NO. 22-_____

In the Supreme Court of the United States

GARY FRISBY P/K/A G-MONEY,

Petitioner,

v.

SONY MUSIC ENTERTAINMENT, D/B/A RCA RECORDS, A DELAWARE GENERAL PARTNERSHIP; BRYSON TILLER, AN INDIVIDUAL; AND MICHAEL HERNANDEZ P/K/A FOREIGN TECK, AN INDIVIDUAL,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Petition involves two consolidated copyright infringement cases (Case 1712 and Case 4167) regarding a hip-hop "beat track," *i.e.*, the background music of a hip-hop song. A beat track is a single work of authorship that is simultaneously created as both a musical composition and a sound recording. Although one work, it legally may be registered for copyright in both categories. The district court made an order consolidating Case 1712 (sound recording infringement) with Case 4167 (musical composition infringement), and instructed counsel to make all future filings in Case 1712. Thereafter, counsel and the court made all filings in Case 1712 with exceptions noted below in italics. After granting defendants' motion for summary judgment that was filed in Case 1712, but expressly covered both cases, *the court filed the identical Statement of Ruling and Judgment in both Cases*, but only gave Frisby notice of the filing in Case 1712.

On appeal the Ninth Circuit ruled that it did not have subject matter jurisdiction of the musical composition infringement claim appeal (Case 4167) because although Frisby filed a notice of appeal from the Judgment filed in Case 1712, he did not also file a notice of appeal from the identical Judgment filed in Case 4167.

The Question Presented Is:

1. Does the arguably cavalier manner in which the Ninth Circuit erroneously ruled that it did not have subject matter jurisdiction constitute a wrongful undermining of appellate jurisprudence that it so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power?

PARTIES TO THE PROCEEDINGS

Petitioner

- Gary Frisby, PKA G-Money
  Note: Gary Frisby as an individual

Respondents

- Sony Music Entertainment, D/B/A RCA Records, a Delaware General Partnership
- Bryson Tiller, an Individual
- Michael Hernandez, PKA Foreign Teck, an Individual

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit

No. 21-55586, 21-55587

Gary Frisby, PKA G-Money, *Plaintiff-Appellant*, v. Sony Music Entertainment, DBA RCA Records, a Delaware General Partnership; et al., *Defendants-Appellees*., and Cortez Bryant, an Individual; et al., Defendants

Date of Final Opinion: June 7, 2022

Date of Rehearing Denial: June 21, 2022

United States District Court
Central District of California

No. CV 19-1712-GW-AGRx

consolidated in pre-trial phase with[1]

No. CV 19-4167-GW-AGRx

Gary Frisby v. Sony Music Entertainment, et al.

Date of Statement of Ruling Granting Motion for Summary Judgment, Filed in Case 1712 & Case 4167: March 11, 2021

Date of Entry of Judgment, Case 1712:
March 15, 2021

Date of Entry of Identical Judgment, Case 4167:
March 18, 2021

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[1] The District Court consolidated cases 1712 and 4167 for pretrial purposes, and directed counsel to make future filings and party additions to case 1712. App.128a

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The Ninth Circuit's Memorandum Opinion was not certified for publication, but is reported at 2022 WL 2045340 and included in the Appendix ("App.") at 1a. The district court's opinion granting defendant's motion for summary judgment has not yet been published, but is reported at 2021 WL 2325646 and included at App.13a. The district court opinion denying Frisby's F.R.C.P. Rules 59/60 motion for reconsideration has not been reported, but is included at App.75a.

JURISDICTION

The judgment of the Ninth Circuit was entered on June 7, 2022. App.1a. A timely petition for rehearing was denied on June 21, 2022 (App.73a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- United States Constitution, Fifth Amendment (App.99a)
- Copyright Act, 17 U.S.C. §§ 101, 102 (App.99a-113a)
- Jurisdiction statutes, 28 U.S.C. §§ 1254, 1291 (App.113a-114a)

- F.R.C.P. 42 (App.114a-115a)
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- F.R.C.P. 60 (App.116a-118a)
- F.R.E. 201 (App.118a-119a)

INTRODUCTION

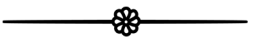
The law treats the issue of subject matter jurisdiction differently than all other issues. In order to maintain the right of appeal of aggrieved parties a court of appeals is obligated to exercise subject matter jurisdiction when it exists. In order to protect the rights of non-aggrieved parties a court of appeals is required to refrain from exercising subject matter jurisdiction when it does not exist.

When a court of appeals erroneously declines to exercise subject matter jurisdiction it fundamentally subverts appellate jurisprudence. In one stroke its ruling rejects its statutory obligation to adjudicate the merits of the appeal and simultaneously removes the aggrieved party's statutory right of appeal. *See* 28 U.S.C. § 1291.

Supreme Court Rule 10 provides in relevant part that a petition for writ of certiorari will only be discretionarily granted for compelling reasons such as when a United States court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Depending upon the circumstances, because of its undermining effect on fundamental justice, an erroneous denial of subject matter juris-

diction may call for an exercise of this Court's supervisory power.

Frisby respectfully submits that such circumstances are present in this case. At a minimum the Ninth Circuit's denial of subject matter jurisdiction, including its failure to address the myriad points raised by Frisby, created an improper appearance of perfunctory indifference to the paramount issue of subject matter jurisdiction rather than conscientious respect for the issue.



STATEMENT OF THE CASE

1. Since 2009 Frisby has been a professional producer and composer of hip-hop beat tracks in the music business. Hip-hop music, a genre of popular music, consists of two major parts: 1) a beat track which contains rhythmical background music; and 2) lyrics that are presented by one or more lead vocalists by rapping and/or singing. Rapping is the rhythmical recitation of lyrics over the background of a beat track. Decl. of Frisby, ¶ 22, Ninth Circuit ("CA 9"), 3-ER-4.

In 2013 Frisby created a beat track entitled *Shawty So Cold* ("*Shawty*"). Undisputed Fact, CA 9, 4-ER-531. A beat track is a single work of authorship.[1] Because of the manner in which it is produced (manipulating digital sounds on music creation software), it is simultaneously created with the dual nature of a musical composition and a sound recording, and may

[1] *See* 17 U.S.C. §§ 101, 102.

be registered for copyright in both categories.[2] Frisby copyright-registered *Shawty* as a musical composition on a PA form and as a sound recording on an SR form. Decl. of Frisby ¶ 22, CA 9, 3-ER-442.[3]

The great majority of commercially-released hip-hop music is a collaborative joint work[4] between the creator of a beat track, the creator of the lyrics, the vocalist who performs the lyrics, and the creative entourage of the lyricist and/or vocalist that produces the commercial recording, putting the elements of the music together for commercial release. Decl. of Frisby, ¶ 2, CA 9, 3-ER-433.

Frisby claims that the beat track contained in a hip-hop song entitled *Déjà Vu* and the beat track contained in a hip-hop song entitled *Exchange* both

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[2] *See*, *e.g.*, *Bridgeport Music, Inc. v. Recordings, Inc.*, 585 F.3d 267, 273, 276 (6th Cir. 2009); ("Uncontroverted testimony at trial established that the song was composed and recorded in the studio simultaneously and, therefore, that the composition was embedded in the sound recording," such that the sounds heard in the sound recording (including a dog barking and rhythmic panting) were copyrightable as part of the musical composition).

[3] The district court excluded Frisby's testimony as to copyright registration. This exclusion was erroneous because a court may take judicial notice of a public record copyright registration and the sample of the copyrighted music submitted as part of the registration. F.R.E. 201; *see Centro Medico del Turabo, Inc. v. Feliciano de Melecio*, 406 F.3d 1, 5 (1st Cir. 2005). Those judicially noticeable facts demonstrate *Shawty* is a single work of authorship even though registered in two copyright categories.

[4] *See* 17 U.S.C. § 101.

constitute copyright infringements of the *Shawty* beat track.[5]

2. In chronological order, the procedural history resulting in this Petition is set forth below.

A. District Court Proceedings

In Case 1712, Frisby filed a Complaint for copyright infringement against the producers of the *Exchange* and *Déjà Vu* beat tracks, and the defendants related to those beat track producers, alleging that defendants had infringed the copyright-registered *sound recording* aspect of *Shawty*. District Court ("DC") Doc 1. Shortly thereafter in Case 4167, Frisby filed a Complaint for copyright infringement against the producers of the *Exchange* and *Déjà Vu* beat tracks, and the defendants related to those beat track producers, alleging that defendants had infringed the copyright-registered *musical composition* aspect of *Shawty*. DC, Doc 1, App.124a. In Case 1712 Frisby filed a First Amended Complaint which became the operative complaint. DC, Doc 79, App.120a.

The district court filed a Scheduling Conference Order ("Order") in Case 1712 in which, amongst other things, it: 1) consolidated Case 1712 and Case 4167 for pretrial purposes; 2) directed counsel to make all future filings in Case 1712; and 3) instructed the Clerk's Office to add any necessary parties and counsel in Case 1712. DC, Doc 106, App.128a.

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[5] This Petition involves only the issue of the Ninth Circuit's ruling on the issue of subject matter jurisdiction. Therefore a recitation of the facts proffered by Frisby in the district court as proof of the ownership and copying elements of a claim of copyright infringement is not necessary.

The defendants in the *Exchange* infringement claim filed a motion for summary judgment that encompassed the sound recording infringement of Case 1712 and the musical composition infringement of Case 4167. DC, Doc 127, CA 9, 4-ER-615, App.132a.

Frisby settled with the defendants in the infringement claims regarding *Déjà Vu* and pursuant to the settlement both Cases were dismissed as against those defendants. DC, Doc 133.

Frisby substituted in his current attorney, Steinhart. DC, Doc 143, App.130a.

The district court filed a Statement of Ruling in Case 1712 granting the motion for summary judgment. App.13a. The Statement of Ruling covered the infringement claims of both Cases. DC, Doc 156, CA 9, 1-ER-18, App.13a. Five days after filing the Statement of Ruling in Case 1712, the district court also filed an identical copy of the same in Case 4167. DC, Doc 55, App.215a, App.10a. Because pursuant to the Order, Frisby's attorney had substituted only into Case 1712 (DC, Doc 40, App.210a) and had been added by the Clerk to the official electronic filing mailing list in Case 1712 (App.142a) but not in Case 4167 (App.144a), plaintiff was given notice through his attorney that the Statement of Ruling had been filed in Case 1712, but was not given notice that an identical copy had also been filed in Case 4167.

The district court signed a Judgment based on the Statement of Ruling which provided that Frisby take nothing and that the First Amended Complaint in Case 1712 and the Complaint in Case 4167 Case were dismissed on the merits in favor of defendants. DC, Doc 159; CA 9, 1 ER 18, App.7a.

The district court filed a copy of the Judgment (DC, Doc 159, 1-ER-16, App.7a) in Case 1712 and three days later filed an identical copy of the Judgment in Case 4167 (App.10a). Because pursuant to the Order, Frisby's attorney had substituted only into Case 1712 (App.210a) and had been added to the official electronic filing mailing list in Case 1712 (App.142a) but not in Case 4167 (App.144a), plaintiff was given notice through his attorney that the Judgment had been filed in Case 1712, but was not given notice that an identical copy had also been filed in Case 4167.

Pursuant to the Order, Frisby filed in Case 1712 a F.R.C.P. Rule 59/60 motion for reconsideration of the Judgment, which addressed the infringement claims of both Cases. DC, Doc 165; CA 9, 2 ER 168, App.75a.

The district court filed a Statement of Ruling in Case 1712 denying the motion for reconsideration. App.75a. The Statement of Ruling addressed the issues of both the Case 1712 sound recording and Case 4167 musical composition infringement claims. DC, Doc 172; CA 9, 1 ER 2, App.13a.

In Case 1712 Frisby filed a notice of appeal from the Judgment filed in that Case (App.7a, App.140a), but did not file a notice of appeal from the identical Judgment filed in Case 4167 (App.10a). DC, Doc 177; CA 9, 2-ER-81, App.140a.[6]

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[6] Frisby also filed a notice of appeal from the order denying his Rule 59/60 motion for reconsideration. However, that appeal is not relevant to this Petition.

B. Court of Appeal Proceedings

Frisby filed an Opening Brief (CA 9, Doc 11, App. 219a) and Excerpts of Record (CA 9, Doc12) that addressed both the sound recording and musical composition infringement claim issues.

Defendants filed an Answering Brief (CA 9, Doc 22, App.224a) and Supplemental Excerpts of Record (CA 9, Doc 23) that addressed both of the infringement claim issues. The Answering Brief also contained an argument that the court of appeals lacked subject matter jurisdiction of the appeal from the music composition infringement claim (Case 4167) because Frisby had not filed a Notice of Appeal in Case 4167. CA 9, Doc 22, App.226a.

Frisby filed a Motion to Take Judicial Notice (CA 9, Doc 40, App.235a) which, amongst other things, requested the Ninth Circuit to take judicial notice of the official electronic filing mailing lists pertaining to Case 1712 and Case 4167 (App.142a, 144a); and a Reply Brief (CA 9, Doc 41, App.237a) in which he addressed the subject matter jurisdiction issue, in summary as follows:

> In the Order (DC, Doc 106, App.128a) the district court consolidated the two Cases for "pretrial purposes." In a second sentence of the Order it directed counsel to make "all" future filings in Case 1712, and that sentence did not contain the "pretrial purposes" phrase. In a third sentence it instructed the Clerk to add all necessary parties in Case 1712. Thereafter, pursuant to the Order all filings by counsel, including both prejudgment and post-judgment filings, were made only in

Case 1712. *See* the dockets from both Cases. App.146a, 202a.

The court filed identical copies of its Statement of Ruling (CA 9, Doc 156, App.13a) on the motion for summary judgement in both cases. DC, Doc 156, App.189a; DC, Doc 55, App.215a. It also filed identical copies of the Judgment in both cases. DC, Doc 159; DC, Doc 56, App.7a, 10a, 189a-190a, 216a. However, because Steinhart had substituted only into Case 1712 and the official electronic filing mailing list of Case 4167 (App.144a) did not contain his name and contact information, although plaintiff through his attorney received notice of the filing of the Statement of Decision and Judgment in Case 1712, he did not receive notice of the filing of the identical Statement of Decision and Judgment in Case 4167. Copies of the mailing lists are contained in the Appendix. App.142a, 144a.

The ordinary meaning and dictionary definition of "pretrial" is "occurring or existing before a trial." The purpose of a motion for summary judgment is to eliminate the necessity of a trial by obtaining a judgment before a trial occurs. Because the motion for summary judgment was granted, no trial occurred. Therefore, the case remained in a "pretrial" posture. If the Judgment is reversed on appeal, the case will be remanded to the district court in a pretrial posture and a trial will thereafter occur.

All of the post-judgment filings by counsel for both sides, including the Notice of Appeal, were made only in Case 1712 (and not in case 4167)

because they all constituted "pretrial" filings. App.140a.

Because Frisby did not receive notice of the filing of the Statement of Decision nor the Judgment in Case 4167, it is a denial of the notice provision of procedural due process to rule that Frisby's claim of copyright infringement of the musical composition (Case 4167) is not encompassed within the Notice of Appeal he filed in Case 1712 (App.140a).

The Ninth Circuit filed a two-page Memorandum Opinion ("Memorandum") (CA 9, Doc 57, App.1a) which held with regard to the issue of subject matter jurisdiction:[7]

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[7] The Memorandum also contained rulings that: 1) the District court did not err in denying Frisby's motion for reconsideration in Case 1712; and 2) Frisby's sound recording claim of copyright infringement failed because there was no genuine issue of material fact that defendants' song did not recapture the actual sounds contained in *Shawty*. These latter two rulings are not relevant to this Petition so no further elaboration is necessary.

Although the Memorandum's ruling on Frisby's motion for reconsideration in the district court (App.75a) is not relevant to this Petition, it is worthy of mention that in addressing that issue the Memorandum stated in footnote 3 that the motion for reconsideration only pertained to the Judgment entered in Case 1712. App.4a. Respectfully, the Memorandum's comment is incorrect. Proof of copying as to a sound recording requires proof of identical replication of the actual sounds of the sound recording. *VMG Salsoul, LLC v. Ciccione*, 824 F.3d 871, 883 (9th Cir. 2016). Proof of copying of a musical composition can be established by circumstantial evidence of access and substantial similarity. *Shaw v. Lindheim*, 919 F.2d 1353, 1356 (9th Cir. 1990). That the motion for reconsideration included the musical composition infringement claim of Case 4167 as well as the sound recording infringement claim of Case 1712 is demonstrated by the fact

The Court lacks jurisdiction over Frisby's appeal of the judgment dismissing his musical composition copyright infringement claim asserted in Case 4167 because he did not file a notice of appeal from that judgment. He did file notices of appeal in Case 1712 from the judgment dismissing his sound recording copyright infringement claim and the order denying his motion for reconsideration. But the notices of appeal filed in Case 1712 do not confer jurisdiction on the Court to consider Frisby's appeal of the "separate judgment" entered in Case 4167. In footnote 1 the Memorandum denied Frisby's Motion to Take Judicial Notice on the grounds that the subject documents (1) were already part of the record on appeal, (2) were duplicative of Appellees' request for judicial notice, or (3) *were irrelevant to the jurisdictional question*.

Although the district court consolidated the cases for pretrial purposes, they retain their separate identities for the purpose of determining whether a court has jurisdiction to consider a case's merits, citing *Hall v. Hall*, 138 S.Ct. 1118, 1131 (2018). The limited scope of the consolidation was confirmed by the district court's entry of a separate judgment of dismissal in each case (Memorandum, fn 2). The Supreme Court has dismissed an

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that the motion expressly argued the issues of substantial similarity and access which are only relevant to proof of copying of a musical composition, and not a sound recording. *See* table of contents to the motion for reconsideration, CA 9, 2-ER-168, App.135a. Moreover, the district court's Statement of Ruling denying the motion for reconsideration also expressly addressed the issues of access and substantial similarity. *See* CA 9, 1-ER-2, 9, 10, App.32a, 41a, 42a,

> appeal because the constitutional question that supplied its jurisdiction had not been raised in the case before it, but instead only in other cases with which it had been consolidated. *Id.* at 1130 (citing *Butler v. Dexter*, 425 U.S. 262, 266-267 (1976) (per curiam)). The Ninth Circuit therefore dismissed Frisby's "purported appeal" from the judgment in Case 4167.

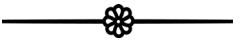
Frisby filed a Petition for Panel Rehearing in which he argued:

> *Hall* and *Butler* were distinguishable and therefore not applicable to the instant case. *Hall* was inapplicable because its decision was specifically limited to the holding that because consolidated cases maintain their individual identity, a final decision in one is immediately appealable by the losing party even though the other case remains active in the trial court. That issue is not involved in the instant case. *Butler* was inapplicable because unlike the situation there, the copyright infringement issues in Case 4167 were the same as those in Case 1712, *i.e.*, whether there was triable issue of fact as to the evidence proffered by Frisby to prove the ownership and copying elements of the copyright infringement claims in each Case.

> Frisby elaborated on his "pretrial purposes" argument in his Reply Brief, pointing out that the district court agreed with Frisby's "pretrial purposes" argument in that in ruling on Frisby's motion for reconsideration, the district court concluded that Frisby's reliance on F.R.C.P. 59(a)(1)(B) was misplaced because that section is applicable only "after a nonjury trial" and the motion for reconsideration pertained to the court's ruling on

> defendants' [pretrial] motion for summary judgment. App.250a.

The Ninth Circuit denied Frisby's Petition for Panel Rehearing. CA 9, Doc 59, App.73a.



REASONS FOR GRANTING THE PETITION

I. SUBJECT MATTER JURISDICTION IS A UNIQUE, OVERARCHING ISSUE THAT REQUIRES UTMOST RESPECT FROM APPELLATE COURTS.

The court of appeals jurisdiction statute, 28 U.S.C. § 1291, expressly presents the grant and scope of appellate authority.

Reed Elsevier, Inc. v. Muchnick, 59 U.S. 154, 160-161, (2010) holds:

> "Jurisdiction" refers to a court's adjudicatory authority which properly applies only to delineated classes of cases implicating that authority. Subject matter jurisdiction refers to the court's statutory or constitutional power to adjudicate the case. "[J]urisdictional statutes speak to the power of the court of the court rather than to the rights or obligations of the parties."

Although it is true that the express language of the 28 U.S.C. § 1291 presents only the grant and scope of appellate authority, by implication the Court has held that the statute grants a right of appeal to aggrieved parties. *See Abney v. United States*, 431 U.S. 651, 656 (1977); *Hardy v. United States*, 375 U.S. 277, 278 (1963); ("We deal with the federal system

where the appeal is a matter of right"); *Coppedge v. United States*, 369 U.S. 438, 441-442 (1962).

Section 1291 provides in relevant part: "The courts of appeals . . . *shall have jurisdiction* of appeals from all final decisions of the district courts. . . . " It appears *sub silencio* the Court has interpreted "shall have jurisdiction" to mean "shall exercise jurisdiction," making it mandatory for courts of appeals to exercise jurisdiction when it exists, thus creating a right of appeal as to aggrieved parties.

The general rule is that federal appellate courts do not consider an issue not passed upon below; however, as a rule of practice they have discretion to consider the issue. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008). Similarly, the general rule in federal appellate courts is that an issue not raised in a merits brief sufficiently to put the opposing party on notice is deemed waived (*Tri-Valley CAREs v. US Department of Energy*, 671 F.3d 1113, 1129-1130 (9th Cir. 2012); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 339, fn. 2 (2006). However, as a rule of practice appellate courts have discretion to consider the issue. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815-816 (1985).

Neither of the above rules that permit discretionary consideration of otherwise waived issues are applicable to the unique, paramount issue of subject matter jurisdiction. Rather, when an appellate court spots the presence of an issue of subject matter jurisdiction in a case before it, even though (1) the issue was not raised below nor (2) raised by the parties in their merits briefs, the court on its own motion is mandatorily obligated to decide the issue before it considers any other issue. *Mansfield, C. & L. M. Ry.*

v. Swan, 111 U.S. 379, 381-382 (1884); *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976).

Thus, as to the issue of subject matter jurisdiction in appellate courts, discretion to consider the unraised issue is converted to obligation to decide the unraised issue. Conceptually, "may" is alchemically converted to "must."

In *Mansfield* and *Liberty Mutual* the Court concluded that subject matter jurisdiction was lacking such that the lower courts had erroneously exercised jurisdiction which they did not possess. In the instant case Frisby contends the Ninth Circuit erroneously declined to exercise jurisdiction that it did possess. Both categories of error are equally harmful. An exercise of jurisdiction that an appellate court does not possess injures the responding party. A declination to exercise jurisdiction that an appellate court does possess injures the aggrieved party.

In *Mansfield* and *Liberty Mutual* neither of the parties was aggrieved as to the subject matter jurisdiction issue because neither party raised the issue. However, because of the unique significance of the issue, the Court held that it was mandatorily required to decide the issue.

Unlike *Mansfield* and *Liberty Mutual*, in the instant case the issue of subject matter jurisdiction was expressly raised and decided below in the Ninth Circuit, and Frisby presents it to the Court in the instant Petition.[8]

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[8] If not to the level of an actual conflict, at a minimum there is an obvious tension between 1) the discretionary nature of ruling on a petition for a writ of certiorari even when the petition

II. THE COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO CORRECT THE NINTH CIRCUIT BECAUSE ITS MEMORANDUM OPINION'S DENIAL OF SUBJECT MATTER JURISDICTION IS NOT ONLY ERRONEOUS, BUT ALSO CREATES AN IMPROPER APPEARANCE OF PERFUNCTORY INDIFFERENCE RATHER THAN CONSCIENTIOUS RESPECT FOR THE PARAMOUNT ISSUE OF SUBJECT MATTER JURISDICTION.

Because the gravamen of this Petition is that the court below so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers, it is necessary, at least in abbreviated format, to discuss the erroneousness of the Memorandum opinion ("Memorandum").

Frisby's Reply Brief raised myriad analytical points in regard to the subject matter jurisdiction issue. However, the Memorandum superficially disposed of the issue in less than one-half page without addressing any of those points. Moreover, even though Frisby raised additional salient points in his Petition

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presents an arguably meritorious contention on the issue of subject matter jurisdiction, and 2) the rule that mandatorily requires the Court to decide the issue of subject matter jurisdiction once spotted, even if it must do so on its own motion. This tension is implicated here because the Court can use the expedient of discretionarily denying certiorari, thereby circumventing the mandatory requirement that it decide the issue when spotted once the case is before it.

As a reasonable resolution of this tension, perhaps the Court could adopt a rule of practice that favors the granting of a certiorari petition when it presents an arguably meritorious contention regarding a subject matter jurisdiction issue.

for Panel Rehearing, the Ninth Circuit summarily denied the Petition.

Respectfully, the Memorandum is demonstrably erroneous on the merits for a variety of reasons.

In filing the notice of appeal from the Judgment in Case 1712 Frisby complied with the Order that all future filings were to be made in that Case. The Memorandum failed to explain on what ground Frisby's compliance with the Order was insufficient. The only potential ground upon which Frisby's compliance could have been deemed unsatisfactory was that because the cases were consolidated for "pretrial purposes," only filings that were made for such purposes came within the ambit of the Order's instruction regarding future filings. Although the "pretrial purposes" issue was brought to Ninth Circuit's attention in Frisby's Reply Brief, the Memorandum did not address the issue.

The Memorandum relied on *Butler* for the general rule that if the issue which gives an appellate court jurisdiction is not presented in the case before it, but only in a case with which it is consolidated, the Court lacks subject matter jurisdiction of the appeal. However, the Memorandum improperly failed to offer any analysis as to how the general rule of *Butler* applies to the instant case. A proper analysis of the subject matter jurisdiction issue should reasonably have included the following points of which Frisby made the Ninth Circuit aware:

> Both consolidated Cases were based on claims of copyright infringement of the same identical, singular work of authorship.

> The Judgment filed in each Case was identical, and the Judgment expressly provided for dismissal of the complaints for infringement in each case, specifically referring to each case by its district court case number.
>
> The elements of copyright infringement in both cases were identical:
>
> (1) plaintiff's ownership of the allegedly infringed work; and (2) the copying of protected elements of plaintiff's work by defendant's work. *Shaw v. Lindheim*, 919 F.2d 1353, 1356 (9th Cir. 1990); *Baxter v. MCA, Inc.*, 812 F.2d 421, 423-424 (9th Cir. 1987).

Subsequent to the issuance of the Order, with the exception of the filing of the identical Statement of Ruling and Judgment in both Cases, both counsel and the district court made all filings in Case 1712, demonstrating by conduct that both prejudgment and post-judgment filings were deemed by the court and counsel to be for "pretrial purposes."

There is an ambiguity in the Order as to whether the filing of a notice of appeal from a summary judgment constitutes a "pretrial purpose." Whether the "pretrial purposes" limitation applies to the clause of the Order instructing counsel to make "all" future filings in Case 1712 is ambiguous. Even if the "pretrial purposes" limitation applies to the Order's instruction regarding future filings, it is nonetheless ambiguous. It appears the Ninth Circuit concluded that a notice of appeal from a summary judgment is not for a pretrial purpose. However, a notice of appeal from a summary judgment is arguably for the pretrial purpose of obtaining a reversal on appeal and returning the

case to the trial court in a pretrial posture to thereafter conduct a trial. In view of this ambiguity, the Memorandum was erroneous in failing to apply the rule that ambiguities in a document of governance, such as a contract, statute or court order,[9] are to be interpreted in favor of the party that did not create the ambiguity as long as the ambiguous language is reasonably susceptible of that favorable interpretation. *United States Fidelity & Guaranty Co. v. Guenther*, 28 U.S. 34, 37 (1930).

Although the district court chose to file a copy of the identical Statement of Ruling and Judgment in both cases, Frisby was given notice only of the filing in Case 1712 and not in Case 4167 which created a constitutional issue of violation of the notice provision of procedural due process. U.S. Const, Amend. V; *Lambert v. California*, 355 U.S. 225, 228 (1957) ("Engrained in our concept of Due Process is the requirement of notice."). The lack of due process notice was a product of the instructions to counsel and the Clerk in the Order. Pursuant to those instructions, Frisby's successor attorney, Steinhart, was substituted only into Case 1712, and the Clerk added Frisby's successor attorney only into the electronic filing mailing list of Case 1712.

As a result of the lack of notice, Frisby was not made aware of the filing of the Statement of Ruling nor Judgment in Case 4167. That lack of awareness in combination with the instruction of the Order to make all future filings in Case 1712, supports the

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[9] A Scheduling Order is in essence a regulation of governance for the particular case.

good faith and reasonableness of Frisby's filing the notice of appeal only in Case 1712.[10]

Because the Judgment expressly dismissed the complaints in both cases by specific reference to the official case number of each case, Frisby's notice of appeal filed in Case 1712 covered both the claim of infringement of the sound recording (Case 1712) as well as the claim of infringement of the musical composition (Case 4167). Moreover, because identical copies of the Judgment were filed in both Cases, if Frisby had filed a notice of appeal in Case 4167, his filing in Case 4167 would have covered exactly the same thing as his notice of appeal filing in Case 1712 covered.

Under the above circumstances, the conclusion of the Memorandum that Frisby waived his appeal from the musical composition infringement claim because he did not file a notice of appeal in Case 4167 improperly elevates form over substance. *See Young v. Higbee Co.*, 324 U.S. 204, 209 (1945); *U.S. v. Phellis*, 257 U.S. 156, 168 (1921).

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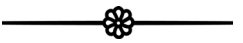
[10] The court below denied Frisby's request to take judicial notice of the official electronic mailing lists in both Cases on the ground that those documents were "irrelevant to the jurisdictional question." That ruling was erroneous because the subject mailing lists are relevant to the issue of lack of due process notice to Frisby as to the district court's filing of identical copies of its Statement of Ruling and Judgment in Case 4167 in addition to filing the same in Case 1712.



CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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