

In the  
Supreme Court of the United States

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THE MOODSTERS COMPANY,

*Petitioner,*

v.

THE WALT DISNEY COMPANY, ET AL.,

*Respondents.*

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

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BRIEF OF AMICUS CURIAE  
CALIFORNIA SOCIETY OF ENTERTAINMENT LAWYERS  
IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

Pursuant to Supreme Court Rule 37, the CALIFORNIA SOCIETY OF ENTERTAINMENT LAWYERS (“CSEL”) respectfully submits this brief as *Amicus Curiae* in support of Petitioner The Moodsters Company (“Moodsters Co.”).

CSEL is an association comprised of creative professionals and attorneys representing authors, screenwriters, songwriters, and other creators of intellectual property in the entertainment industry. Since submitting its first *amicus curiae* brief in support of the Petitioner in *Petrella v. Metro-Goldwyn-Mayer, Inc., et al.*,<sup>2</sup> CSEL has continued to identify lines of reasoning that lack integrity or violate long-standing precedent before those in a position able to correct them. Ultimately, CSEL seeks to balance the influence of powerful international conglomerates that dominate the entertainment industry with the interests of independent creators and artists. Such an opportunity is presented here.

Due to their limited resources and relative ignorance of the law, independent creators in the entertainment industry are at a great disadvantage relative to

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<sup>1</sup> In accordance with Supreme Court Rule 37.2(a), CSEL has sought the consent of the parties to file this brief. Both counsel for Petitioner and counsel for Respondents granted consent. *Amicus Curiae* states that no counsel for a party authored this brief in whole or in part, and no persons other than *Amicus Curiae* and its counsel made any monetary contribution intended to fund the preparation and submission of this brief.

<sup>2</sup> 572 U.S. 663 (2014).

corporate entities when attempting to protect or enforce their rights relating to their intellectual property. CSEL has come to realize that large, corporate entities (like the defendants in the present case) often seek to deprive creative professionals of the compensation (and credit) to which they are entitled, possibly relying on the fact that many will lack the wherewithal to mount a legal challenge. CSEL seeks to level the playing field by providing informative counseling and advice as to best practices to such individuals, as well as advocating for their rights to those in a position to correct deficiencies in their legal protections.

In its petition for writ of certiorari, The Moodsters Co. has detailed the confusion surrounding the copyrightability of characters, leading to unpredictable results. CSEL fears that this circuit split, vagueness in the law, and heightened requirements for copyrightability of characters which unfairly impact independent creators, will continue to allow big media companies to misappropriate extremely valuable intellectual property with impunity.





## SUMMARY OF THE ARGUMENT

The case before this Court illustrates the confusion in the different circuits with respect to the copyrightability of fictional characters. Not only is there a circuit split as to what is required to protect fictional characters, but the unduly stringent requirements in the Ninth Circuit for protection of characters directly conflicts with *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991) (requiring only originality), and specifically favors the interests of international conglomerates to the detriment of independent creators. Furthermore, the Ninth Circuit failed to apply the “selection and arrangement” test to provide protection for the combination of characters appropriated by Disney in this case. Here, the combination of five fictional characters representing the emotions of happiness, sadness, anger, fear, and love, represent the core commercial value of the works at issue.

This Court has yet to expressly address the copyrightability of characters. As a result, circuit courts have developed and applied standards that run afoul of well-established copyright law. For example, while this Court has held that “originality” governs copyrightability, the heightened standards developed by district courts have made it nearly impossible for such creators to protect their work. The actual test itself favors large companies. The lack of a consistent standard prejudices creator-litigants by subverting the

fundamental goals of copyright law to incentivize creators to create.<sup>3</sup>

This Court should grant the petition for writ of certiorari to determine the proper standard for granting copyright protection of a fictional character. Both public policy and precedent dictate that “originality,” as set forth by this Court in *Feist, supra*, is the proper standard. Further, this case provides an opportunity to create a standard for the copyrightability of characters that is not so unfairly skewed in favor of large corporations. It only requires the application of common sense to appreciate how the Ninth Circuit test favors companies like Disney, and works to the detriment of the plaintiffs/appellants. Allowing the application of heightened standards for copyrightability of characters opens the door for major studios and entertainment conglomerates to misappropriate the creative works of independent creators without liability therefor, as occurred in the present case.

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<sup>3</sup> See *Golan v. Holder*, 132 U.S. 873 at 902 (2012) (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (2012) and *Mazur v. Stein*, 347 U.S. 201 (1954) to highlight that copyright law is intended to promote the public policy of motivating the creativity of authors and other artists).



## ARGUMENT

### A. THE “ORIGINALITY” STANDARD SET FORTH IN *FEIST* GOVERNS COPYRIGHT INFRINGEMENT CASES AND IS THE PROPER STANDARD TO DETERMINE THE COPYRIGHTABILITY OF CHARACTERS.

In order to “Promote the Progress of Science and the Useful Arts,”<sup>4</sup> Congress passed the Copyright Acts of 1909 and 1976 (collectively, the “Copyright Acts” or “Acts”) to incentivize artists to create original works that enrich our culture in exchange for the exclusive right to exploit their intellectual property.<sup>5</sup> Providing artists with the ability to protect and exploit their creations allows copyright to fulfill its purpose and “promote the production of new works”<sup>6</sup> and “stimulate artistic creativity for the general public good.”<sup>7</sup> This can only be achieved if well-established precedent is followed.

To establish copyright infringement, “two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that

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<sup>4</sup> U.S. Const. art I, § 8, cl. 8

<sup>5</sup> Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 Colum. L. Rev. 1865, 1909 (1990).

<sup>6</sup> Benjamin E. Marks, *Copyright Protection, Privacy Rights, and The Fair Use Doctrine: The Post-Salinger Decade Reconsidered*, 72 NYU L Rev. 1377 (1997).

<sup>7</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991). Both elements require analysis of the essential concept of originality, which is “the *sine qua non* of copyright”<sup>8</sup> and is mandated “as a prerequisite for copyright protection”<sup>9</sup> in the Constitution.

The congressional intent behind the Copyright Act’s passing was clarified to solidify the “originality” standard as the overarching “premise of copyright law”<sup>10</sup>:

“The phrase ‘original works or authorship,’ which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present copyright statute. This standard does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them.”<sup>11</sup>

Deviating from the fairly minimal standard correctly espoused in *Feist* results in the inability to accomplish the goals of copyright law while making it nearly impossible for independent creators to protect their works. Furthermore, “a move to withdraw protec-

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<sup>8</sup> *Feist*, 499 U.S. at 345

<sup>9</sup> U.S. Const. Art. I, § 8, cl. 8

<sup>10</sup> *Miller v. Universal City Studio, Inc.*, 650 F.2d 1365 (5th Cir. 1981)

<sup>11</sup> HR Rep No. 1476 at 51; S Rep No. 473 at 50

tion from ‘low originality’ works might actually impair ‘high creative’ output.”<sup>12</sup>

**B. CIRCUIT COURTS ARE SPLIT OVER WHEN COPYRIGHT LAW PROTECTS CHARACTERS AND THIS CONFUSION LEADS TO UNPREDICTABILITY, AND IN THE NINTH CIRCUIT, THE APPLICATION OF UNNECESSARILY HEIGHTENED STANDARDS THAT PREJUDICE INDEPENDENT CREATORS.**

The Ninth Circuit and other courts have routinely extended protection to characters. *See, e.g., Warner Bros., Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 240 (2d Cir. 1983) (finding that “there has been no doubt that copyright protection is available for characters portrayed in cartoons”) *See, also, DC Comics v. Towle*, 802 F.3d 1012, 1019 (9th Cir. 2015) (When addressing the copyrightability of comic book characters, the Ninth Circuit concluded that “we have long held that such characters are afforded copyright protection”). While this holds true, there is a clear split amongst the circuits regarding what standard determines copyrightability.<sup>13</sup>

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<sup>12</sup> *See*, Eva E. Subotnick, *Originality Proxies: Toward a Theory of Copyright and Creativity*, 76 *Brook. L. Rev.* (2011) (discussing the problematic aspects of deviating from the current originality threshold and the extent raising the originality threshold would rule out copyright protection for many works).

<sup>13</sup> *See Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004) (citing *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 674, 681 (2d Cir. 1998); *North Coast Industries v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1035 (9th Cir. 1992); *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 34 n.5 (1st Cir. 2001); and *Publications Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 478 (7th Cir. 1996) to corroborate the statement that the circuits are split).

This Court should resolve the circuit split by deciding what standard governs the copyrightability of fictional characters. The standard set forth by this Court in *Feist* provides that originality governs copyrightability. There is no dispute that literary, graphic, and animated characters are entitled to copyright protection; however, circuit courts have been blatantly ignoring binding Supreme Court precedent and developing their own standards to determine substantial similarity in copyright infringement cases dealing with characters. *See* Pet. For Writ of Certiorari at 19-20 (discussing that abandonment of the low standard in *Feist* and adoption of a more rigorous standard will result in geography deciding the fate for artists' original characters instead of creativity).

The copyrightability of fictional characters was first addressed in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), where Judge Learned Hand provided what is now known as the “sufficient-delineation” test.<sup>14</sup> Judge Hand explained that the more highly developed the character, the greater protection available to said character.<sup>15</sup> Put simply, in order to be considered copyrightable, a character must be suffi-

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<sup>14</sup> *See, e.g., Silverman v. CBS Inc.*, 870 F.2d 40, 50 (2d Cir. 1989) (holding that the “Amos ’n Andy” characters from the television and radio show satisfied the “sufficiently delineated” standard); *Warner Bros., supra*, 720 F.2d at 240 (addressing that *Nichols* “recognized the possibility that a literary character could be sufficiently delineated to support a claim of infringement by a second comer”)

<sup>15</sup> *See Nichols* at 121. (noting that the “sufficient delineation” test can be defined as “[t]he less developed a character is, the less it can be copyrighted; that is the penalty an author must bear for making them too indistinctly”)

ciently delineated from a “stock character.”<sup>16</sup> This standard continues to be applied to copyright infringement cases within the Second Circuit.

Although the originality standard from *Feist* is not followed to the letter to determine the copyrightability of characters within the Seventh Circuit, the standard recognized in *Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004), most closely resembles what is required by that binding precedent.<sup>17</sup> Under *Gaiman*, Judge Posner ruled that “[n]o more is required for a character copyright” than a fictional character that has both a specific name, as well as a specific appearance.<sup>18</sup> If this test had been applied to the case at bar, Petitioners would have clearly been entitled to protection; however, the Ninth Circuit, which has been described as “the most hostile to copyright owners of all the circuits,”<sup>19</sup> applied two stringent analyses in the present case that assured protection was not available to the plaintiff. The Ninth Circuit applies and applied the following test for copyrightability in this case:

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

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<sup>16</sup> *Lewinson v. Henry Holt & Co., LLC*, 659 F.Supp.2d 547 at 567 (S.D.N.Y. 2009).

<sup>17</sup> *See, Feist* at 346 (discussing various cases that have construed the constitutional requirement of “originality” to mean “independent creation plus a modicum of creativity”).

<sup>18</sup> *Id.* at 660

<sup>19</sup> *Petrella v. Metro-Goldwyn-Mayer, Inc., et al.*, 695 F.3d 946, 958 (9th Cir. 2012) *rev'd* 572 U.S. 663 (2014).

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.”<sup>20</sup>

Based upon the foregoing test, the plaintiff failed to make the grade. The Ninth Circuit decided to further analyze The Moodsters characters under the “story being told test,” which the plaintiff failed to satisfy as well since “The Moodsters” is apparently not a “character study.” *Id.* at 774. To say that the foregoing tests cause further confusion and unpredictability within the world of copyright law is an understatement.<sup>21</sup> Also, the foregoing Ninth Circuit test places judges in the role of a literary critic in determining the intrinsic worth of a character, which is not something courts are intended, nor suitable, for.

Thus, this Court should grant the petition for writ of certiorari and resolve this circuit split to decide the proper standard to be applied in copyright cases. The various tests being used in the different circuits evidences the confusion surrounding the copyrightability of characters. Without clear and consistent

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<sup>20</sup> *Daniels v. Walt Disney Co.*, 958 F.3d 767, 771 (9th Cir. 2020) (quoting *DC Comics v. Towle*, 802 F.3d 1012, 1020-21 (9th Cir. 2015)).

<sup>21</sup> *See, e.g., Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F.Supp. 1287, 1295 (C.D. Cal. 1995) (“The law in the Ninth Circuit is unclear as to when visually-depicted characters such as James Bond can be afforded copyright protection.”); *See also*, E. Fulton Brylawski, *Protection of Characters – Sam Spade Revisited*, 22 Bull. Copyright Soc’y U.S.A., 77, 87 (1974) (noting that “the legal doctrines of literary and cartoon characters are rather inconsistent, unclear and quixotic”).



precedent, neither creators nor large companies will have proper notice of when infringement occurs. The differing tests being created and applied by each circuit must be resolved in order to ensure that copyright law remains consistent among all jurisdictions.

### C. THE NINTH CIRCUIT’S IMPOSSIBLE-TO-SATISFY STANDARDS FRUSTRATE THE PURPOSE OF COPYRIGHT LAW.

Copyright law does not and should not discriminate between large and small companies, yet the current test in the Ninth Circuit definitely does. The Ninth Circuit, which perhaps deals with the most copyright disputes of any circuit, has devised and adopted the most difficult standard amongst any circuit court for creators to meet, essentially applying either the analysis set forth in *DC Comics v. Towle*, 802 F.3d 1012, 1020-21 (9th Cir. 2015), or the “story being told” test of *Warner Bros. Pictures Inc. v. Columbia Broad Sys., Inc.*, 216 F.2d 945, 950 (9th Cir. 1954). Both tests are unduly difficult for independent creators to satisfy, as exemplified in the instant case.

Under *Towle*, “[n]ot every comic book, television, or motion picture character is entitled to copyright protection.” *Towle*, 802 F.3d at 1019. In analyzing the Batmobile, the court applied a three-prong test and held that a graphical 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” *Id.*

The first prong of the *Towle* analysis (i.e. “having physical as well as conceptual qualities”) pays homage to the copyright requirement of originality; however,

the second and third prongs are vague. Furthermore, the last two prongs appear to require some level of fame and economic significance; the *Towle* test “grant[s] copyright owners greater ability to control fictional characters with high economic and cultural worth.”<sup>22</sup> If the Ninth Circuit continues to rely on the analysis set forth in *Towle*, creators that have yet to achieve success in the entertainment industry will continue to be pushed aside and stripped of constitutionally-guaranteed rights to their original works.

In the case of *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954), the Ninth Circuit applied an alternative test, known as “the story being told,” which may set an even higher bar than the *Towle* test. In *Warner Bros.*, the court ruled that a character is not copyrightable and is available for use by third parties so long as said character is ruled to be a “chessman in the game of the story” rather than so integral as to “so dominate the story such that it becomes essentially a character study.” *Id.* at 950. This test has been utilized to extend copyright protection to iconic and beloved Hollywood characters, such as the Batmobile in *Towle, supra*, Rocky Balboa in *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431 (C.D. Cal. Apr. 25, 1989), and James Bond in *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Corp.*, 990 F.Supp. 1287, 1296 (C.D. Cal. 1995); however this standard has been recognized as causing “massive confusion” within the world of character jurisprudence as it has created “such a complicated maze that the outcome is neither predictable nor

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<sup>22</sup> Michael D., *DC Comics v. Towle: Protecting Fictional Characters Through Stewardship*. Berkeley Technology Law Journal, Vol. 32, 437-486 (2017).

fair.”<sup>23</sup> As pointed out, the court in the instant case declined to find that plaintiff had satisfied this test because *The Moodsters* was not a “character study.” *Daniels*, 958 F.3d at 774.

This confusion can be seen in the current test for protectability in the Ninth Circuit. Independent creators are vulnerable to infringement because the “story being told” test and the *Towle* test make it nearly impossible for lesser-known creators to enjoy copyright protection. The application of both tests is highly skewed to protecting characters in established franchises, such as James Bond and Mickey Mouse, and unfairly penalizes characters created by independent creative professionals. In *Metro-Goldwyn-Mayer*, the fictional character of James Bond was given copyright protection as a result of the unique and recognizable personality traits that remain the same with every adaptation of the character, despite the change in physical appearance.<sup>24</sup>

**D. THE NINTH CIRCUIT’S FAILURE IN THIS CASE TO PROTECT ORIGINAL SELECTION AND ARRANGEMENT WHEN DETERMINING SUBSTANTIAL SIMILARITY IS INCONSISTENT WITH SUPREME COURT AND NINTH CIRCUIT PRECEDENT.**

Copyright protection extends to the original selection and arrangement of even unprotected elements.

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<sup>23</sup> See, e.g. Brylawski, *supra* note 17, at 87.

<sup>24</sup> See, e.g. *Warner Bros. v. ABS*, 720 F.2d 231, 243 (2d Cir. 1983) (finding that Superman was protectable after taking into consideration both the physical build of Superman, as well as the suit worn by the character, to determine the level of copyright extended to the character)

*See Feist*, 499 U.S. at 345 (finding that the originality standard embodies the idea that “original selection and arrangements can be protected because the bar for originality is low.”). The court emphasized that “if the selection and arrangement are original, these elements of the work are eligible for copyright protection.” *Id.* at 349. The panel’s decision to not extend full copyright protection to the characters in the instant case is erroneous because it neglected to analyze the selection and arrangement of said characters in combination when determining substantial similarity.

The panel’s ruling that “The Moodsters as an ensemble are no more copyrightable than the individual characters”<sup>25</sup> violates both Supreme Court and Ninth Circuit precedent.<sup>26</sup> Rather than treating the five characters separately, selection and arrangement demands that the court analyze these characters in the aggre-

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<sup>25</sup> *Daniels v. The Walt Disney Company, et al.*, 958 F.3d 767 (9th Cir. 2020).

<sup>26</sup> *See, Paramount Pictures Corp. v. Axanar Productions, Inc.*, 121 U.S.P.Q.2D (BNA) 1699 (C.D. Cal. 2017) (film); *L.A. Printex Inds., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 848-52 (9th Cir. 2012) (textile designs); *Swirsky v. Carey*, 376 F. 3d 841, 847 (9th Cir. 2004) (music); *Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002) (TV show); *Fleener v. Trinity Broad.*, 203 F.Supp.2d 1142, 1148-51 (C.D. Cal. 2001) (book); *Miller v. Miramax*, No. CV 99-08526 DDP (AJWx), 2001 U.S. Dist. LEXIS 25967 (C.D. Cal. Sept. 26, 2001) (film); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) (music); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1441-48 (9th Cir. 1994) (computer programs); *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 194, 197 (9th Cir. 1989) (organizer); *Worth v. Selchow & Righter Co.*, 827 F.2d 569, 572-74 (9th Cir. 1987) (trivia fact books); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970) (greeting cards); *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 361 (9th Cir. 1947) (film).

gate. The Court refused to do this. It does not take an expert to see that Disney, after negotiating with the plaintiff, simply appropriated plaintiff's "high concept" creative work in which each of the five major emotions is portrayed as a separate animated character. *Id.*



## CONCLUSION

If this Court does not grant Moodsters Co.'s petition for a writ of certiorari, the significant departure from binding Supreme Court precedent will continue to dominate the landscape. Exclusive rights to their own intellectual property are considered a constitutional right for creators, and the Ninth Circuit's impossible-to-satisfy standards subvert the intent and purpose of copyright law. Granting review will enable this Court to set a precedent that will not discriminate against less established creators and will provide consistency and predictability.

For the reasons set forth above, *Amicus Curiae* joins Petitioners in respectfully requesting that this Court grant the petition for the writ of certiorari.

Respectfully submitted,

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