders to evaluate characters by making subjective judgments as to whether a character is sufficiently delineated. In this way, the “sufficient delineation” test violates *Feist* by creating arbitrary modes of analysis for character copyrightability when all that is required is independent creation and minimal creativity.

C. THE SEVENTH CIRCUIT’S “DISTINCTIVENESS” TEST

The Seventh Circuit requires a character to be distinctive in order to be protected. *Gaiman*, 360 F.3d at 661; *See also, Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496, 502–03 (7th Cir. 2014). In *Gaiman*, the court approached character copyrightability through the lens of *scènes à faire*,⁴ stating that stock characters were “an example of the operation of the doctrine.” *Gaiman*, 360 F.3d at 660. If stock characters were copyrightable, then, the court reasoned, “[i]t would be difficult to write successful works of fiction without negotiating for dozens or hundreds of copyright licenses, even though such stereotyped characters are the products not of the creative imagination but of simple observation of the human comedy.” *Id.* Moreover, if a character is distinctive,

⁴ Standard or general themes that are common to a wide variety of works and are therefore not copyrightable. Examples of *scènes à faire* are obvious plot elements and character types. SCÈNES À FAIRE, BLACK’S LAW DICTIONARY (11th ed. 2019).

then “other authors can use the stock character out of which it may have been built without fear...of being accused as infringers.” *Id.* In essence, the Seventh Circuit held that a character may be protected so long as it is not a stock character. *Id.* In *Gaiman*, for example, a combination of the character’s age, phony title, knowledge, words, and slightly mosaic visual features were enough to differentiate the character from being just “an unexpectedly knowledgeable old wino.” *Id.*

Even though this test suggests more leniency by the courts, it still violates *Feist* because it requires more than a modicum of creativity and confuses the doctrine of copyright with that of trademark. First, the meaning of “distinctiveness” suggests more than minimal creativity, one of its dictionary definitions being “having or giving an uncommon and appealing quality.”⁵ Requiring a character to be “uncommon” and “appealing” amounts to quality judgments that play no role in whether a work is copyrightable. *Feist*, 499 U.S. at 359. Second, “distinctiveness” is a term that is closely associated with trademark law that should have no place in a court’s copyright analysis. The Lanham Act requires a mark to be distinctive in order for it to qualify for trademark protection. 15 U.S.C.A. § 1052 (West). Trademark protection is a right appurtenant to use, meaning that a trademark cannot be protected unless it is viewed by the public. 4 McCarthy on Trademarks and Unfair Competition § 24:11 (5th ed. 2020). Copyright protection, on the other hand, is a right in gross that vests in the creator

⁵ *Distinctive*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/distinctive> (last visited Aug. 22, 2020).

as soon as the work comes into existence and is wholly unrelated to public perception. *Id.* A trademark analysis, therefore, is highly dependent on the consumer perspective. *Id.* Third, the two types of protection should not be conflated because they serve different purposes. The purpose of trademark law is to protect consumers from being misled and to prevent the value of an enterprise owning a distinctive mark from being impaired. 1 McCarthy on Trademarks and Unfair Competition § 2:1 (5th ed. 2020). The purpose of copyright law, however, is entirely different. Copyright protection exists in order to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art. I, § 8, cl. 8. Applying a trademark term to a copyrightability analysis deprives an author of their right in gross. The “distinctiveness” test requires more than a mere modicum of creativity and contravenes this Court’s standard for originality. While it is the least onerous test among the circuit courts, the “distinctiveness” test still presents an obstacle to character copyrightability that contradicts *Feist*.

D. OTHER CIRCUITS

The remaining circuit courts mainly use the tests established by the Ninth, Second and Seventh Circuits. *See e.g., TMTV, Corp. v. Mass Prods., Inc.*, 645 F.3d 464, 469 (1st Cir. 2011) (following the Second Circuit approach); *Warner Bros. Entm’t, Inc. v. X One X Prods.*, 644 F.3d 584, 598 (8th Cir. 2011) (referencing both the Second and Seventh Circuit approaches); *Blehm v. Jacobs*, 702 F.3d 1193, 1205

(10th Cir. 2012) (affording protection for stylistic choices that created a “uniform standard to achieve unique expression” based on the Ninth Circuit’s approach). These approaches each represent a violation of *Feist* for the same reasons described above.

III. THE INCONSISTENCIES ACROSS THE CIRCUIT COURTS DIVEST INDEPENDENT CREATORS OF THEIR CONSTITUTIONALLY GRANTED MONOPOLY AND THEIR STATUTORILY CREATED COPYRIGHT IN GROSS

There is a lack of consistency across the circuits that has created an ambiguous body of law governing the copyrightability of characters. As Judge Hand noted in *Nichols*, it is difficult to determine when a character becomes copyrightable expression, and an exact line can never be drawn. *Nichols*, 45 F.2d at 121. However, this should not give circuit courts free reign to layer requirements that create arbitrary barriers to character copyrightability. *See, e.g., Towle*, 802 F.3d at 1021 (combining pre-existing, already heightened standards demanding more creativity than *Feist* to establish an even higher bar to character copyrightability); *CBS*, 216 F.2d at 950 (requiring a character to be the core of a work); *Gaiman*, 360 F.3d at 661 (requiring a character to be “distinctive”); *Nichols*, 45 F.2d at 121 (requiring a character to be well-developed). Currently, the circuits use the “story being told test,” the *Towle* test, the “sufficient delineation” test, and the “distinctiveness” test as described above.

The use of these different tests leads to different outcomes. For example, the Second Circuit has extended copyright protection to the *attitude* of a character, *Salinger*, 607 F.3d at 68 (2d Cir. 2010) (protecting a character’s anti-social attitude), while the Ninth Circuit has not. *Mattel, Inc. v. MGA Entm’t, Inc.*, 616 F.3d 904, 916 (9th Cir. 2010) (“Mattel can’t claim a monopoly over fashion dolls with a bratty look or attitude...”). Copyright protection has also been extended to an accessory of a character which significantly aids in identifying it. *New Line Cinema Corp. v. Russ Berrie & Co.*, 161 F.Supp. 2d 293, 302 (S.D.N.Y. 2001) (extending copyright protection to Freddy Krueger’s glove). The Second Circuit has also suggested that characters can be protected as compilations, *Warner Bros. III*, 720 F.2d at 243 (recognizing that “[a] character is an aggregation of the particular talents and traits his creator selected for him”); *See also, Lone Wolf McQuade Associates v. CBS, Inc.*, 961 F. Supp. 587, 594 (S.D.N.Y. 1997) (relying on the Second Circuit’s approach in *Warner Bros. III* and holding that J.J. McQuade could be copyrighted regardless of whether he was viewed as an aggregation of talents and traits pursuant to the “sufficient delineation” test or as a non-factual compilation), while other circuit courts have not addressed this possibility.

By not specifying exactly *when* a character becomes sufficiently delineated, the circuits have allowed judges to make determinations based on their own internal sense of character copyrightability. Although the sufficient delineation requirement is meant to ensure that “the metes and bounds” of a character have been defined, *X One*, 644 F.3d at 598,

there are few objective guidelines for courts to follow. This leads factfinders to subjectively conclude that a character is sufficiently delineated without going much further than listing character traits. *See Bruns*, 111 F.2d at 433-34; *Burroughs*, 519 F. Supp. at 391; *Olson*, 855 F.2d at 1452-53 (recognizing that lightly sketched characters can occasionally be descriptive enough to be copyrighted, but not providing guidance on when a lightly sketched character is sufficiently descriptive). *But see, Blehm*, 702 F.3d at 1205 (holding that simple stick figures could be protected because the figures followed a “uniform standard to achieve a unique expression”). Although this may be a fact-intensive issue, *Halicki*, 547 F.3d at 1225, there is no clear approach other than stating that a character is either well-defined or not. *See, e.g., Burroughs*, 519 F. Supp. at 391 (“Tarzan is the ape-man. He is an individual closely in tune with his jungle environment, able to communicate with animals yet able to experience human emotions. He is athletic, innocent, youthful, gentle and strong. He is Tarzan.”); *Silverman*, 870 F.2d at 50 (stating “we have no doubt that they were sufficiently delineated...” without offering any objective analysis); *Rice*, 330 F.3d at 1175 (stating that magician character was too standard to be sufficiently delineated). A factfinder should have a more objective way of evaluating whether a character is sufficiently delineated than to simply know it when they see it. There should be a clearer standard.

The Ninth Circuit’s approach both before and after *Towle* suggests that the wide dissemination of a character is a pre-requisite for protection, which improperly focuses the copyrightability analysis on

the commercial success of a character instead of the minimal level of creativity required for originality under copyright law. *See, e.g., Rice*, 330 F.3d at 1175 (noting that the plaintiff's work had only appeared in "one home video that sold approximately 17,000 copies"); *Metro-Goldwyn-Mayer, Inc.*, 900 F. Supp. at 1296-97 (recognizing that the character of James Bond had been developed over the course of sixteen films). Courts have consistently protected widely disseminated characters. *See, e.g., Burroughs*, 519 F. Supp. at 391 (Tarzan); *Air Pirates*, 581 F.2d at 757 (Mickey Mouse and the Disney characters); *Toho*, 33 F. Supp. at 1216 (Godzilla); *Metro-Goldwyn-Mayer*, 900 F. Supp. at 1296-97 (James Bond). This recognition has established a pattern among courts to compare the character at issue to widely popular characters, inappropriately making commercial success a factor in determining copyrightability. *See, e.g., Towle*, 802 F.3d at 1020 (using James Bond, Batman, and Godzilla as characters protected by copyright); *Olson*, 855 F.2d at 1452 ("Van Druten is neither Malvolio nor Mickey Mouse; Brown is neither Sir Toby Belch nor Superman"). This line of reasoning was offered even by the District Court in Petitioner's case, *Daniels v. Walt Disney Co.*, No. 17-CV-4527 PSG (SKX), 2018 WL 3533363, at *4 (C.D. Cal. May 9, 2018) (reasoning that the characters were not sufficiently delineated because their traits did not "give rise to the instant recognition enjoyed by James Bond or Godzilla"), *aff'd*, 952 F.3d 1149 (9th Cir. 2020), *opinion amended and superseded on denial of reh'g*, 958 F.3d 767 (9th Cir. 2020), and *aff'd*, 958 F.3d 767 (9th Cir. 2020), and went largely unchecked by the Ninth Circuit on appeal. *Daniels*, 958 F.3d at 771 (also comparing the characters at issue to popular

characters such as Godzilla and James Bond). Though a subsequent decision by the Ninth Circuit sitting *en banc* stated, “nothing in copyright law suggests that a work deserves stronger legal protection simply because it is more popular or owned by better-funded rights holders,” *Skidmore v. Zeppelin*, 952 F.3d 1051, 1068 (9th Cir.), these decisions imply that only commercially successful characters owned by companies with unlimited resources deserve to be protected.

The purpose of copyright law is not to reward those who have the most money or the marketing and distribution resources; it is to “motivate the creative activity of authors and inventors” by giving those authors and inventors a limited monopoly over the use of their works as an incentive to continue creating. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). Copyright protection is a right in gross, one that vests as soon as an original work is fixed in a tangible medium of expression. 17 U.S.C.A §102(a). The central inquiry in the copyrightability analysis is originality, as defined in *Feist*, 499 U.S. at 345, not the additional, ambiguous and arbitrary requirements that the circuit courts have developed over the years that disproportionately favor large companies. There is no reason for the circuits to set these inconsistent standards, and there is a need for a unity across the circuits in order for creators to know what the law is, and to continue to promote and incentivize creative expression.

CONCLUSION

The persistent lack of consistency across the circuit courts has created a confusing body of copyright law governing characters. The different tests of the circuit courts and their arbitrary rulings reinforce an unpredictable landscape for character copyrightability, one that does not exist for other works of authorship. The notion that a character would be protected in one circuit but not in another is unacceptable. Moreover, the notion that a character that has been seen by many is more deserving of protection than a character that has never been seen by anyone is objectionable. Copyright is a right in gross that rewards creative expression by allowing an author to enjoy a monopoly over their original work for a limited time. The inconsistencies that exist in the circuits deprive independent creators of this right in gross, wasting valuable judicial time and resources on applying and creating different tests when the standard already exists in *Feist*.

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