No. 21-711

IN THE

Supreme Court of the United States

MARKHAM CONCEPTS, INC. ET AL.,
Petitioners,

v.

HASBRO, INC. ET AL.,
Respondents.

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

BRIEF OF WILLIAM MORRIS ENDEAVOR ENTERTAINMENT LLC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

Amicus is the longest-running talent agency in America. Originally formed in 1898 in New York City, William Morris Agency has historically represented artists in silent films, vaudeville, radio, and television, including Charlie Chaplin, Marilyn Monroe, Frank Sinatra, Elvis Presley, and the Rolling Stones. In 2009, William Morris Agency merged with Endeavor Talent Agency in 2009 (to become William Morris Endeavor Entertainment LLC, or "WME"). In 2014, WME acquired IMG Worldwide, and it has several offices around the world.

Today, WME represents an array of creative professionals spanning music, film, and beyond, including Garth Brooks, Angela Lansbury, and Whoopi Goldberg, as well as up-and-coming artists. WME also represents the estates of deceased writers and artists, such as Tom Clancy, Andy Kaufman, and The Notorious B.I.G. In 2016, *Fortune* magazine named WME one of the "25 Most Important Private Companies" by *Fortune* magazine, and in 2019, the Billboard Live Music Awards designated it "Agency of the Year."

Amicus has an interest in the administration of copyright law. Copyright law impacts both *amicus*' client base and its core business: *Amicus* serves as an agent for hundreds of clients who have created works

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus* or its counsel made such a contribution. Counsel of record for all parties received timely notice of intent to file this brief and gave consent to its filing.

of art and other copyrightable materials in a wide range of media and markets. *Amicus* often derives its revenues from a percentage of a creator's earnings, including copyright-related licenses and royalties.

Amicus has a particular interest in the operation of the Copyright Act of 1909. WME represents many artists, as well as estates and heirs of artists, who created works covered by that Act and who are squarely affected by the interpretation of its "work-for-hire" provision. *Amicus* is also intimately familiar with the practical and economic realities that inform how artists, actors, and other creators estimate and negotiate either employment or independent contractor agreements.

William Morris has previously offered this Court its perspective on the "unique nature of the labor market for entertainment and media talent." *See* Brief *Amicus Curiae* of the William Morris Agency in Support of Respondent, *Preston v. Ferrer*, 2007 WL 4298480 at *14 (U.S. 2007). In this case too, *amicus* respectfully shares its experience and its viewpoint about the importance of the question presented.

SUMMARY OF ARGUMENT

The Copyright Act of 1909 was the predominant regime for copyrightable materials for seven decades, including the "golden age" of Hollywood and the heyday of rock and roll. And although at first glance, it might seem to have little relevance to today's era of streaming movies and updated intellectual property frameworks, that impression is mistaken.

Through a series of Congressional extensions, the protections of the 1909 Act are still very much with us

today. A script written and copyrighted in 1975, for example, will remain protected by the 1909 Act until the year 2070. Thus, for many years to come, creators and courts will continue to face the question of whether a party who commissioned a work from an independent contractor qualifies as the creator's "employer" under the 1909 Act's work-for-hire provision. As a result, the split in the Courts of Appeals and the inconsistency between some of those courts' interpretations of the 1909 Act and this Court's definitive interpretation of the work-for-hire provision in the Copyright Act of 1976, *see Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740-49 (1989), will continue to complicate and confuse this area of law.

The interpretation of the 1909 Act's work-for-hire provision is also economically consequential – both for creators and for the talent agent industry. The 1909 Act offers creators a statutory right to terminate a current copyright (and reassert their own rights), "other than a copyright in a work made for hire." 17 U.S.C. § 304(c). In *amicus*' experience representing hundreds of clients across the literary, entertainment, and other artistic spheres, this termination right can materially affect commercial opportunities and negotiation dynamics. Simply put, these rights can accrue significant value for creators, their estates, and their agents.

Finally, *amicus* offers some practical perspective about why freelance creators and independent contractors should not categorically be deemed employees of a party that originally commissioned the work under the 1909 Act. *Amicus*' clients often sell or license their intellectual property or temporarily loan out their services, without joining a production studio or publisher as a full-time employee. It is common

industry practice for creators to collaborate with numerous parties over the course of any given year, without the traditional indicia of an employer-employee relationship. The legislative record of the 1909 Act acknowledges this reality.

Amicus respectfully urges this Court to grant certiorari in this case because of the significant ramifications that this case could have for creative professionals and their agents. Indeed, this Court has already recognized that the "contours of the work for hire doctrine" are of "profound significance for freelance creators—including artists, writers, photographers, designers, composers, and computer programmers—and for the publishing, advertising, music, and other industries which commission their works." *Reid*, 490 U.S. at 737.

ARGUMENT

I. THIS CASE RAISES AN IMPORTANT ISSUE FOR CREATIVE PROFESSIONALS AND THEIR AGENTS NATIONWIDE.

As this Court acknowledged in *Reid*, the extent of ownership rights in a creative work "not only [determines] the initial ownership of its copyright, but also the copyright's duration, and the owners' renewal rights, termination rights, and right to import certain goods bearing the copyright." *Id.* at 737 (citations omitted)." *Reid* addressed the Copyright Act of 1976, but the contours of the work-for-hire doctrine under the 1909 Act are just as significant, due to its enduring application.

A. The 1909 Act Will Apply to Creative Works Well Into the Second Half of This Century.

Under the Copyright Act of 1909, as amended, a creative work published in 1975 will be subject to the 1909 Act's protection until the year 2070. As originally enacted, the Copyright Act of 1909 provided 28 years of protection to applicable works, with the possibility of renewal for 28 more years. 1909 Act § 23, 35 Stat. at 1080. But Congress extended these protections in 1976 and 1998, expanding the renewal term to 67 years in many circumstances. *See generally* 1976 Act, 90 Stat. at 2573; Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998); 17 U.S.C. § 304(a).

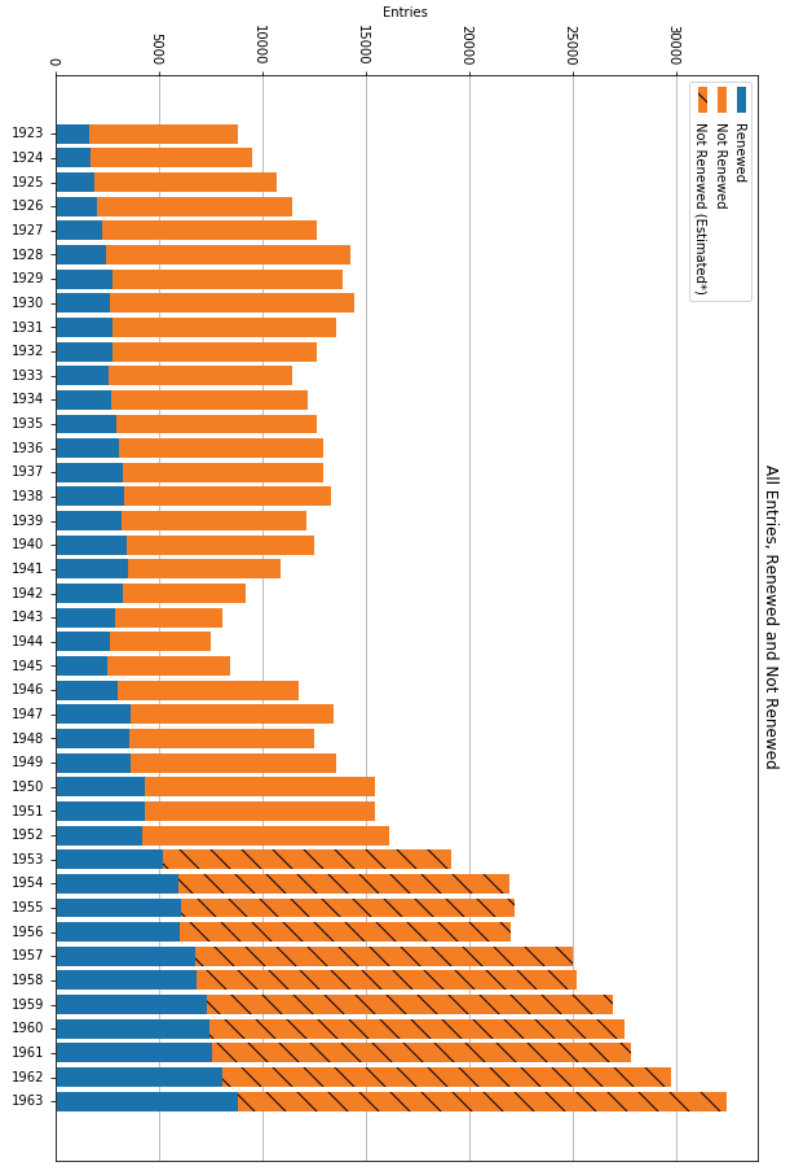
Moreover, throughout the entertainment industry, copyrighted materials from the pre-1976 era remain in high demand. The period between 1909 and 1976 was a particularly prolific and culturally significant period for American film, music, and literature, including the "Golden Age of Hollywood," and the original heyday of rock and roll. *See, e.g.*, April Edlin, *The Golden Age of Hollywood: 1930s - 1940s*, University of North Carolina at Chapel Hill (Nov. 2003), https://ils.unc.edu/dpr/path/goldenhollywood/; Robert Palmer, *The 50s: A Decade of Music That Changed the World*, Rolling Stone (April 19, 1990), https://www.rollingstone.com/feature/the-50s-a-decade-of-music-that-changed-the-world-229924/; Pet. 30-31 (summarizing prominent written works from the pre-1976 period).

Many works created in this period have intrinsic market value. Disney's iconic Mickey Mouse character, for example, created by Walt Disney in 1928, is still subject to the Copyright Act of 1909, and Disney continues to bring claims under the Act and its 1998

amendments. *See e.g.*, Brooks Barnes, *Disney Sues to Keep Complete Rights to Marvel Characters*, N.Y. Times (Sept. 24, 2021), https://nyti.ms/3C2i4zu. *Compare* Steve Schlackman, *How Mickey Mouse Keeps Changing Copyright Law*, Art Business Journal (Feb. 15, 2014), *with* Michael Rosen, *As copyrighted works (re)enter the public domain, is the end of Mickey nigh?*, AEIdeas (Jan. 31, 2019).

Many older creative works also have the potential for sequels and "reboots." *See* Matthew Garrahan, *The rise and rise of the Hollywood film franchise*, Financial Times (Dec. 12, 2014), https://www.ft.com/content/192f583e-7fa7-11e4-adff-00144feabdc0 ("Hollywood studios love franchise films because they have built-in awareness with audiences."); Amanda Ann Klein and R. Barton Palmer, *From "Battlestar" to "Star Wars": Why There Are So Many Reboots, Remakes, Spinoffs, and Sequels*, The Atlantic (March 20, 2016), https://www.theatlantic.com/entertainment/archive/2016/03/cycles-sequels-spinoffs-remakes-and-reboots/474411/.

Unsurprisingly, given the ongoing economic value of such creative works, creators and owners of copyright assert their rights under the 1909 Act at a growing pace. An analysis of copyright registrations and renewals demonstrates a steady increase in such activity since World War II:



Sean Redmond, *U.S. Copyright History 1923–1964*, New York Public Library (May 31, 2019), https://www.nypl.org/blog/2019/05/31/us-copyright-history-1923-1964#toc_9.

This body of creative works will surely continue to be subject to litigation and attempted termination of their respective copyrights. Certainty and uniformity in the law are thus essential. *Cf. Reid*, 490 U.S. at 740 ("Establishment of a federal rule of agency, rather than reliance on state agency law, is particularly appropriate here given the Act's express objective of creating national, uniform copyright law by broadly pre-empting state statutory and common-law copyright regulation.").

Petitioner has identified a notable circuit split: The First, Second, and Ninth Circuits have adopted a test whereby a creative work is a work for hire if it was produced by independent contractors at the "instance and expense" of a commissioning party. *See* Pet. 23 (collecting cases). By contrast, the Eleventh Circuit has held that its prior precedent establishing an instance-and-expense test did not survive this Court's ruling in *Reid*. *See M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486 (11th Cir. 1990).

That lack of uniformity has significant practical consequences. If the circuit split is allowed to stand, for example, *amicus* will have to advise clients in Second Circuit to structure certain negotiations and copyright deals in light of the "instance and expense" test. But for clients in the Eleventh Circuit, *amicus* would disregard the "instance and expense" test and advise creative professionals of their more expansive copyright protections. And of course it is not always possible to predict where litigation will be initiated, creating significant uncertainty about the governing legal framework for many negotiations. For a national industry managing scores of artists and artforms, this patchwork is problematic.

There will also be inconsistencies in the treatment of related works if this Court does not address the

mismatch between some lower courts' interpretation of the 1909 Act and this Court's definitive construction of the 1976 Act in *Reid*. The original *Star Wars* movie (*Episode IV – A New Hope*, 1977), covered by the 1909 Act, would be subject to one interpretation of the work-for-hire doctrine until at least 2070. But subsequent *Star Wars* sequels, covered by the 1976 Act, would be subject to an entirely different interpretation. In the years to come, this mismatch could lead to commercial and administrative complications for talent agencies such as *amicus*.

B. The Work-For-Hire Doctrine Is Economically Consequential for Creators and the Agencies that Represent Them.

Whether a party that commissions a work from an independent contractor is classified as the creator's "employer" (under the 1909 Act's work-for-hire provision) has significant effects on creators' legal rights and economic opportunities. The classification determines whether creators can exercise their termination rights, which are "designed to enable creators to renegotiate the terms of the publishing deals they concluded before the true value of their work was known." Brian Caplan, *Navigating US Copyright Termination Rights*, World International Property Organization Magazine (Aug. 2020), https://www.wipo.int/wipo_magazine/en/2012/04/article_0005.html.

In *amicus*' experience representing a wide range of creators over multiple decades, these termination rights are very important to the economics and structure of contracts and licensing agreements. Namely, these rights empower freelance artists to renegotiate the price of licensing a given piece of content in light of market demand, competing bids,

and other information that might have been unforeseeable at the time of the original creation of the work.

Amicus also has a growing practice representing the estates and heirs of creators and has seen firsthand how the application of the Copyright Act of 1909 materially shapes business decisions and profitability long after a work of art was originally produced. When the underlying creator is no longer alive, talent agencies like *amicus* must focus on licensing and expanding the value of legacy intellectual property.

This can be particularly consequential for artists who are little-known for most of their career, but become famous near the end of or after their life. One example is the American author Betty Smith, who wrote *A Tree Grows in Brooklyn*, published in 1943. Ms. Smith was not famous or particularly well-known when she authored the book, which was originally rejected by several publishers. But over time, the book became critically acclaimed and was the basis for film, musical, television, radio, and comic book adaptations. Years after her death, WME worked with Ms. Smith's estate to exercise her termination rights and secure a fair and sizeable renewal contract.

Additionally, these rights and renegotiations squarely impact the revenue of talent agencies, which serve as a legal fiduciary to creators and derive significant revenue from copyright licenses (as a percentage of a creator's earnings). *See, e.g.*, Talent Agencies Act, Cal. Lab. Code § 1700 et seq.; *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 977 (1997) ("an agency relationship is a fiduciary one, obliging the agent to act in the interest of the principal."). *See generally* Christiane Cargill Kinney, *Managers, Agents & Attorneys*, The Practical Guidance Journal (Nov. 25, 2015),

https://www.lexisnexis.com/lexis-practical-guidance/the-journal/b/pa/posts/managers-agents-amp-attorneys (summarizing various roles in the entertainment industry).

All told, the "value added by the core copyright industries [e.g., books, newspapers, movies, recorded music, television, and software] to U.S. GDP reached more than $1.3 trillion dollars [], accounting for 6.85% of the U.S. economy" in 2017. Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2018 Report*, Intellectual Property Alliance at 3 (2018), https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf. These industries "employed nearly 5.7 million workers in 2017, accounting for 3.85% of the entire U.S. workforce, and 4.54% of total private employment in the United States." *Id.* The economic significance of the 1909 Act should not be underestimated.

II. FREELANCE CREATORS ARE NOT TRADITIONAL EMPLOYEES AND CONGRESS DID NOT INTEND TO INCLUDE THEM IN THE WORK-FOR-HIRE DOCTRINE.

In *amicus*' experience representing musicians, writers, actors, and other creative professionals, they often have work contracts that make them very different from employees in the traditional legal sense.

Within the film and television industries, for example, writers and studios typically choose among several different types of flexible contractual relationships:

- Acquisition: Rather than hiring a writer as a full-time employee, sometimes a studio will simply acquire his or her written material and its copyright, and may then hire another writer to further refine the written work.

- Option: Sometimes a studio will acquire an option to obtain the right to adapt the writer's work, but the writer provides limited (if any) services for the studio and retains the primary copyright.
- Loan-out: Often, writers form special corporate entities known as "loan-out" companies. The writer's loan-out company employs the writer (and other staff) and, in turn, "loans" the writer's services to a studio for a particular project for a fee.[2]
- Freelance: Individual writers sometimes take on short assignments and are paid on a per-project basis.
- Employment: Occasionally, a studio will enter into a formal employment relationship with an individual writer as part of a longer-term full-time position, separate from a loan-out or freelance arrangement.

Several of these contractual structures do not bear the hallmarks of a traditional employment relationships, as they lack behavioral control, financial control, benefits, and/or permanency. *See, e.g.*, Internal Revenue Service, *Understanding Employee vs. Contractor Designation*, FS-2017-09 (July 20, 2017), https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation. Moreover, in practice, *amicus*' clients often work with many different studios, publishers, and labels every

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[2] *See generally* American Institute of Certified Public Accountants, et al., *Guide to planning for performing and creative artists; PFP library* at 19-29 (1997) (summarizing loan-out corporations), https://egrove.olemiss.edu/cgi/viewcontent.cgi?article=1055&context=aicpa_guides.

year, sometimes on short-term fixed-fee projects. They also often pitch the same piece of creative work to multiple outlets without having a definite buyer ("on spec"), and cover their own costs and salaries along the way.

In passing the 1909 Act, these important differences between freelance creators and employees were well understood, and Congress did not intend to treat them identically. "[T]he "right belonging to that artist who is employed for the purpose of making a work of art so many hours a day . . . should be very different from the right that is held by the independent artist." Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 Yale J.L. & Humans. 1, 65 (2003) (quoting *Stenographic Report of the Proceedings of the Librarian's Conf. on Copyright*, 2d Sess. (Nov. 1-4, 1905), *republished in* 2 *Legislative History of the 1909 Copyright Act* at 188 (E. Fulton Brylawski & Abe Goldman eds., 1976)). *See also* Borge Varmer, 86th Cong., *Copyright Law Revision Study No. 13: Works Made for Hire and on Commission* at 130 (Comm. Print 1960) (1958) (a study contemporaneous with the 1909 Act highlighted "that section 26 refers only to works made by salaried employees in the regular course of their employment"); *The House Report on the Copyright Act of 1909* at 1 (Feb. 1909) ("[Copyright law as it existed before 1909] should be revised so that protection to the honest literary worker, artist, or designer shall be simple and certain.") (adopted by the Senate as S. Rep. No. 1108, 60th Cong., 2d Sess. (1909)), https://ipmall.law.unh.edu/sites/default/files/hosted_resources/lipa/copyrights/The%20House%20Report%201%20on%20the%20Copyright%20Act%20of

%201909.pdf.[3] This history aligns with the wisdom of *Reid* and the plain text similarities between the 1976 and 1909 Acts.

In *Reid*, this Court recognized that when Congress enacted the Copyright Act of 1976, it acknowledged and addressed these differences. *See, e.g.*, *Reid*, 490 U.S. at 743 ("Despite the lengthy history of negotiation and compromise which ultimately produced the [1976] Act, two things remained constant. First, interested parties and Congress at all times viewed works by employees and commissioned works by independent contractors as separate entities. Second, in using the term 'employee,' the parties and Congress meant to refer to a hired party in a conventional employment relationship. These factors militate in favor of the reading we have found appropriate."). It is time for this Court to squarely determine whether Congress did the same in the essentially identical 1909 Act.

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[3] *See also* Catherine L. Fisk, *Hollywood Writers and the Gig Economy*, 2017 U. Chi. L. Forum 177, 184-85 (2017) ("[Historically,] studios also adopted contradictory positions with respect to writers' legal status as labor. While resisting giving writers creative control and insisting writers were employees for purposes of the copyright work-for-hire doctrine, studios opposed writers' efforts to bargain collectively by arguing to the National Labor Relations Board (NLRB) that the writers were not employees eligible to unionize.").

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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