

No. 20-132

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

**REPLY BRIEF FOR THE PETITIONER**

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November 24, 2020

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## INTRODUCTION

Disney's opposition confirms that character copyrightability is an issue of first impression for this Court. Without this Court's guidance, the lower courts have ignored the originality standard that Congress adopted in the Copyright Act and this Court articulated in *Feist*. In place, the lower courts have struggled to articulate a consistent standard, so that "a character can be protected in one circuit, but not in the other." SLS Amici at 3. The only cohesion across circuits is that they all apply heightened standards for characters inapplicable to any other artistic creation. That the Ninth Circuit, home to Hollywood and the most copyright cases, applies the most hostile standard to artists heightens the need for this Court's review now.

Disney's opposition also confirms that "there is some uncertainty among the circuits whether to label copyrightability a factual, legal or mixed question." BIO at 2. Contrary to Disney's nonchalance over this split (BIO at 27), *who* decides copyrightability can be just as important as *what* they decide in copyright cases. If not, then no dispute would exist in *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179 (Fed. Cir. 2018), *cert. granted*, 140 S. Ct. 520 (2019). Or the Ninth Circuit would have decided whether an inanimate car qualifies for copyright protection in *Halicki Films, LLC v. Sanderson Sales & Mktg.*, rather than remand for a jury to ultimately decide that question. 547 F.3d 1213 (9th Cir. 2008). Yet those disputes exist precisely because of the uncertainty that Disney concedes. Nor does Disney contest that the outcome of this uncertain issue

implicates the Seventh Amendment under *Feltner v. Columbia Pictures Tv., Inc.*, 523 U.S. 340 (1998).

That Disney tries to defend the lower courts' "fact-bound determination" on a Rule 12(b)(6) motion only underscores why this case is an ideal vehicle for the Court's review. The Moodsters Co.'s complaint detailed why and how no other characters expressed the unique combination of traits and characteristics that make the Moodsters so original, and identified a leading expert to support those allegations. It detailed evidence of focus-group results. It highlighted prestigious awards that celebrate these expressive characters and refute Disney's attorney argument that the characters only reflect generic and abstract ideas. Yet the lower courts treated the issue as one of pure law that it could decide without any consideration of or deference to these allegations. This Court's review of either question will compel a different outcome. No better vehicle is coming.

## ARGUMENT

**I. The split between this Court's originality standard in *Feist* and the various standards from the circuits is real.**

**A. Disney concedes that the heightened standard for a character copyright differs from the originality standard for every other artistic work.**

Both Congress and this Court established originality as the standard for copyrighted works. Congress adopted an originality standard in the Copyright Act. 17 U.S.C. § 102(a) (establishing

copyrights for “*original* works of authorship” (emphasis added). The Court endorsed that standard as a “constitutional requirement” in *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.* 499 U.S. 340, 346 (1991). This “low standard” applies to every copyrightable work—from phone books<sup>1</sup> to cheerleader uniforms<sup>2</sup> to seven-note sequences in a song.<sup>3</sup> Disney points to nothing in the Copyright Act or this Court’s precedents that supports a special, heightened standard *only* for character copyrights. Even Disney’s endorsed “leading treatise” (BIO at 2) confirms that originality should govern fictional characters as well: “The better approach is that literary characters should be judged according to *the same standards of originality* as all other works of authorship.” William F. Patry, 2 *Patry on Copyright* § 3:164 (2020) (emphasis added).

The heightened standard that Disney wants—the “rigorous standard” employed below (App. 38a)—is hostile to artists. This enmity is especially stark in the Ninth Circuit where judges brand the court as “the Court of Appeals for the Hollywood Circuit,” *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1521 (9th Cir. 1993) (Kozinski, J., dissenting), and “the most hostile to copyright owners of all the circuits.” *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 695 F.3d 946, 958 (9th Cir. 2012) (Fletcher, J., concurring), *rev’d*, 572 U.S. 663 (2014). The court’s heightened standard for character copyrights is another example that “favors large companies,” as amici point out. CSEL Br. at 3. This Court’s review is

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<sup>1</sup> *Feist*, 499 U.S. at 363-64.

<sup>2</sup> *Star Athletica LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1012 n.1 (2017).

<sup>3</sup> *Swirsky v. Carey*, 376 F.3d 841, 851-52 (9th Cir. 2004).

necessary to vindicate the essential goal of copyright: “to stimulate artistic creativity for the general public good.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

Disney’s vague suggestion of some parade of horrors does not justify a heightened standard for character copyrights. BIO at 14. Every copyright claim has two elements: (1) valid copyright, and (2) copying. *Feist*, 499 U.S. at 361. This petition only involves the first. And Disney offers no argument that the originality standard for a valid copyright that governs every other artistic work chills any other type of commercial work. Indeed, the artist still needs to prove that the defendant copied her work. Yet if left to stand, the result is any company may copy the Moodsters characters verbatim without recourse under the law.

Disney mischaracterizes the short reference to characters in the Register’s Report it cites. BIO at 13-14. Copyright law protects all original components of any statutorily protected work. The Register merely recognized that it would be “unnecessary and misleading” to identify fictional characters as “a separate class of copyrightable work” because Copyright law already protected them. U.S. Copyright Office, Supplementary Register’s Report on the General Revision of the U.S. Copyright Law 13-14 (H. Comm. Print, 89th Cong., May 1965), available at <https://tinyurl.com/y384d6w6>. Once again, Disney’s preferred treatise recognizes the same: that “[c]haracters are not enumerated in the statute as a separate class of copyrightable work” is “a purely administrative matter with no effect on copyrightability.” 2 *Patry on Copyright* § 3:164.

Disney's suggestion that Congress sought to limit character copyrights is false.

**B. Disney's efforts to harmonize the circuit courts based on *Nichols* fail.**

The Second Circuit's *Nichols* decision is not the seminal case that Disney contends. *Nichols* includes only a vague sliding-scale conclusion that "the less developed the characters, the less they can be copyrighted[.]" *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930). The Ninth Circuit did not adopt *Nichols* when it instead chose a "story being told" test for literary characters in *Warner Bros. Pictures v. CBS*, 216 F.2d 945, 950 (9th Cir. 1954). When the Ninth Circuit addressed animated characters in *Walt Disney Prods. v. Air Pirates* the court made only one passing reference to *Nichols* immaterial to the holding. 581 F.2d 751 (9th Cir. 1978). The court did not even mention *Nichols* when it articulated its three-prong test in *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015). The three-prong test adds two elements beyond consideration of "sufficient delineation." *Id.* at 1021. The Seventh Circuit only referenced *Nichols* fleetingly in discussing stock characters, and then emphasized that graphical characters receive more protection than the Ninth Circuit's "wrong" decision in *Warner Bros. Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004). If *Nichols* was so seminal, then the parties would have cited it at least one time in the ten briefs below. Yet *Nichols* made its first appearance in this Court.

If "striking coherence" existed across this body of law (BIO 12), then district courts would not struggle to apply consistent outcomes. Yet district courts

reach wildly “incoherent” conclusions, as amici notes (SLS Amici at 3):

- “Jim Brockmire,” a fictitious broadcaster was found protected from merely a 4-minute online skit in *Azaria v Bierko*, No. 12-9732, 2014 U.S. Dist. LEXIS 190372, at \*11-13 (C.D. Cal. Feb. 21, 2014).
- A person wearing a dollar-bill costume named “Bill” in a regional banking commercial was found copyrighted in *JB Oxford & Co. v. First Tenn. Bank Nat’l Ass’n*, 427 F. Supp. 2d 784, 799-800 (M.D. Tenn. 2006).
- The cartoon character “Betty” was found copyrighted based on appearance alone even before anyone knew her by the now-famous name “Betty Boop” in *Fleischer Studios, Inc. v. A.V.E.L.A, Inc.*, 772 F. Supp. 2d 1135, 1147 (C.D. Cal. 2008), *aff’d-in-part*, 654 F.3d 958 (9th Cir. 2011).

None of these courts applied the lower court’s “rigorous standard” that only characters “on par with . . . iconic characters” like “Sherlock Holmes, Tarzan, Superman, and James Bond” can surpass. App. 38a-39a, 61a-63a.

The law on character copyrightability needs clarity. To uphold “Congress’ paramount goal . . . of enhancing predictability and certainty of copyright ownership,” *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989), “it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible.” *Fogerty v. Fantasy, Inc.*, 510

U.S. 517, 527 (1994). This goal is lost without this Court's review here.

**C. Neither the Copyright Act nor any coherent precedent supports Disney's arguments that the persistence of a character over time affects copyrightability.**

The Moodsters Co.'s petition showed that a copyright exists at "creation" when an original work is fixed in a tangible medium. Pet. at 20. Yet Disney's response includes pages of its attorneys' perceived differences over authorized derivative versions of the Moodsters characters arising after creation of the original characters. Disney offers no basis in the Copyright Act to support its argument that consideration of events after fixation is "inherent." BIO at 17 n.4. This omission underscores the error in the Ninth Circuit's heightened standard here.

No other circuit has supported Disney's argument or the Ninth Circuit's "persistence" standard. In fact, some courts within the Ninth Circuit interpret the law differently: "that his character has not been delineated over time is inconsequential." *Bach v. Forever Living Prods. U.S., Inc.*, 473 F. Supp. 2d 1127, 1136 (W.D. Wash. 2007). The Seventh Circuit's decision in *Klinger v. Conan Doyle Estate, Ltd.* rejects the premise of Disney's argument as well. 755 F.3d 496 (7th Cir. 2014). The court held that later, refined versions of Sherlock Holmes did not prevent expiration of the copyright on the original character. *Id.* at 503. Put differently, if characters only obtain copyright status over time, then the copyright term would only start—not from creation as Congress

dictated in the Copyright Act—at some indefinite time in the future. The Seventh Circuit rejected that argument in *Klinger*, and so too should this Court reject the Ninth Circuit’s application of Disney’s argument now.

**II. Disney concedes that circuit courts are split as to the important question of whether copyrightability is a legal, factual, or mixed question.**

Disney admits that “there is some uncertainty among the circuits whether to label copyrightability a factual, legal or mixed question[.]” BIO at 2. Indeed, this Court “has not addressed whether copyrightability is a pure question of law or a mixed question of law and fact, or whether, if it is a mixed question of law and fact, the factual components of that inquiry are for the court, rather than the jury.” *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1353 n.3 (Fed. Cir. 2014). Like the first question presented, the second question is an important issue for the Court to resolve.

Disney’s glib response that the answer to that question “makes little apparent difference in practice” is wrong. BIO at 27. Consider *Oracle* where the Federal Circuit’s de novo review on fair use led to results contrary to the jury’s verdict. See 886 F.3d at 1183-1211. Also consider the Ninth Circuit’s holding in *Halicki* that character copyrightability of a lifeless car in *Gone in 60 Seconds* that does not speak or emote was a “fact-intensive” question improper for the court’s resolution—even on a full summary judgment record, and even with the movie as evidence. 547 F.3d at 1225. The decision over

copyrightability was ultimately for the jury. CA9.R.Excerpts.26, 38-41.<sup>4</sup> Thus, who decides the question of copyrightability not only matters, but raises constitutional considerations under *Feltner*—as Moodsters Co. showed and Disney does not dispute.

This Court’s precedents in trademark and patent law confirms this conclusion, and refutes Disney’s reliance on circuit courts on those subjects. BIO at 30-31. In *Hana Fin., Inc. v. Hana Bank*, this Court addressed whether the trademark defense of “tacking” was a question for the jury or the court. 574 U.S. 418 (2015). This Court concluded that tacking was a mixed question of law and fact, and reiterated that a jury has the “constitutional responsibility” to “apply the law to those facts and draw the ultimate conclusion.” *Id.* at 424 (quoting *United States v. Gaudin*, 515 U.S. 506, 514 (1995)). The same practice holds true in patent cases as juries routinely decide patent validity based on the underlying factual inquires this Court identified in *Graham v. John Deere Co.*, 383 U.S. 1 (1966). Disney offers no precedent from this Court to the contrary.

It does not follow—as Disney’s strawman argument suggests—that the Moodsters Co.’s argument is that “a court can never decide” copyrightability. BIO at 28. This Court rejected

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<sup>4</sup> Neither lower court addressed *Halicki*. See App. 18a-68a. In its petition for rehearing or en banc review, Moodsters Co. focused on this error along with the Ninth Circuit’s failure to apply the originality standard in *Feist*. No law required Moodsters Co. to cite all the precedents of other circuits that conflicted with the panel’s decision as well.

Disney’s superficial argument in *Hana*. 574 U.S. at 423. Nothing about the petition’s second question seeks to abolish Rule 12 or 56. Rather, the question here is much like the ones this Court addressed in *Hana* and in *Markman v. Westview Instruments, Inc.*: should a determination be an issue of law for a court to decide, an issue of fact normally appropriately decided by a jury, or if considered a mixed question who should make the ultimate determination? In *Hana*, the fact-based judgment over the impression to consumers fell “comfortably within the ken of a jury.” 574 U.S. at 422. In contrast, claim construction of a patent is treated as a question of law because it is “one of those things that judges often do ... better[.]” *Markman*, 517 U.S. 370, 388 (1996) (comparing claim construction to interpretation of written instruments); *see also Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 325 (2015). The assessment of artistic works is uniquely in the province of the jury. *See, e.g., Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

### **III. This case is a perfect vehicle for resolving either or both questions presented.**

The panel decision is not a “master class” in anything. The panel did not mention the standard of review. *See* 1a-17a. Nor did the panel reference plausibility under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). The panel did not apply that standard—in letter or spirit—to the “fact-bound determination” that Disney now seeks to defend. BIO at 1. The only reasonable conclusion is that the panel decided copyrightability—under its heightened standard—as a pure issue of law. That is why this

case is so ideal for the Court to review: the outcome on either question presented will affect the decision below. And a clear rule from this Court would eliminate the confusion and uncertainty from the lower court decisions.

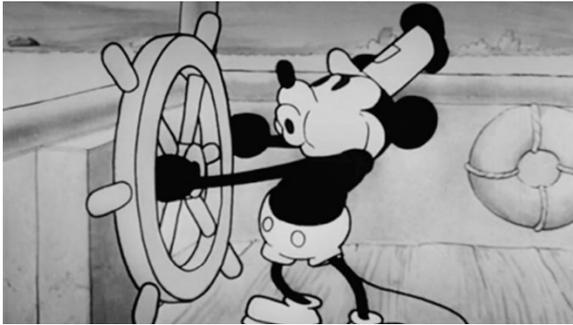
The Moodsters Co.'s 87-page complaint with meticulous evidentiary foundation defies Disney's contention that the Moodsters characters are "nothing but nameless, formless bipeds that are nothing more than anthropomorphized, color-coded emotions." BIO at 27. Indeed, Disney must ignore Moodsters Co.'s detailed allegations about creatively selected (from many possible choices) and arranged combinations of traits and characteristics of the Moodsters characters—individually and as an ensemble—had never been done before in past works. CA9.R.Excerpts.99-157.<sup>5</sup> Disney hides from the Moodsters Co.'s preeminent art historian who the complaint stated would testify to these allegations if given the chance. *Id.*103-104,108-109. Nor can Disney account for the concrete focus-group results of Yale University's Center for Emotional Intelligence about the Moodsters characters. *Id.*102-103. If the Moodsters were so "generic" and "abstract," as Disney contends, then why did they win so many awards that praised the characters' uniqueness—ranging from the Parents' Choice Foundation to Dr. Toy's 100 Best—and why would the media celebrate these characters as they did. *Id.*105-106. The lower

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<sup>5</sup> By definition, characters may not be stock or generic—on a Rule 12(b)(6) motion no less—if no similar characters existed before. *Cf. Oracle*, 750 F.3d at 1364 ("Google failed to make a sufficient factual record to support its contention that the groupings and code chosen [by Oracle's creators] . . . were either commonplace or essential to the idea being expressed.").

courts did not merely “miss[] some detail about the Moodsters characters[.]” BIO at 32. Like Disney, the lower courts ignored *all* the factual allegations above when they imposed their personal judgments about the Moodsters as a matter of law without even allowing evidence.

Disney’s arguments also conflict with its characters. For instance, Disney’s focus on character names is unusual since its most famous character appeared in its mainstream debut as a nameless mouse in *Steamboat Willie*:<sup>6</sup>



And Disney’s contention that a character that once donned “Sherlock Holmes attire” would somehow affect copyrightability is surprising given Disney’s application of the same:<sup>7</sup>

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<sup>6</sup> *Steamboat Willie* (Walt Disney Co. 1928), available at <https://video.disney.com/watch/steamboat-willie-4ea9de5180b375f7476ada2c>.

<sup>7</sup> Walt Disney Co., *Detective Mickey Mouse* (Golden Books 1985).



The double standards are endless. Disney does not even dispute that it manipulated copyright law to extend the term over its monopoly on its anthropomorphic mouse. *See Pet.* at 32. Or that its own advocacy in *Walt Disney v. Air Pirates*—unaddressed in Disney’s brief—secured a more lenient standard for animated characters than the Ninth Circuit had earlier applied. 581 F.2d at 755. At base, Disney has gerrymandered copyright law to protect its characters while preserving its ability to infringe others. No better set of parties will present these issues for the Court’s review.

## CONCLUSION

The petition should be granted.

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