

No. _____

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**

PETITION FOR WRIT OF CERTIORARI

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(i)

QUESTIONS PRESENTED

1. Originality is the “touchstone,” the “sine qua non,” and the “premise” of copyright law. An artist may obtain a valid copyright if she meets this “extremely low” bar for creativity through her expression of a statutorily eligible work. The Copyright Act defines statutorily eligible works in 17 U.S.C. § 102(a). While § 102(a) does not list literary and animated characters, lower courts have uniformly found characters independently protectable as components of literary or audio-visual works. Yet the Second, Seventh, and Ninth Circuits have all announced different standards to determine when copyright law independently protects characters. None of these standards depends on originality.

The first question for this Court is whether originality is the proper standard to determine character copyrightability, and, if not, what the proper standard is?

2. The circuit courts are split over whether to decide copyrightability as a question of fact or law. If a question of fact, this Court held in *Feltner v. Columbia Pictures Television, Inc.*, that juries—not judges—decide disputes in copyright cases. 523 U.S. 340 (1998). And the sole question for a Rule 12(b)(6) motion is whether the complaint states enough facts to plead a plausible claim.

The second question for this Court is whether copyrightability—for a character or any work—is a

(ii)

question of fact, or involves questions of fact, ill-suited for resolution on a Rule 12 motion?

(iii)

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Denise Daniels was also a plaintiff in the district court and appellant in the Ninth Circuit along with The Moodsters Company.

RULE 29.6 STATEMENT

Petitioner The Moodsters Company has no parent corporations and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in any court that are directly related to this case other than the proceeding from which this petition arises: *Daniels v. The Walt Disney Co.*, No. 18-55635, Am. Opinion (9th Cir. May 4, 2020), addressing appeal from *Daniels v. The Walt Disney Co.*, No. 2:17-cv-04527-PSG-SK, Judgment (C.D. Cal. May 9, 2018).

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PETITION FOR WRIT OF CERTIORARI

Petitioner The Moodsters Company (Moodsters Co.) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals and order denying the petition for panel rehearing and rehearing en banc, App. 1a-17a, is reported at 958 F.3d 767 (9th Cir. 2020). The original opinion of the court of appeals, App. 18a-33a, is reported at 952 F.3d 1149 (9th Cir. 2020). The opinion and order of the United States District Court granting defendants' motion to dismiss the second amended complaint, App. 34a-50a, is not reported but available at 2018 WL 3533363 (C.D. Cal. May 9, 2018). The opinion and order of the United States District Court granting defendants' motion to dismiss the first amended complaint with leave to amend, App. 51a-68a, is not reported but available at 2018 WL 4849700 (C.D. Cal. Jan. 31, 2018).

JURISDICTION

The Ninth Circuit entered judgment on March 16, 2020. App. 18a-33a. On May 4, 2020, the court of appeals filed an order amending its opinion and denying the Petitioner's timely petition for panel rehearing and rehearing en banc. App. 1a-17a. Jurisdiction of this Court is proper under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clause 8 of the U.S. Constitution: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

Amendment VII to the U.S. Constitution: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

17 U.S.C. § 102(a): “(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.”

17 U.S.C. § 106: “Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: ...

(2) to prepare derivative works based upon the copyrighted work;”

INTRODUCTION

Some are heroes; others villains. Some mimic reality and others personify fantasy. And some appear in comic books and video games, while others in television shows and movies. Whatever the role or forum, fictional characters epitomize the essence of creativity. They capture our imagination based on the artist’s expressive selection of traits and characteristics that combine to make that character unique. For that reason, characters often represent the most valuable part of any work. But the law that protects them—character copyrights—is in chaos. Every circuit court to address this subject employs a different test. And circuit courts remain conflicted about whether copyrightability is a question of fact or law. This Court has never addressed the subject of character copyrights—and it shows in the fractured approaches employed by the lower courts.

The threshold issue for this Court to decide is the proper standard for a character copyright. This Court has held that “originality”—the “very premise” of copyright law—governs copyrightability. Yet the three circuit courts that have developed standards for character copyrightability have jettisoned originality as a standard. The Ninth Circuit, for instance, has created its own three-part test that remains foreign to any other area of copyright law.

The Second Circuit deploys a vague “sufficient delineation” standard. And the Seventh Circuit asks whether the character offers something more than a stock character—the closest test to originality while still not referencing it. Based on these diverging tests, neither artists nor entertainment companies can discern the metes-and-bounds of which characters are protected by copyright. Moodsters Co. asks this Court to resolve this uncertainty, and decide the proper standard for character copyrights.

Whatever the standard, this Court should also address whether character copyrightability—or copyrightability of *any* work—is a question of fact or law. The Seventh Circuit’s survey of the law shows that the circuits are “split” with some deciding copyrightability as a matter of law, and others finding issues of fact. The outcome of this split has constitutional importance. This Court has held that the Seventh Amendment attaches to fact disputes in copyright cases in *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998). Thus, if character copyrightability is a question of fact, then courts—like the Ninth Circuit here—violate artists’ constitutional rights when they decide the issue as a matter of law. This issue is important and ripe for the Court to decide.

This Court should also accept review because the Ninth Circuit panel erred. Emotions are abstract. No one knows what they look like. Or what color they may be. And scientists dispute how many exist. Moodsters Co. brought to life the abstract concept of emotions through its creative expression of five anthropomorphic single-emotion color-coded characters that reside inside a child. No other

artist—and Disney in particular—had ever before expressed characters with The Moodsters’ unique combination of traits and characteristics. These characters were so original that Disney—including its most senior executives—copied them for its billion-dollar blockbuster *Inside Out*.

But the district court and panel denied Moodsters Co. the chance to prove its copyright infringement claims when they dismissed its complaint by finding the characters unprotected as a matter of law. The district court and panel relied on an evolving standard divorced from originality in favor of questions about whether The Moodsters were famous enough to qualify for copyright. Above all, both courts denied Moodsters Co. the chance to offer evidence—including from a preeminent expert in the field—to prove its claims. Moodsters Co. asks this Court to grant review, so the Court can address this important and unsettled area of copyright law.

STATEMENT OF THE CASE

Denise Daniels and her company Moodsters Co. brought the abstract concept of emotions to life through five unique animated characters. As detailed in their 89-page complaint, no other artist had ever before expressed characters with the combination of traits and characteristics as The Moodsters. CA9.R.Excerpts.72-160. Indeed, their creation of these characters stemmed from many expressive choices selected and arranged to create characters unlike any others seen in any prior work. *Id.*, *e.g.*, at ¶¶37-38, 51-59, 76, 96-105, 143, 163-165, 176-192, 198-333; *see also* App. 48a.

But the district court and Ninth Circuit never

addressed the amended complaint for plausibility in dismissing Moodsters Co.'s copyright infringement claims on a Rule 12(b)(6) motion by the defendants (collectively Disney). App. 1a-68a. Rather, the Ninth Circuit affirmed the dismissal of the copyright infringement case by finding that The Moodsters characters are not copyrightable as a pure matter of law because they are not "sufficiently delineated" or "especially distinctive." App. 1a-17a. The courts thus provided Moodsters Co. no chance to prove the originality of its characters. Nor did any fact finder ever assess Disney's wanton copying.

A. Factual Background

Denise Daniels, an expert on children's emotional intelligence and development, had an idea to bring emotions to life through individual characters. *See* App. 4a-5a. Daniels started a company—Moodsters Co.—and recruited industry-leading talent to help develop and express the characters. App. 5a, App. 52a; *see also* CA9.R.Excerpts.78-81. Daniels and Moodsters Co. had a blank slate to work from in creating the characters as emotions have no standard physical form or character attributes. CA9.R.Excerpts.112-113.

The amended complaint detailed how numerous creative choices were available in how to express the idea of characters representing emotions, including, for example, choices in general physical form, number, and types of emotions for the character ensemble. CA9.R.Excerpts.112-116. Moodsters Co. eventually selected and arranged several creative choices to express The Moodsters characters: five gendered anthropomorphic animated

characters each paired with a core body color that lived together “inside a child,” and which each included many other nuanced expressions, like the anger character’s tendency to explode from the head when angry. *See* CA9.R.Excerpts.72-160, e.g. ¶¶37-38, 51-59, 143, 176-192, 198-333; *see also* App. 5a. No other artist had ever created a character like any of the Moodsters before. CA9.R.Excerpts.93-116 ¶¶96-105, 163-165, 178-192; *see also* App. 48a.

Moodsters Co. raised over \$3 million in investment capital to refine and develop these characters. App. 46a; CA9.R.Excerpts.102 ¶146. With that capital, Moodsters Co. focus-group tested the characters with a diverse range of children at Yale University. *Id.* ¶¶147-149; App. 45a. Moodsters Co. also released a professional-grade “pilot” episode in 2007. App. 5a. Moodsters Co. used this pilot and its “bible” to pitch The Moodsters to potential collaborators. App. 5a-6a, App. 52a-53a.

Moodsters Co. had its most extensive discussions with Disney. In fact, Daniels and Moodsters Co. pitched The Moodsters to Disney executives (and even Roy E. Disney—the son and nephew of the founders—had access) every year from 2005 through 2009. App. 5a-6a, App. 53a; *see also* CA9.R.Excerpts.87-89. In 2010, Disney started to work on the movie *Inside Out*. App. 6a. *Inside Out* features five color-coded, single-emotion characters that reside in a child. App. 6a, App. 53a. Disney released *Inside Out* in 2015. App. 6a.

B. The District Court Proceeding

Daniels sued Disney for breach of contract and Moodsters Co. sued for copyright infringement. App.

6a-7a. Moodsters Co. is the owner of the registered copyrights in the literary bible and audiovisual pilot *The Moodsters* works and all their protectable components. App. 60a, CA9.R.Excerpts.99-100; *see also* App. 16a-17a (“There is no dispute that the 2005 Moodsters Bible and the 2007 pilot television episode are protected by copyright.”). Moodsters Co. alleged copyright infringement by Disney of the individual Moodsters characters and the ensemble of The Moodsters characters. App. 7a. Rather than answer, Disney moved to dismiss the amended complaint under Federal Rule of Civil Procedure 12(b)(6). *See* App. 7a.

The district court adopted Disney’s argument that Moodsters Co.’s “characters are not protectable in the first instance, either individually or as an ensemble” and thus found it unnecessary to address whether Disney’s *Inside Out* characters were substantially similar to *The Moodsters* characters. App. 60a. It cited the Ninth’s Circuit “test” for character copyrightability, stating that a character is “copyrightable independent of the underlying work in which the character appears” when it (1) has “physical as well as conceptual qualities,” (2) is “sufficiently delineated to be recognizable as the same character whenever it appears,” and (3) is “especially distinctive” and “contain[s] some unique elements of expression.” App. 60a-61a; *DC Comics v. Towle*, 802 F.3d 1012, 1020-21 (9th Cir. 2015). The district court called this standard a “rigorous test.” App. 65a; *see also* App. 38a, App. 46a. The district court found that The Moodsters characters were not sufficiently delineated because they had not persisted over time, not been widely distributed, and their traits were not “on par with those of the iconic

characters” like Sherlock Holmes, Tarzan, Superman, and James Bond. App. 61a-67a. The district court, thus, granted Disney’s motion, but allowed Moodsters Co. leave to amend its copyright infringement claims. App. 65a-68a.

Moodsters Co. filed a second amended complaint that Disney again moved to dismiss. *See* App. 7a. Because the district court had at first focused on the lack of “persistence” of The Moodsters “over time or over multiple iterations,” App. 61a-63a, the second amended complaint included facts about the “second generation” of Moodsters which appeared in certain books and toys distributed by major retailers. *See* App. 40a.

But the district court dismissed the second amended complaint as well. *See* App. 7a; App. 34a-50a. To start, the court was “unpersuaded” that the second generation Moodsters could be widely and instantly recognized as the same characters. App. 43a-44a. In the district court’s opinion, the differences in certain details of the physical appearance, like arm length, and changes to certain names of individual Moodsters characters (although the ensemble retained the name The Moodsters) in the authorized derivative second version of Moodsters characters prevented protection for the original version of the characters. App. 40a-44a. So the court determined that The Moodsters characters still “fell short of the Ninth Circuit’s rigorous test” for copyrightability. App. 46a. It also concluded that The Moodsters as an ensemble “are neither delineated nor distinctive” to a degree sufficient for copyright protection, and declined to apply the Ninth Circuit’s alternate “story being told” test. App. 48a-49a.

Even though Moodsters Co. emphasized the fact-intensive nature of these issues, CA9.R.Excerpts.66-68, 325-326, 337, the district court never addressed the second amended complaint for plausibility. Rather, the district court decided as a matter of law that The Moodsters characters were not copyrighted. *See* App. 34a-68a. To support this conclusion, the district court made its own findings about lack of sufficient delineation and distinctiveness without allowing Moodsters Co. to develop the record and offer evidence about the unique selection and arrangement of features of its characters. *Id.* The district court also disregarded Moodsters Co.'s detailed allegations about the original novelty of these characters. *See id.*

C. The Ninth Circuit Decision

The Ninth Circuit affirmed the district court's dismissal of Moodster Co.'s copyright infringement claims by holding The Moodsters characters did not qualify for copyright protection. App. 4a. The panel stated The Moodsters characters failed to meet its *Towle* test for copyrightability because the characters were too "lightly sketched" and lacked "consistent, identifiable character traits and attributes." App. 4a. The Court focused on changes in names, certain physical appearance details, and situational attributes seen between the first generation Moodsters characters—the basis for infringement—and the authorized derivative "second generation Moodsters" characters, to say that the first generation Moodsters lacked "consistent" identifiable traits and attributes "across iterations." App. 10a-12a. It also noted that ideas, unlike expression of ideas, do not have protection under copyright law.

App. 9a (citing 17 U.S.C. § 102(b)). It stated that the “notion of using a color to represent a mood or emotion is an idea that does not fall within the protection of copyright” and the idea of an emotion is also not copyrightable. App. 9a-10a.

After Moodsters Co. petitioned for rehearing, pointing out, among other things, that the fact finder should determine copyright protection based on a work at a single point in time (when the author fixes her expression in a tangible medium), the Ninth Circuit made some small changes to its opinion. *See* App. 1a-17a. The court removed several sentences and phrases mentioning the second generation Moodsters toys, including a footnote that maintained that the second generation “remains relevant.” *Cf.* App. 27a; App. 10a. But the amended opinion still justified its decision that the first generation of Moodsters are not protectable by copyright by discussing the different individual character names and certain different physical appearance details and situational attributes across the first and second generation Moodsters character iterations App. 8a-13a. The panel contrasted its views of The Moodsters with protected characters like Godzilla and James Bond, which maintained some consistent traits, despite physical appearance changes, “across various productions.” *Id.*

The Ninth Circuit held that The Moodsters thus fail the second prong of its *Towle* test, but then made a conclusory finding that The Moodsters are not “especially distinctive” and lack some unique elements of expression even if The Moodsters are sufficiently delineated. App. 12a-13a. The Court cited no other characters that any individual Moodsters

character, or The Moodsters ensemble, was indistinct from, however. *Id.* It made no finding that there was only one or just a few ways to express the idea of emotion-based characters so that Daniel's ideas and the expression of The Moodsters merged. *Id.* Indeed, such a finding would conflict with the detailed allegations in Moodsters Co.'s complaint about the many creative choices they selected and arranged to express characters unlike any characters seen in any prior work. CA9.R.Excerpts.72-160, e.g. ¶¶37-38, 51-59, 143, 164-165, 176-192, 198-333

The Ninth Circuit then stated that its “story being told” test first mentioned in *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954) remains a valid alternate test for character copyright protection. App. 13a-14a. It stated this test represents “a high bar” for protection, though. App. 13a. It held The Moodsters thus enjoy no protection under that test either. App. 14a.

REASONS FOR GRANTING THE WRIT

I. This Court should decide what standard governs the copyrightability of fictional characters because the circuits are split.

This petition asks the Court to address the copyrightability standard for fictional characters. Although the Copyright Act does not explicitly list animated characters as protectable subject matter, every circuit court to address this issue has found them protectable as components of statutorily protected audiovisual or literary works. *See, e.g., Warner Bros., Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 240 (2d Cir. 1983) (“there has been no doubt that copyright protection is available for characters

portrayed in cartoons”); *Warner Bros. Entm’t, Inc. v. X One X Prods.*, 644 F.3d 584, 597 (8th Cir. 2011) (“It is clear that when cartoons or movies are copyrighted, a component of that copyright protection extends to the characters themselves”); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 754 (9th Cir. 1978) (recognizing copyrightability of animated characters and citing “a series of cases dating back to 1914 that have held comic strip characters protectable under the old Copyright Act”); *see also* App. 7a (“Although characters are not an enumerated copyrightable subject matter under the Copyright Act ... there is a long history of extending copyright protection to graphically-depicted characters.”). But circuit courts are split over the standard characters must meet for copyright protection. This Court should accept review to resolve this crucial uncertainty.

The Court has announced a singular standard to qualify for a valid copyright—originality. “The *sine qua non* of copyright is originality.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). Originality is a constitutional requirement, and “remains the touchstone of copyright protection today.” *Id.* at 346-47. It is also a low standard: “the requisite level of creativity is extremely low; even a slight amount will suffice.” *Id.* at 345. This minimal standard promotes copyright law’s ultimate aim “to stimulate artistic creativity for the general public good.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). Thus, an artist may obtain a valid copyright when she expresses her original work of authorship in a fixed medium. 17 U.S.C. §§ 101, 102(a), 302(a).

But the lower courts have deviated from this “touchstone” of originality to determine when fictional characters receive copyright protection. The Second, Seventh, and Ninth Circuits have all created different standards. These different standards lead to unpredictable results. For decades now, commentators have sung a single chorus about the inconsistent approaches among the circuit courts about character copyrightability:

- “Unfortunately, while copyright law plays an important role in allocating rights to the use of characters, the law in this area is very unclear.” Zahr K. Said, *Fixing Copyright in Characters: Literary Perspectives on a Legal Problem*, 35 CARDOZO L. REV. 769, 772 (2013).
- “The development of copyright protection for fictional characters has been riddled with uncertainty and inconsistency as courts have struggled to fit fictional characters into the rubric of copyright law.” Kathryn M. Foley, *Protecting Fictional Characters: Defining the Elusive Trademark-Copyright Divide*, 41 CONN. L. REV. 921, 926 (2009).
- “Since copyright law does not explicitly address the issue of protection for fictional and cartoon characters, courts are free to apply a number of standards to determine whether or not a character is copyrightable.” Cathy J. Lalor, *Copyrightability of Cartoon Characters*, 35 IDEA: THE JOURNAL OF LAW & TECH. 497, 503-504 (1995).
- “Recent court decisions have shown that the legal doctrines for the protection of literary

and cartoon characters are rather inconsistent, unclear and quixotic. ... In addition, the judicial process by which the courts have selected the appropriate legal doctrine has become such a complicated maze that the outcome is neither predictable nor fair.” E. Fulton Brylawski, *Protection of Characters - Sam Spade Revisited*, 22 BULL. COPYRIGHT SOC’Y U.S.A. 77, 77 (1974).

This Court should resolve this uncertainty.

A. The Seventh Circuit’s standard most closely tracks the touchstone question of originality.

The Seventh Circuit addressed character copyrightability in *Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004). *Gaiman* involved an ownership dispute between comic book authors. *Id.* at 648. On appeal, one of the authors argued that two characters were not protected by copyright. *Id.* at 657. The Seventh Circuit rejected this argument, and explained the low threshold for a character to enjoy copyright protection.

At the outset, the court explained that stock characters receive no protection. *Id.* at 659-61. The court provided several examples, like “a gesticulating Frenchman, a fire-breathing dragon, a talking cat, a Prussian officer who wears a monocle and clicks his heels,” among others. *Id.* at 660. Copyright law offers no protection because “such stereotyped characters are the products not of the creative imagination but of simple observation of the human comedy.” *Id.*

But the court found both characters still exceeded the low threshold for copyright protection. The first disputed character—Count Cogliostro—qualified for a copyright protection because his “age, obviously phony title (“Count”), what he knows and says, his name, and his faintly Mosaic facial features combine to create a distinctive character. No more is required for a character copyright.” *Id.* Indeed, “once [Count Cogliostro] was drawn and named and given speech he became sufficiently distinctive to be copyrightable.” *Id.* at 661.

The court’s treatment of the second disputed character also underscores this lenient standard. The second character—Medieval Spawn—lacked a proper name, and differed from other characters only through “his costume and manner of speech, together with the medieval background.” *Id.* “But that is enough expressive content for copyrightability,” under the Seventh Circuit’s standard. *Id.* Put another way, the Seventh Circuit recognized a low standard for character copyrightability, even though it did not adopt originality as the test.

B. The Second Circuit applies a “sufficient delineation” test.

The Second Circuit follows an ill-defined “sufficient delineation” test. The court first addressed character copyrights in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930). Judge Learned Hand examined whether several characters from a play qualified for copyright. *Id.* at 122-23. In rejecting the plaintiff’s argument for protection of his literary characters, Judge Hand provided the oft-quoted—yet vague—standard:

If Twelfth Night were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare's "ideas" in the play, as little capable of monopoly as Einstein's Doctrine of Relativity, or Darwin's theory of the Origin of Species. It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.

Id. at 121. Courts and commentators have called this standard a "sufficient delineation" test. *See, e.g., Silverman v. CBS Inc.*, 870 F.2d 40, 50 (2d Cir. 1989) (relying on *Nichols* and finding "Amos 'n Andy" characters "sufficiently delineated"); *Warner Bros.*, 720 F.2d at 240 (explaining that *Nichols* "recognized the possibility that a literary character could be *sufficiently delineated* to support a claim of infringement by a second comer") (emphasis added); *see also X One*, 644 F.3d at 597 (allowing copyright protection for characters "to the extent that such characters are sufficiently distinctive").

Detective Comics, Inc. v. Bruns Publications, Inc. is another application of this standard. In *Detective Comics*, the Second Circuit affirmed a finding that the *Wonderman* comic infringed the character copyright in *Superman*. 111 F.2d 432, 433-434 (2d Cir. 1940). The court found that a

complainant “is not entitled to a monopoly of the mere character of a ‘Superman’ who is a blessing to mankind[.]” *Id.* at 434 (citing *Nichols*, 45 F.2d 119). But “[s]o far as the pictorial representations and verbal descriptions of ‘Superman’ are not a mere delineation of a benevolent Hercules, but embody an arrangement of incidents and literary expressions original with the author, they are the proper subjects of copyright and susceptible of infringement because of the monopoly afforded by the act.” *Id.* at 433-34. Thus, the Second Circuit recognizes and protects characters with copyrights, but fails to provide clear guidance as to when copyright attaches to a character.

C. The Ninth Circuit applies two different, heightened standards.

The Ninth Circuit applies the most stringent standards of any circuit court. The court articulated its first “story being told” standard in *Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc.*, 216 F.2d 945, 950 (9th Cir. 1954). This decision focused on literary characters. *Id.* The court declined to find the “Sam Spade” character protected. *Id.* at 950. But the court explained that copyright law may protect a literary character if he is the “story being told,” and not just a mere “chessman in the game of telling the story.” *Id.* The Ninth Circuit stated in this appeal that this standard remains valid. App. 12a-13a.

The Ninth Circuit has adopted a second test for graphic characters. In *Walt Disney Productions v. Air Pirates*, the court explained that animated characters, rather than literary characters, have “physical as well as conceptual qualities” and thus are “more likely to contain some unique elements of

expression.” 581 F.2d at 755. So the court affirmed copyright protection for twenty-one Disney characters, ranging from well-known characters like Mickey Mouse to obscure characters like Toby Tortoise and Max Hare. *Id.* at 753 n.5.

The court later adopted the three-part test in *Towle* to determine when copyright protects graphical characters. 802 F.3d at 1020-21. The court 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.* Thus, the Ninth Circuit requires the most rigorous standard of the circuit courts.

This Court should grant review to resolve this split over when copyright law protects characters. The degree of copyright protection for an artist’s character varies greatly depending on which circuit court hears the dispute. And each circuit court above replaced originality—the “touchstone” and “sine qua non” of copyright law—as the standard in favor of various enhanced tests.

The panel decision underscores the need for this Court to decide this issue. Even though originality remains “the very ‘premise of copyright law,’” *Feist*, 499 U.S. at 347 (quoting *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981)), the panel decision avoided this foundational doctrine at all costs. *See generally* App. 1a-17a. Instead, the panel applied the same

“rigorous” standard that the district court employed. App. 7a-8a, App. 38a. This rigorous standard betrays the “extremely low” standard for all other works. *Feist*, 499 U.S. at 345. The panel decision also reflects the outcome-determinative conflict with the Seventh Circuit’s standard. Under *Gaiman*, The Moodsters characters are not stereotypical characters by any means. Until this Court rules, geography—not creativity—will decide the fate for artists’ original characters.

The Ninth Circuit’s standard also violates basic elements of the Copyright Act. By statute, an artist’s copyright term “subsists from [a work’s] creation.” 17 U.S.C. § 302(a). A work is “created” when it is “fixed” “for the first time”—and “fixed” means put in a tangible medium of expression, like on paper or other material object that stores the work. 17 U.S.C. § 101. Any later versions fixed or expressed on a tangible medium are derivative, separate works that copyright law independently protects when they employ another original expression. *Id.*; 17 U.S.C. § 103(b) (“The copyright in a ... derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.”). Thus, copyrightability of any work depends on the time that the artist first expressed her work in a tangible medium.

But the Ninth Circuit’s vague standard invites courts to disregard these foundational aspects of the Copyright Act. For instance, the district court found that the Moodsters characters failed to persist “over time or over multiple iterations.” App. 39a, App. 63a. The panel likewise weighed similarities and differences across generations. App. 8a-13a. Yet the only question under the Copyright Act was whether the Moodsters characters were original enough when first expressed in a tangible medium.

II. This Court should grant review to address whether a copyright dispute over an original character presents a question of fact about protection for the character.

Whatever the standard, this Court should also decide whether copyrightability of an animated character—or any work—is a question of fact or law. The Court has suggested that copyrightability is a question of fact. Most recently, in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, the Court held that designs on cheerleading uniforms are eligible for copyright protection as a two- or three-dimensional work of art. 137 S. Ct. 1002, 1007-13 (2017). The Court decided subject matter eligibility as a question of law over statutory interpretation. *Id.* But the Court expressed “no opinion on whether these works are sufficiently original to qualify for copyright protection,” suggesting that the copyrightability determination of the particular uniform was a question of fact. *Id.* at 1012 n.1. Indeed, this Court has traditionally considered copyrightability of particular works as questions of fact. *See, e.g., Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59-60 (1884) (“the existence of those *facts* of

originality, of intellectual production, of thought, and conception on the part of the author *should be proved.*”) (emphasis added). This Court’s review is necessary to eliminate the uncertainty in circuit courts below, and to vindicate the right of artists to have juries—not judges—resolve facts in copyright disputes.

A. The circuit courts are split about whether copyrightability disputes are questions of fact versus questions of law.

The circuit courts do not speak with one voice about whether the validity of a copyright is a question of fact versus a question of law. To start, the Federal Circuit observed that this Court has never addressed this important issue. *Oracle Am., Inc. v. Google, Inc.*, 750 F.3d 1339, 1353 n.3 (Fed. Cir. 2014). And the Seventh Circuit surveyed the circuit courts that have addressed this issue and found them “split.” *Gaiman*, 360F.3d at 648. The Second and Ninth Circuits have found copyrightability is a mixed question of law and fact, while the First Circuit and Seventh Circuit have decided copyrightability as a matter of law. *Id.* (citing *Matthew Bender & Co. v. W. Publ’g Co.*, 158 F.3d 674, 681 (2d Cir.1998); *N. Coast Indus. 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 *Publ’ns Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 478 (7th Cir. 1996)). This split is reason alone for the Court to accept this case for review.

In fact, the Ninth Circuit—the circuit with perhaps the most copyright disputes—is inconsistent

itself. The court’s earliest precedent holds that the question of originality “is one of fact, not of law; one that may not be summarily disposed of upon a motion to dismiss, but which must be established by proof.” *Dezendorf v. Twentieth Century-Fox Film Corp.*, 99 F.2d 850, 851 (9th Cir. 1938) (citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903)). The court reiterated this holding in *North Coast*. 972 F.2d at 1035 (“plaintiff was entitled to have the validity of its copyright determined by a trier-of-fact”); see also *Kamar Int’l, Inc. v. Russ Berrie & Co.*, 657 F.2d 1059, 1061 (9th Cir. 1981).¹ But the Ninth Circuit has also decided originality—and thus copyrightability—as a matter of law. See, e.g., *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1073 (9th Cir. 2000) (finding commercial photograph of a vodka bottle was an original work as a matter of law).

Character copyright cases compound this uncertainty. In *Halicki Films, LLC v. Sanderson Sales & Mktg.*, the Ninth Circuit emphasized that character copyrightability is a “fact-intensive issue.” 547 F.3d 1213, 1225 (9th Cir. 2008). As a result, the court remanded the appeal to the district court to decide whether “Eleanor”—the inanimate car in *Gone in 60 Seconds*—qualified for copyright protection. *Id.* On remand, the district court found a triable issue for the jury to decide. *Halicki v. Carroll Shelby Int’l*, No. 04-08813, Dkt No. 330 at 1, 13-16 (C.D. Cal. Aug. 12, 2009) (CA9.R.Excerpts.26, 38-41). In contrast, the Ninth Circuit found the Batmobile character

¹ The Ninth Circuit even found a plausible claim of originality in a six-word phrase and a four-part lyrical sequence from a song called *Playas Gon’ Play*. *Hall v. Swift*, 782 Fed. Appx. 639 (9th Cir. 2019), modified by 786 Fed. Appx. 711 (9th Cir. 2019).

protected by copyright and a magician who revealed tricks unprotected—both as a matter of law. *See Towle*, 802 F.3d at 1019-23; *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175-76 (9th Cir. 2003). The Ninth Circuit likewise decided that the Moodsters characters were not protected by copyright as a matter of law as well. *See App. 4a, App7a-14a.*

This uncertainty is unique in the field of intellectual property law. Questions of fact dominate the validity of every other form of intellectual property. This Court has found fact issues underlie patent validity challenges. *See Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966) (holding that obviousness of patents under 35 U.S.C. §103 is a question of law involving multiple underlying issues of fact); *see also Gen Elec. Co. v. Nintendo Co.*, 179 F.3d 1350, 1353 (Fed. Cir. 1999) (explaining that patent validity under §102 is a question of fact). Courts reach the same conclusion with trademark validity. *E.g., Zobmondo Entm't, LLC v. Falls Media, LLC*, 602 F.3d 1108, 1113 (9th Cir. 2010) (“The issue of trademark validity is considered an intensely factual issue.”); *see also U.S. Patent & Trademark Office v. Booking.com B.V.*, 140 S. Ct. 2298, 207 L. Ed. 2d 738, 749-59 (2020) (rejecting argument that booking.com is ineligible for trademark protection as a matter law because whether a given term is generic and thus unregistrable “depends on whether consumers *in fact* perceive that term as a name of a class or, instead, as a term capable of distinguishing among members of the class” (emphasis added)). Courts likewise recognize the factual nature of the existence of trade secrets. *See, e.g., Garter-Bare Co. v. Munsingwear, Inc.*, 723 F.2d 707, 714-15 (9th Cir. 1984) (reinstating jury’s factual findings over trade

secret). The Court should resolve this unique uncertainty in copyright law.

B. This Court needs to resolve this uncertainty because this issue is of constitutional importance.

The Court's determination of this issue will affect artists' Seventh Amendment right to trial by jury. Juries—not judges—decide factual disputes in copyright cases. *Feltner*, 523 U.S. at 355. And for good reason. “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations [or other works of art], outside of the narrowest and most obvious limits.” *Bleistein*, 188 U.S. at 251. Yet courts that decide copyrightability as a matter of law eliminate the jury entirely. As one judge held, the copyrightability of a work is a question that the “jury has nothing to do with.” *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 932 F. Supp. 220, 225 (N.D. Ill. 1996) (Easterbrook, J.).

This Court has fiercely defended against any intrusion to the right to trial by jury. “Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.” *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). And this Court has long stressed the need of the courts to protect this right:

The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right

so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.

Jacob v. New York City, 315 U.S. 752, 752–53 (1942). But until this Court resolves whether copyrightability is a question of fact, scores of artists risk wrongfully losing their Seventh Amendment rights. The time is now for the Court to resolve this issue.

The panel decision erred when it decided that copyright law did not protect the Moodsters characters as a matter of law. Copyright protection extends to the original selection and arrangement of even unprotected elements. *Feist*, 499 U.S. at 348-49. In the character context, by definition “[a] character is an aggregation of the particular talents and traits his creator selected for him. That each one may be an idea does not diminish the expressive aspect of that combination.” *Warner Bros.*, 720 F.2d at 243. And similar issues in copyright law are mixed questions of law and fact. *See, e.g., Harper & Row, Publr., Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (addressing fair use doctrine).

Indeed, an artist need only prove two elements to establish copyright infringement: “(1) ownership of a valid copyright, and (2) copying of *constituent elements* of the work that are *original*.” *Feist*, 499 U.S. at 361 (emphasis added). Both elements involve originality. And the circuit courts regularly find questions of fact about the infringer’s copying of original elements. *See, e.g., L.A. Printex Indus., Inc.*

v. Aeropostale, Inc., 676 F.3d 841, 852 (9th Cir. 2012) (reversing summary judgment on “fact-oriented standard” over substantial similarity because “the selection, coordination, and arrangement” of the copyrighted design compared to accused design presented a triable fact issue); *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946) (explaining whether a defendant copied enough from an artist’s original expression is “an issue of fact which a jury is peculiarly fitted to determine”); *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1296 (D.C. Cir. 2002) (“because substantial similarity is customarily an extremely close question of fact, summary judgment has traditionally been frowned upon in copyright litigation”). Neither logic nor law allows courts to decide originality as a matter of law for copyrightability while reserving that same issue as a question of fact for the copying element. Thus, the fundamental question for the panel was whether Moodsters Co.’s 89-page complaint stated a plausible claim that a copyright protects the Moodsters characters. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-63 (2007).

Yet the panel decision disregarded Moodsters Co.’s detailed factual allegations, despite elementary rules to the contrary. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (“the allegations of the complaint should be construed favorably to the pleader”).² The amended complaint detailed how no

² The constitutional basis for Rule 12 motions assumes that courts will not decide fact issues on the merits. *See, e.g., Arthur R. Miller, From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 22 (2010) (explaining that common law demurrer procedures—the constitutional basis for Rule 12 motions—“focused exclusively

other artist had created characters as anthropomorphized emotions—an inherently abstract concept—that featured the Moodsters characters’ unique and expressive traits and characteristics. CA9.R.Excerpts.93-116 ¶¶96-105, 163-165, 178-192. Indeed, the amended complaint even featured a preeminent animation historian expert witness who would opine to these averments. CA9.R.Excerpts.103-109 ¶¶155, 160, 164-165. And the amended complaint described the wide range of options to express the idea of single-emotion characters. CA9.R.Excerpts.112-116.

But the panel ignored these factual allegations and decided that the Moodsters characters were not copyrightable as a matter of law. The panel did not mention plausibility or the detailed factual allegations in the amended complaint. *See generally* App. 1a-17a. Rather, the panel imposed its opinions and impressions in place of the pleading. The panel, for instance, compared different generations of the Moodsters characters and opined, “it would be difficult to conclude that the 2005 Moodsters are the same characters as those sold at Target in 2015.” App. 27a.³ But here are exemplary depictions of one

on the legal sufficiency of the plaintiff’s statement of each substantive element of a cause of action, and did *not* involve a judicial assessment of the case’s *facts or actual merits.*”) (emphasis added); *see also* Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008).

³ The Ninth Circuit panel removed this conclusion from its opinion after Moodsters Co. petitioned for rehearing. *Cf.* App. 10a, App. 27a. But that removal does not change the panel’s underlying determination of its perceived differences in the generations of Moodsters to convey the Moodsters are insufficiently “delineated” or not “especially distinctive,” while

of the characters in these different versions of The Moodsters (each with the signature explosion-from-the-head expression, among other common traits):



CA9.R.Excerpts.147.

The panel’s role was not to make personal determinations about these characters—the first generation or otherwise. At base, the originality, delineation, or distinctiveness—whatever the standard—of the selection and arrangement of combined traits and attributes that make up The

disregarding the similarities. App. 8a-13a. Nor is the question over later iterations of a character even relevant. As mentioned above, later versions of a character are a derivative work, which “does not affect or enlarge the scope ... or subsistence of, any copyright protection in the preexisting material.” 17 U.S.C. § 103(b); see also *Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496 (7th Cir. 2014) (holding that derivative versions of Sherlock Holmes characters in later works could not prevent copyright on original Sherlock Holmes character from passing into public domain at end of copyright term of first Sherlock Holmes work).

Moodsters is a fact issue for the jury. The panel usurped that right through its fact-specific determinations about the characters while ignoring other factual allegations. This erosion of the Seventh Amendment, and more generally the rise of trial by pleading,⁴ will continue unless this Court decides that copyrightability includes fact issues reserved for the jury. At a minimum the Court should reverse the Ninth Circuit’s judgment and remand to the district court for a jury to decide the originality of The Moodsters characters and whether Disney copied them.

III. This case presents exceptionally important issues and is an ideal vehicle for review.

Uniform federal copyright law has paramount importance. “The objective of the Copyright Clause was clearly to facilitate the granting of rights national in scope.” *Goldstein v. California*, 412 U.S. 546, 555 (1973). As Joseph Story explained,

It is beneficial to all parties, that the national government should possess this power; to authors and inventors, because, otherwise, they would be subjected to the varying laws and systems of the different states on this

⁴ See, e.g., Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 337 (2013) (concluding that “it is not unreasonable to assume that the new plausibility regime may lead to judges resolving fact issues on a motion to dismiss” and “thereby intruding on a domain historically committed to the trial process and juries, something that even the fact and narrative pleading systems of times gone by never allowed”).

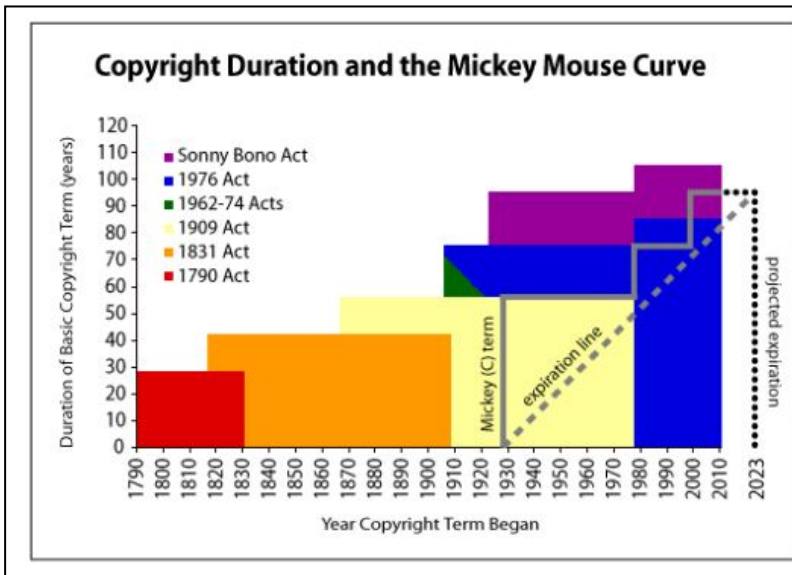
subject, which would impair, and might even destroy the value of their rights; to the public, as it will promote the progress of science and the useful arts, and admit the people at large, after a short interval, to the full possession and enjoyment of all writings and inventions without restraint.

Joseph Story, *Commentaries on the Constitution of the United States* § 502, at 402 (Rotunda & Nowak eds., 1987). But these virtues are defeated by adopting different standards across the circuit courts over copyright law. This Court has never addressed character copyrights. As a result, the circuit courts employ widely divergent standards that decrease certainty and thus fail to incentivize creativity.

Moodsters Co. and Disney are the ideal parties to present these foundational issues about character copyrightability to this Court. Copyright law protects individuals and small companies. In *Stewart v. Abend*, for instance, this Court explained the purpose of copyright's monopoly rights: "The limited monopoly granted to the artist is intended to provide the necessary bargaining capital to garner a fair price for the value of the works passing into public use." 495 U.S. 207, 229 (1990); *see also Twentieth Century Music*, 422 U.S. at 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor."). Now more than ever, in an era of dull reboots and mundane sequels, copyright law must foster creativity. And Moodsters Co. created new, novel, and—above all—original characters that no one had ever expressed before. Moodsters Co. brought the abstract nature of emotions to life. Disney copied

these original characters after its executives viewed the pilot and considered the characters. Moodsters Co. is the ideal party to advocate for a standard to prevent this story from repeat sequels.

Disney is also an appropriate party to vet the proper standard over character copyrights. While Disney benefited from copying the Moodsters characters in *Inside Out*, Disney is also notorious for its aggressive protection of its own characters. Professor Thomas Bell's "Mickey Mouse curve," for instance, reflects Disney's successful efforts to extend the duration of copyright terms every time Disney's copyright on Mickey Mouse nears expiration:



Tom W. Bell, *Copyright Duration and the Mickey Mouse Curve*, August 6, 2009, available at <https://techliberation.com/2009/08/06/copyright->

duration-and-the-mickey-mouse-curve/. And for good reason. Forbes values fictional characters. Even Daffy Duck's uncle, Scrooge McDuck, exceeds \$28 billion in net worth to Disney—a result only possible with copyright protection. See Foley, *Protecting Fictional Characters*, 41 CONN. L. REV. at 923. Disney is also as litigious as any company in its enforcement of its character copyrights, as it even sued the Academy Awards for copyright infringement after a trivial skit at the Oscars that briefly included Snow White. *Disney Company Sues Over Snow White Use*, N.Y. TIMES, Mar. 31, 1989, available at <https://www.nytimes.com/1989/03/31/movies/disney-company-sues-over-snow-white-use.html>. As a copyright owner and infringer, Disney is an ideal party to litigate the standard for character copyrightability.

CONCLUSION

Character copyrights are among the most lucrative copyrights in existence. Yet the circuit courts produce uncertain outcomes based on inconsistent tests divorced from the foundational principles of copyright law. And some courts have excised the jury from its constitutional role in these disputes. The time is now for this Court to address this important body of law—for the first time no less. The Court should grant Moodsters Co.’s petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DENISE DANIELS; THE
MOODSTERS COMPANY,

*Plaintiffs-
Appellants,*

v.

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

*Defendants-
Appellees.*

No. 18-
55635

D.C. No.
2:17-cv-04527-
PSG-SK

ORDER AND
AMENDED
OPINION

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, District Judge, Presiding

Argued and Submitted November 6, 2019
Pasadena, California

Filed March 16, 2020
Amended May 4, 2020

Before: Jerome Farris, M. Margaret McKeown, and
Barrington D. Parker, Jr.,* Circuit Judges.

Order;
Opinion by Judge McKeown

SUMMARY**

Copyright

The panel filed (1) an order amending its opinion, denying a petition for panel rehearing, and denying on behalf of the court a petition for rehearing en banc; and (2) an amended opinion affirming the district court's dismissal of an action alleging copyright infringement by the Disney movie *Inside Out* of plaintiffs' characters called The Moodsters.

Affirming the denial of plaintiff's claim under the Copyright Act, the panel held that The Moodsters, lightly sketched anthropomorphized characters representing human emotions, did not qualify for copyright protection because they lacked consistent, identifiable character traits and attributes and were not especially distinctive. The Moodsters also did not

* The Honorable Barrington D. Parker, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Second Circuit, sitting by designation.

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qualify for copyright protection under the alternative “story being told” test.

The panel also affirmed the district court’s denial of plaintiff’s claim for breach of an implied-in-fact contract under California law, based on her disclosure of information about The Moodsters to various employees of Disney and its affiliates.

COUNSEL

Patrick Arenz, Esq.(argued), Ronald J. Schutz and Brenda L. Joly, Robins Kaplan LLP, Minneapolis, Minnesota, for Plaintiffs-Appellants.

Mark Remy Yohalem, Esq. (argued), Glenn D. Pomerantz, Erin J. Cox, Kenneth M. Trujillo-Jamison, and Anne K. Conley, Munger, Tolles & Olson LLP, Los Angeles, California, for Defendants-Appellees.

ORDER

The opinion filed on March 16, 2020, slip op. 18-55635, and appearing at 952 F.3d 1149, is hereby amended. An amended opinion is filed concurrently with this order.

With these amendments, the panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and petition for rehearing en banc are **DENIED**. No further petitions for en banc or panel rehearing shall be permitted.

OPINION

McKEOWN, Circuit Judge:

Literary and graphic characters—from James Bond to the Batmobile—capture our creative imagination. These characters also may enjoy copyright protection, subject to certain limitations. Here we consider whether certain anthropomorphized characters representing human emotions qualify for copyright protection. They do not. For guidance, we turn to *DC Comics v. Towle*, our court’s most recent explanation of the copyrightability of graphically-depicted characters. *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015).

Denise Daniels developed a line of anthropomorphic characters called The Moodsters, which she pitched to entertainment and toy companies around the country, including The Walt Disney Company. Under *Towle*, “lightly sketched” characters such as The Moodsters, which lack “consistent, identifiable character traits and attributes,” do not enjoy copyright protection. *Id.* at 1019, 1021. We affirm the district court’s dismissal of Daniels’s complaint.

BACKGROUND

I. The Moodsters

Daniels is an expert on children’s emotional

intelligence and development. She designed and promoted initiatives that help children cope with strong emotions like loss and trauma. The Moodsters were devised as a commercial application of this work. Daniels hired a team to produce and develop her idea under the umbrella of her new company, The Moodsters Company. The initial product was The Moodsters Bible (“Bible”), a pitchbook released in 2005. It provided a concise way to convey Daniels’s idea to media executives and other potential collaborators, and included a brief description of the characters, themes, and setting that Daniels envisioned for her Moodsters universe.

The Moodsters are five characters that are color-coded anthropomorphic emotions, each representing a different emotion: pink (love); yellow (happiness); blue (sadness); red (anger); and green (fear). Daniels initially named The Moodsters Oolvia, Zip, Sniff, Roary, and Shake, although these names changed in each iteration of the characters.

In 2007, Daniels and her team released a 30-minute pilot episode for a television series featuring The Moodsters, titled “The Amoodsment Mixup” (“pilot”). The pilot was later available on YouTube.

Between 2012 and 2013, Daniels and her team developed what they call the “second generation” of Moodsters products: a line of toys and books featuring The Moodsters that were sold at Target and other retailers beginning in 2015.

Daniels and The Moodsters Company pitched The Moodsters to numerous media and entertainment companies. One recurring target was The Walt

Disney Company and its affiliates, including Pixar. Daniels alleges that she or a member of her team had contact with several different Disney employees between 2005 and 2009.

The claimed contact began in 2005, when a member of The Moodsters Company shared information about The Moodsters with an employee of Playhouse Disney. Daniels alleges that in 2008 she was put in touch with Thomas Staggs, the Chief Financial Officer of the Walt Disney Company, and that Staggs later informed her that he would share materials about The Moodsters with Roy E. Disney, the son of a Disney founder, and Rich Ross, the President of Disney Channels Worldwide. Finally, Daniels alleges that she spoke by phone with Pete Docter, a director and screenwriter, and they discussed The Moodsters, although no year or context for this conversation is alleged in the Complaint.

II. Disney's *Inside Out*

Disney began development of its movie *Inside Out* in 2010. The movie was released in 2015, and centers on five anthropomorphized emotions that live inside the mind of an 11-year-old girl named Riley. Those emotions are joy, fear, sadness, disgust, and anger. Docter, who directed and co-wrote the screenplay, stated that his inspiration for the film was the manner with which his 11-year-old daughter dealt with new emotions as she matured.

III. District Court Proceedings

Daniels filed suit against Disney in 2017 for breach of an implied-in-fact contract, arising from Disney's

failure to compensate Daniels for the allegedly disclosed material used to develop *Inside Out*. Daniels then filed an amended complaint, joining The Moodsters Company as a co-plaintiff and alleging copyright infringement of both the individual Moodsters characters and the ensemble of characters as a whole.

Disney filed a motion to dismiss, asserting that Daniels failed to meet the legal standard for copyright in a character, and that the copyright “publication” of the Bible and pilot doomed Daniels’s implied-in-fact contract claim. The district court granted Disney’s motion to dismiss, and granted Daniels leave to file an amended complaint on the copyright claims. Disney filed a motion to dismiss the Amended Complaint, which the district court granted on the ground that The Moodsters are not protectable by copyright.

ANALYSIS

I. Copyright Protection for The Moodsters

Although characters are not an enumerated copyrightable subject matter under the Copyright Act, *see* 17 U.S.C. § 102(a), there is a long history of extending copyright protection to graphically-depicted characters. *See, e.g., Olson v. Nat’l Broad. Co.*, 855 F.2d 1446, 1452 (9th Cir. 1988); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978). However, “[n]ot every comic book, television, or motion picture character is entitled to copyright protection.” *Towle*, 802 F.3d at 1019. 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 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.” *Id.* at 1021 (internal citations and quotation marks removed).

A. Application of the *Towle* Test to The Moodsters

Disney does not dispute that the individual Moodster characters meet the first prong of the *Towle* test: each has physical as well as conceptual qualities. Because they have physical qualities, The Moodsters are not mere literary characters.

The second prong presents an insurmountable hurdle for Daniels. *Towle* requires that a character must be “sufficiently delineated to be recognizable as the same character whenever it appears.” *Id.* Although a character that has appeared in multiple productions or iterations “need not have a consistent appearance,” it “must display consistent, identifiable character traits and attributes” such that it is recognizable whenever it appears. *Id.*

Consistently recognizable characters like Godzilla or James Bond, whose physical characteristics may change over various iterations, but who maintain consistent and identifiable character traits and attributes across various productions and adaptations, meet the test. *See Tono Co. v. William Morrow & Co.*, 33 F. Supp. 2d 1206, 1215 (C.D. Cal. 1998) (finding that Godzilla is consistently a “pre-historic, fire-breathing, gigantic dinosaur alive and

well in the modern world”), *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Corp.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995) (noting that James Bond has consistent traits such as “his cold-bloodedness; his overt sexuality; his love of martinis ‘shaken, not stirred;’ his marksmanship; his ‘license to kill’ and use of guns; his physical strength; his sophistication”). By contrast, a character that lacks a core set of consistent and identifiable character traits and attributes is not protectable, because that character is not immediately recognizable as the same character whenever it appears. *See, e.g., Olson*, 855 F.2d at 1452–53 (holding that television characters from “Cargo” are too “lightly sketched” to be independently protectable by copyright).

In addressing *The Moodsters*, we first distinguish between the idea for a character and the depiction of that character. The notion of using a color to represent a mood or emotion is an idea that does not fall within the protection of copyright. *See* 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.”); *see also Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344–45 (1991) (internal quotation marks and citation removed) (“The most fundamental axiom of copyright law is that no author may copyright his ideas . . .”); *Frybarger v. Int’l Bus. Mach. Corp.*, 812 F.2d 525, 529 (9th Cir. 1987) (“[I]deas themselves are not protected by copyright and cannot, therefore, be infringed.”). So it is no surprise that the idea of color psychology is involved in everything from decorating books to marketing and color therapy. Color and emotion are also frequent themes in children’s books,

such as Dr. Seuss's classic, *My Many Colored Days*, and Anna Llenas's *The Color Monster: A Story of Emotions*.

Notably, colors themselves are not generally copyrightable. *Boisson v. Banian*, 273 F.3d 262, 271 (2d Cir. 2001) ("Color by itself is not subject to copyright protection."); *see also* 38 C.F.R. § 202.1(a) ("[M]ere variations of . . . coloring" are not copyrightable). Nor is the "idea" of an emotion copyrightable. *See Feist*, 499 U.S. at 350. Taken together, these principles mean that Daniels cannot copyright the idea of colors or emotions, nor can she copyright the idea of using colors to represent emotions where these ideas are embodied in a character without sufficient delineation and distinctiveness.

In analyzing whether The Moodster characters are "sufficiently delineated," we carefully examine the graphic depiction of the characters and not the ideas underlying them. We look first to the physical appearance of The Moodsters. Unlike, for example, the Batmobile, which "maintained distinct physical and conceptual qualities since its first appearance in the comic books," the physical appearance of The Moodsters changed significantly over time. *Towle*, 802 F.3d at 1021. In the 2005 Bible and 2007 television pilot, the five Moodsters have an insect-like appearance, with skinny bodies, long ears, and tall antennas that act as "emotional barometers" to form a distinctive shape and glow when an emotion is strongly felt. By the second generation of toys, The Moodsters look like small, loveable bears. They are round and cuddly, have small ears, and each dons a detective's hat and small cape.

Mindful that physical appearance alone is not decisive, we also consider whether The Moodsters have maintained consistent character traits and attributes. Across the various iterations The Moodsters have consistently represented five human emotions, and those emotions have not changed. But other than the idea of color and emotions, there are few other identifiable character traits and attributes that are consistent over the various iterations. In the 2005 Bible, each character is described in a few short paragraphs. For example, the Zip character is described as having “an infectious laugh and wakes up each morning with a smile on his face and a friendly attitude.” By the 2007 pilot, these characteristics are not mentioned and are not evident from the depiction of Zip. The other four Moodsters similarly lack consistent characteristics and attributes in the 2005 Bible and 2007 pilot. “Lightly sketched” characters of this kind, without identifiable character traits, are not copyrightable under the second prong of *Towle*. See *id.* at 1019 (citing *Olson*, 855 F.3d at 1452–53).

Perhaps the most readily identifiable attribute of The Moodsters is their relationship to emotions. The 2005 Bible explains that each character relates to emotions in its own way when something new happens—the “anger” Moodster might become angry, whereas the “sad” Moodster might become sad. The Moodsters behave in a similar fashion in the 2007 pilot, where each character is especially prone to a particular emotion such as anger or sadness. But by 2015, the five Moodsters are “mood detectives,” and help a young boy uncover how he feels about situations in his life.

Finally, in every iteration the five Moodsters each have a completely different name. For example, the red/anger Moodster was originally named Roary in the 2005 Bible, then Rizzi in the 2007 pilot, and as of 2015 was named Razy in Moodsters toys and the *Meet the Moodsters* storybook. The other four characters have gone through similar name changes over the three iterations. While a change of name is not dispositive in our analysis, these changes across each iteration further illustrate that Daniels never settled on a well-delineated set of characters beyond their representation of five human emotions.

The Batmobile in *Towle* again provides a useful contrast to this case. There, we recognized that from the time of the 1966 television series to the 1989 motion picture, the Batmobile had numerous identifiable and consistent character traits and attributes. It was always a “crime-fighting car” that allowed Batman to defeat his enemies. *Towle*, 802 F.3d at 1021. It consistently had jet-engines and far more power than an ordinary car, the most up-to-date weaponry, and the ability to navigate through landscapes impassible for an ordinary vehicle. *Id.* at 1021–22. Beyond the emotion it represents, each Moodster lacks comparable identifiable and consistent character traits and attributes across iterations, thus failing the second prong of the *Towle* test.

Finally, even giving Daniels the benefit of the doubt on *Towle*’s second prong, we conclude that The Moodsters fail the third prong—they are not “especially distinctive” and do not “contain some unique elements of expression.” *Id.* (internal quotation marks and citations removed). Daniels

identifies The Moodsters as unique in that they each represent a single emotion. But this facet is not sufficient to render them “especially distinctive,” particularly given their otherwise generic attributes and character traits. In contrast, the Batmobile in *Towle* had a “unique and highly recognizable name,” unlike each Moodster, which had three entirely different names. *Id.* at 1022. Developing a character as an anthropomorphized version of a specific emotion is not sufficient, in itself, to establish a copyrightable character. *See Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003) (declining to extend copyright protection to “the magician ... dressed in standard magician garb—black tuxedo with tails, a white tuxedo shirt, a black bow tie, and a black cape with red lining” whose role is “limited to performing and revealing magic tricks”). Taken together, The Moodsters are not “especially distinctive,” and do not meet the third prong of the *Towle* test.

B. The Story Being Told Test

Since the 1950s, we have also extended copyright protection to characters—both literary and graphic—that constitute “the story being told” in a work. *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954); *see also Rice*, 330 F.3d at 1175–76; *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008). A character is not copyrightable under this test where “the character is only the chessman in the game of telling the story.” *Warner Bros. Pictures*, 216 F.2d at 950. This is a high bar, since few characters so dominate the story such that it becomes essentially a character study.

Warner Brothers and *Towle* are two different tests for character copyrightability. See *Rice*, 330 F.3d at 1175 (“characters that are ‘especially distinctive’ or the ‘story being told’ receive protection apart from the copyrighted work” (emphasis added)). Thus, we do not embrace the district court’s view that *Towle* represents the exclusive test for copyrightability.

The *Warner Brothers* test is therefore available, but it affords no protection to *The Moodsters*. Neither the Bible nor the pilot episode exhibits any prolonged engagement with character development or a character study of *The Moodsters*. Although the characters are introduced in the Bible, along with short descriptions, these pithy descriptions do not constitute the story being told. The pilot contains even less character development—rather, each of *The Moodsters* serves primarily as a means by which particular emotions are introduced and explored. *The Moodsters* are mere chessmen in the game of telling the story.

Daniels’s final argument is that even if the individual *Moodsters* are not protectable under the *Towle* or “story being told” regimes, the ensemble of five characters *together* meets one or both of those tests. Daniels’s ensemble claim does not change the distinctiveness or degree of delineation of the characters, and so *The Moodsters* as an ensemble are no more copyrightable than the individual characters.

The district court did not err in dismissing Daniels’s claims for copyright infringement.

II. Implied-in-Fact Contract

Daniels also puts forth a claim for breach of an implied-in-fact contract. Under California law, a plaintiff can recover compensation for an idea conveyed to a counter-party where no explicit contract exists only where (1) “before or after disclosure he has obtained an express promise to pay,” or (2) “the circumstances preceding and attending disclosure, together with the conduct of the offeree acting with knowledge of the circumstances, show a promise of the type usually referred to as ‘implied’ or ‘implied-in-fact.’” *Desny v. Wilder*, 46 Cal. 2d 715, 738 (1956). The Ninth Circuit has developed a multi-part test to evaluate *Desny* claims, asking whether (1) the plaintiff prepared or created the work in question, (2) the work was disclosed to the defendant for sale, and (3) the disclosure was made “under circumstances from which it could be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered and the reasonable value of the work.” *Grosso v. Miramax Film Corp.*, 383 F.3d 965, 967 (9th Cir. 2004).

Daniels’s implied-in-fact contract claim is based on the disclosure of information about The Moodsters to various employees of Disney and its affiliates between 2005 and 2009. These discussions were a part of Daniels’s effort to find a partner with whom she could develop and grow the Moodsters brand and commercial opportunities.

There is no dispute that Daniels created the characters in question, and we accept as true that the alleged conversations took place. But the existence of

a conversation in which an idea is disclosed is, by itself, an insufficient basis to support an implied-in-fact contract.

Daniels alleges that “she was aware and relied on customs and practices in the entertainment industry when she approached Disney·Pixar about a partnership,” and that “Disney·Pixar accepted the disclosure of the ideas in *The Moodsters* with an expectation that it would have to compensate Daniels and The Moodsters Company if Disney·Pixar used this idea in any television, motion picture, merchandise, or otherwise.”

But we are told no more. Daniels offers only bare allegations, stripped of relevant details that might support her claim for an implied-in-fact contract. No dates are alleged, and no details are provided. There is no basis to conclude that Disney either provided an express offer to pay for the disclosure of Daniels’s idea or that the disclosure was made “under circumstances from which it could be concluded that [Disney] voluntarily accepted the disclosure knowing the conditions on which it was tendered and the reasonable value of the work.” *Id.*

To survive a motion to dismiss, Daniels is required under California law to do more than plead a boilerplate allegation, devoid of any relevant details. The district court did not err in dismissing Daniels’s claim for an implied-in-fact contract.

CONCLUSION

There is no dispute that the 2005 Moodsters Bible and the 2007 pilot television episode are protected by

copyright. But Daniels cannot succeed on her copyright claim for The Moodsters characters, which are “lightly sketched” and neither sufficiently delineated nor representative of the story being told. Daniels also fails to allege sufficient facts to maintain an implied-in-fact contract claim against Disney under California law.

AFFIRMED.

APPENDIX B

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DENISE DANIELS; THE
MOODSTERS COMPANY,

*Plaintiffs-
Appellants,*

v.

THE WALT DISNEY
COMPANY; DISNEY
ENTERPRISES, INC.; DISNEY
CONSUMER PRODUCTS AND
INTERACTIVE MEDIA INC.;
DISNEY INTERACTIVE
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OPINION

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Before: Jerome Farris, M. Margaret McKeown, and
Barrington D. Parker, Jr.,* Circuit Judges.

Opinion by Judge McKeown

SUMMARY**

Copyright

The panel affirmed the district court's dismissal of an action alleging copyright infringement by the Disney movie *Inside Out* of plaintiffs' characters called The Moodsters.

Affirming the denial of plaintiff's claim under the Copyright Act, the panel held that The Moodsters, lightly sketched anthropomorphized characters representing human emotions, did not qualify for copyright protection because they lacked consistent, identifiable character traits and attributes and were not especially distinctive. The Moodsters also did not qualify for copyright protection under the alternative "story being told" test.

The panel also affirmed the district court's denial of plaintiff's claim for breach of an implied-in-fact contract under California law, based on her

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disclosure of information about The Moodsters to various employees of Disney and its affiliates.

COUNSEL

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Mark Remy Yohalem, Esq. (argued), Glenn D. Pomerantz, Erin J. Cox, Kenneth M. Trujillo-Jamison, and Anne K. Conley, Munger, Tolles & Olson LLP, Los Angeles, California, for Defendants-Appellees.

OPINION

McKEOWN, Circuit Judge:

Literary and graphic characters—from James Bond to the Batmobile—capture our creative imagination. These characters also may enjoy copyright protection, subject to certain limitations. Here we consider whether certain anthropomorphized characters representing human emotions qualify for copyright protection. They do not. For guidance, we turn to *DC Comics v. Towle*, our court’s most recent explanation of the copyrightability of graphically-depicted characters. *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015).

Denise Daniels developed a line of anthropomorphic characters called The Moodsters, which she pitched to entertainment and toy companies around the country, including The Walt

Disney Company. Under *Towle*, “lightly sketched” characters such as The Moodsters, which lack “consistent, identifiable character traits and attributes,” do not enjoy copyright protection. *Id.* at 1019, 1021. We affirm the district court’s dismissal of Daniels’s complaint.

BACKGROUND

I. The Moodsters

Daniels is an expert on children’s emotional intelligence and development. She designed and promoted initiatives that help children cope with strong emotions like loss and trauma. The Moodsters were devised as a commercial application of this work. Daniels hired a team to produce and develop her idea under the umbrella of her new company, The Moodsters Company. The initial product was The Moodsters Bible (“Bible”), a pitchbook released in 2005. It provided a concise way to convey Daniels’s idea to media executives and other potential collaborators, and included a brief description of the characters, themes, and setting that Daniels envisioned for her Moodsters universe.

The Moodsters are five characters that are color-coded anthropomorphic emotions, each representing a different emotion: pink (love); yellow (happiness); blue (sadness); red (anger); and green (fear). Daniels initially named The Moodsters Oolvia, Zip, Sniff, Roary, and Shake, although these names changed in each iteration of the characters.

In 2007, Daniels and her team released a 30-minute pilot episode for a television series featuring

The Moodsters, titled “The Amoodsment Mixup” (“pilot”). The pilot was later available on YouTube.

Between 2012 and 2013, Daniels and her team developed what they call the “second generation” of Moodsters products: a line of toys and books featuring The Moodsters that were sold at Target and other retailers beginning in 2015.

Daniels and The Moodsters Company pitched The Moodsters to numerous media and entertainment companies. One recurring target was The Walt Disney Company and its affiliates, including Pixar. Daniels alleges that she or a member of her team had contact with several different Disney employees between 2005 and 2009.

The claimed contact began in 2005, when a member of The Moodsters Company shared information about The Moodsters with an employee of Playhouse Disney. Daniels alleges that in 2008 she was put in touch with Thomas Staggs, the Chief Financial Officer of the Walt Disney Company, and that Staggs later informed her that he would share materials about The Moodsters with Roy E. Disney, the son of a Disney founder, and Rich Ross, the President of Disney Channels Worldwide. Finally, Daniels alleges that she spoke by phone with Pete Docter, a director and screenwriter, and they discussed The Moodsters, although no year or context for this conversation is alleged in the Complaint.

II. Disney’s *Inside Out*

Disney began development of its movie *Inside Out* in 2010. The movie was released in 2015, and centers

on five anthropomorphized emotions that live inside the mind of an 11-year-old girl named Riley. Those emotions are joy, fear, sadness, disgust, and anger. Docter, who directed and co-wrote the screenplay, stated that his inspiration for the film was the manner with which his 11-year-old daughter dealt with new emotions as she matured.

III. District Court Proceedings

Daniels filed suit against Disney in 2017 for breach of an implied-in-fact contract, arising from Disney's failure to compensate Daniels for the allegedly disclosed material used to develop *Inside Out*. Daniels then filed an amended complaint, joining The Moodsters Company as a co-plaintiff and alleging copyright infringement of both the individual Moodsters characters and the ensemble of characters as a whole.

Disney filed a motion to dismiss, asserting that Daniels failed to meet the legal standard for copyright in a character, and that the copyright "publication" of the Bible and pilot doomed Daniels's implied-in-fact contract claim. The district court granted Disney's motion to dismiss, and granted Daniels leave to file an amended complaint on the copyright claims. Disney filed a motion to dismiss the Amended Complaint, which the district court granted on the ground that The Moodsters are not protectable by copyright.

ANALYSIS

I. Copyright Protection for The Moodsters

Although characters are not an enumerated copyrightable subject matter under the Copyright Act, *see* 17 U.S.C. § 102(a), there is a long history of extending copyright protection to graphically-depicted characters. *See, e.g., Olson v. Nat'l Broad. Co.*, 855 F.2d 1446, 1452 (9th Cir. 1988); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978). However, “[n]ot every comic book, television, or motion picture character is entitled to copyright protection.” *Towle*, 802 F.3d at 1019. 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 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.” *Id.* at 1021 (internal citations and quotation marks removed).

A. Application of the *Towle* Test to The Moodsters

Disney does not dispute that the individual Moodster characters meet the first prong of the *Towle* test: each has physical as well as conceptual qualities. Because they have physical qualities, The Moodsters are not mere literary characters.

The second prong presents an insurmountable hurdle for Daniels. *Towle* requires that a character must be “sufficiently delineated to be recognizable as

the same character whenever it appears.” *Id.* Although a character that has appeared in multiple productions or iterations “need not have a consistent appearance,” it “must display consistent, identifiable character traits and attributes” such that it is recognizable whenever it appears. *Id.*

Consistently recognizable characters like Godzilla or James Bond, whose physical characteristics may change over various iterations, but who maintain consistent and identifiable character traits and attributes across various productions and adaptations, meet the test. *See Tono Co. v. William Morrow & Co.*, 33 F. Supp. 2d 1206, 1215 (C.D. Cal. 1998) (finding that Godzilla is consistently a “pre-historic, fire-breathing, gigantic dinosaur alive and well in the modern world”), *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Corp.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995) (noting that James Bond has consistent traits such as “his cold-bloodedness; his overt sexuality; his love of martinis ‘shaken, not stirred;’ his marksmanship; his ‘license to kill’ and use of guns; his physical strength; his sophistication”). By contrast, a character that lacks a core set of consistent and identifiable character traits and attributes is not protectable, because that character is not immediately recognizable as the same character whenever it appears. *See, e.g., Olson*, 855 F.2d at 1452–53 (holding that television characters from “Cargo” are too “lightly sketched” to be independently protectable by copyright).

In addressing *The Moodsters*, we first distinguish between the idea for a character and the depiction of that character. The notion of using a color to represent a mood or emotion is an idea that does not

fall within the protection of copyright. *See* 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.”); *see also Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344–45 (1991) (internal quotation marks and citation removed) (“The most fundamental axiom of copyright law is that no author may copyright his ideas . . .”); *Frybarger v. Int’l Bus. Mach. Corp.*, 812 F.2d 525, 529 (9th Cir. 1987) (“[I]deas themselves are not protected by copyright and cannot, therefore, be infringed.”). So it is no surprise that the idea of color psychology is involved in everything from decorating books to marketing and color therapy. Color and emotion are also frequent themes in children’s books, such as Dr. Seuss’s classic, *My Many Colored Days*, and Anna Llenas’s *The Color Monster: A Story of Emotions*.

Notably, colors themselves are not generally copyrightable. *Boisson v. Banian*, 273 F.3d 262, 271 (2d Cir. 2001) (“Color by itself is not subject to copyright protection.”); *see also* 38 C.F.R. § 202.1(a) (“[M]ere variations of . . . coloring” are not copyrightable). Nor is the “idea” of an emotion copyrightable. *See Feist*, 499 U.S. at 350. Taken together, these principles mean that Daniels cannot copyright the idea of colors or emotions, nor can she copyright the idea of using colors to represent emotions where these ideas are embodied in a character without sufficient delineation and distinctiveness.

In analyzing whether The Moodster characters are “sufficiently delineated,” we carefully examine

the graphic depiction of the characters and not the ideas underlying them. We look first to the physical appearance of The Moodsters. Unlike, for example, the Batmobile, which “maintained distinct physical and conceptual qualities since its first appearance in the comic books,” the physical appearance of The Moodsters changed significantly over time. *Towle*, 802 F.3d at 1021. In the 2005 Bible and 2007 television pilot, the five Moodsters have an insect-like appearance, with skinny bodies, long ears, and tall antennas that act as “emotional barometers” to form a distinctive shape and glow when an emotion is strongly felt. By the second generation of toys, The Moodsters look like small, loveable bears.¹ They are round and cuddly, have small ears, and each dons a detective’s hat and small cape. This physical transformation over time was not insubstantial, and it would be difficult to conclude that the 2005 Moodsters are the same characters as those sold at Target in 2015.

Mindful that physical appearance alone is not decisive, we also consider whether The Moodsters have maintained consistent character traits and attributes. Across the various iterations The Moodsters have consistently represented five human emotions, and those emotions have not changed. But other than the idea of color and emotions, there are few other identifiable character traits and attributes

¹ Although the second generation of toys was developed between 2012 and 2013—after Disney began to develop *Inside Out* in 2010—that iteration remains relevant because the *Towle* test asks whether a character has displayed “consistent, identifiable character traits and attributes” whenever it appears. 802 F.3d at 1021.

that are consistent over the various iterations. In the 2005 Bible, each character is described in a few short paragraphs. For example, the Zip character is described as having “an infectious laugh and wakes up each morning with a smile on his face and a friendly attitude.” By the 2007 pilot and the second generation of toys, these characteristics are not mentioned and are not evident from the depiction of Zip. “Lightly sketched” characters of this kind, without identifiable character traits, are not copyrightable under the second prong of *Towle*. See *id.* at 1019 (citing *Olson*, 855 F.3d at 1452–53).

Perhaps the most readily identifiable attribute of The Moodsters is their relationship to emotions. The 2005 Bible explains that each character relates to emotions in its own way when something new happens—the “anger” Moodster might become angry, whereas the “sad” Moodster might become sad. The Moodsters behave in a similar fashion in the 2007 pilot, where each character is especially prone to a particular emotion such as anger or sadness. But by 2015, the five Moodsters are “mood detectives,” and help a young boy uncover how he feels about situations in his life.

Finally, in every iteration the five Moodsters each have a completely different name. For example, the red/anger Moodster was originally named Roary in the 2005 Bible, then Rizzi in the 2007 pilot, and as of 2015 was named Razy in Moodsters toys and the *Meet the Moodsters* storybook.

The other four characters have gone through similar name changes over the three iterations. While a change of name is not dispositive in our analysis,

these changes across the three iterations further illustrate that Daniels never settled on a well-delineated set of characters beyond their representation of five human emotions.

The Batmobile in *Towle* again provides a useful contrast to this case. There, we recognized that from the time of the 1966 television series to the 1989 motion picture, the Batmobile had numerous identifiable and consistent character traits and attributes. It was always a “crime-fighting car” that allowed Batman to defeat his enemies. *Towle*, 802 F.3d at 1021. It consistently had jet-engines and far more power than an ordinary car, the most up-to-date weaponry, and the ability to navigate through landscapes impassible for an ordinary vehicle. *Id.* at 1021–22. Beyond the emotion it represents, each Moodster lacks comparable identifiable and consistent character traits and attributes across iterations, thus failing the second prong of the *Towle* test.

Finally, even giving Daniels the benefit of the doubt on *Towle*’s second prong, we conclude that The Moodsters fail the third prong—they are not “especially distinctive” and do not “contain some unique elements of expression.” *Id.* (internal quotation marks and citations removed). Daniels identifies The Moodsters as unique in that they each represent a single emotion. But this facet is not sufficient to render them “especially distinctive,” particularly given their otherwise generic attributes and character traits. In contrast, the Batmobile in *Towle* had a “unique and highly recognizable name,” unlike each Moodster, which had three entirely different names. *Id.* at 1022. Developing a character

as an anthropomorphized version of a specific emotion is not sufficient, in itself, to establish a copyrightable character. See *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003) (declining to extend copyright protection to “the magician ... dressed in standard magician garb—black tuxedo with tails, a white tuxedo shirt, a black bow tie, and a black cape with red lining” whose role is “limited to performing and revealing magic tricks”). Taken together, The Moodsters are not “especially distinctive,” and do not meet the third prong of the *Towle* test.

B. The Story Being Told Test

Since the 1950s, we have also extended copyright protection to characters—both literary and graphic—that constitute “the story being told” in a work. *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954); see also *Rice*, 330 F.3d at 1175–76; *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008). A character is not copyrightable under this test where “the character is only the chessman in the game of telling the story.” *Warner Bros. Pictures*, 216 F.2d at 950. This is a high bar, since few characters so dominate the story such that it becomes essentially a character study.

Warner Brothers and *Towle* are two different tests for character copyrightability. See *Rice*, 330 F.3d at 1175 (“characters that are ‘especially distinctive’ or the ‘story being told’ receive protection apart from the copyrighted work” (emphasis added)). Thus, we do not embrace the district court’s view that *Towle* represents the exclusive test for copyrightability.

The *Warner Brothers* test is therefore available, but it affords no protection to *The Moodsters*. Neither the Bible nor the pilot episode exhibits any prolonged engagement with character development or a character study of *The Moodsters*. Although the characters are introduced in the Bible, along with short descriptions, these pithy descriptions do not constitute the story being told. The pilot contains even less character development—rather, each of *The Moodsters* serves primarily as a means by which particular emotions are introduced and explored. *The Moodsters* are mere chessmen in the game of telling the story.

Daniels's final argument is that even if the individual *Moodsters* are not protectable under the *Towle* or "story being told" regimes, the ensemble of five characters *together* meets one or both of those tests. Daniels's ensemble claim does not change the distinctiveness or degree of delineation of the characters, and so *The Moodsters* as an ensemble are no more copyrightable than the individual characters.

The district court did not err in dismissing Daniels's claims for copyright infringement.

II. Implied-in-Fact Contract

Daniels also puts forth a claim for breach of an implied-in-fact contract. Under California law, a plaintiff can recover compensation for an idea conveyed to a counter-party where no explicit contract exists only where (1) "before or after disclosure he has obtained an express promise to pay," or (2) "the circumstances preceding and attending disclosure, together with the conduct of the

offeree acting with knowledge of the circumstances, show a promise of the type usually referred to as ‘implied’ or ‘implied-in- fact.’” *Desny v. Wilder*, 46 Cal. 2d 715, 738 (1956). The Ninth Circuit has developed a multi-part test to evaluate *Desny* claims, asking whether (1) the plaintiff prepared or created the work in question, (2) the work was disclosed to the defendant for sale, and (3) the disclosure was made “under circumstances from which it could be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered and the reasonable value of the work.” *Grosso v. Miramax Film Corp.*, 383 F.3d 965, 967 (9th Cir. 2004).

Daniels’s implied-in-fact contract claim is based on the disclosure of information about The Moodsters to various employees of Disney and its affiliates between 2005 and 2009. These discussions were a part of Daniels’s effort to find a partner with whom she could develop and grow the Moodsters brand and commercial opportunities.

There is no dispute that Daniels created the characters in question, and we accept as true that the alleged conversations took place. But the existence of a conversation in which an idea is disclosed is, by itself, an insufficient basis to support an implied-in-fact contract.

Daniels alleges that “she was aware and relied on customs and practices in the entertainment industry when she approached Disney.Pixar about a partnership,” and that "Disney.Pixar accepted the disclosure of the ideas in *The Moodsters* with an expectation that it would have to compensate Daniels

and The Moodsters Company if Disney.Pixar used this idea in any television, motion picture, merchandise, or otherwise.”

But we are told no more. Daniels offers only bare allegations, stripped of relevant details that might support her claim for an implied-in-fact contract. No dates are alleged, and no details are provided. There is no basis to conclude that Disney either provided an express offer to pay for the disclosure of Daniels’s idea or that the disclosure was made “under circumstances from which it could be concluded that [Disney] voluntarily accepted the disclosure knowing the conditions on which it was tendered and the reasonable value of the work.” *Id.*

To survive a motion to dismiss, Daniels is required under California law to do more than plead a boiler-plate allegation, devoid of any relevant details. The district court did not err in dismissing Daniels’s claim for an implied-in- fact contract.

CONCLUSION

There is no dispute that the 2005 Moodsters Bible and the 2007 pilot television episode are protected by copyright. But Daniels cannot succeed on her copyright claim for The Moodsters characters, which are “lightly sketched” and neither sufficiently delineated nor representative of the story being told. Daniels also fails to allege sufficient facts to maintain an implied-in-fact contract claim against Disney under California law.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 17-CV-4527 PSG (SKx) Date May 9, 2018

Title Denise Daniels and The Moodsters Company v.
The Walt Disney Company, et al

Present: The Honorable Philip S. Gutierrez, United
States District Judge

Wendy Hernandez
Deputy Clerk

Not Reported
Court Reporter

Attorneys Present for
Plaintiff(s):
Not Present

Attorneys Present for
Defendant(s):
Not Present

**Proceedings (In Chambers): The Court
GRANTS Defendants’ Motion to Dismiss**

Before the Court is Defendants Walt Disney Company, Disney Enterprises, Inc., Disney Consumer Products and Interactive Media, Inc., Disney Interactive Studios, Inc., Disney Shopping, Inc., and Pixar’s (“Defendants” or “Disney”) motion to dismiss Plaintiffs Denise Daniels and The Moodsters Company’s (“Plaintiffs”) second amended complaint. *See* Dkt. # 55 (“*Mot.*”). Plaintiffs timely opposed, *see* Dkt. # 59 (“*Opp.*”) and Defendants replied, *see* Dkt. # 62 (“*Reply*”). The Court finds the matter appropriate

for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. After considering the moving papers, the Court **GRANTS** Defendants' motion.

I. Background

Plaintiff Denise Daniels is a nationally recognized child development expert with over 40 years of experience working in the field of children's social and emotional development. *See* Dkt. # 51, *Second Amended Complaint* ("SAC") ¶¶ 26-35. She co-founded the national non-profit National Childhood Grief Institution and she has been called upon to help children cope with grief and loss, after such events as Desert Storm, Hurricane Katrina, Columbine, and September 11. *Id.* ¶ 28. She has appeared on national television and has published nine children's self-help books relating to emotional wellbeing. *Id.* ¶¶ 31, 35.

Daniels developed *The Moodsters*, a cartoon world populated by characters that embody individual emotions, to help children understand and regulate their emotions. *Id.* ¶ 36. Each Moodster is color-coded and anthropomorphic, and each represents a single emotion: happiness (yellow), sadness (blue), anger (red), fear (green), and love (pink). *Id.* ¶ 53. Plaintiffs recruited top industry talent and emotional intelligence experts to develop and produce *The Moodsters*. *Id.* ¶¶ 40-46. In November 2005, Plaintiffs published a "bible" for *The Moodsters*, a contemplated "animated TV show for preschoolers." *Id.* ¶ 48. In 2007, Plaintiffs created the pilot episode for *The Moodsters*. *Id.* ¶ 49.

Between 2006 and 2009, Plaintiffs allege they pitched *The Moodsters* to Disney every year; many high-ranking Disney executives received the pitch materials, allegedly passing them around to other division heads. *Id.* ¶¶ 67-69. Ultimately, Plaintiffs allege that a conversation about *The Moodsters* occurred between Daniels and Pete Docter, subsequently director of *Inside Out*. *Id.* ¶ 71. In 2010, Disney Pixar began development on *Inside Out*, a feature film about the anthropomorphized emotions that live inside the head of an 11-year-old girl. The film features five color-coded emotions as characters—joy (yellow), sadness (blue), anger (red), fear (purple), and disgust (green). *Id.* ¶¶ 86-90. *Inside Out* grossed more than \$350,000,000 domestically and over \$850,000,000 worldwide. *Id.* ¶ 93.

Plaintiff Daniels filed suit on June 19, 2017, alleging breach of implied-in-fact contract arising from Plaintiffs' disclosure of *The Moodsters* to Disney, which Disney then allegedly used without compensating Plaintiffs, and copyright infringement of the individual characters and the ensemble of characters. *See* Dkt. # 1, *Complaint*. Plaintiffs subsequently filed a first amended complaint on September 20, 2017. *See* Dkt. # 27, *First Amended Complaint* (“*FAC*”). Defendants filed a motion to dismiss the implied-in-fact contract claim and all of the copyright infringement claims, *see* Dkt. # 32, which the Court granted. *See* Dkt. # 47 (“*Order*”). Plaintiffs then filed a second amended complaint, which Defendants again move to dismiss.

II. Legal Standard

To survive a motion to dismiss under Rule 12(b)(6), a complaint must “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In assessing the adequacy of the complaint, the court must accept all pleaded facts as true and construe them in the light most favorable to the plaintiff. *See Turner v. City & Cty. of S.F.*, 788 F.3d 1206, 1210 (9th Cir. 2015); *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). The court then determines whether the complaint “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. However, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* Accordingly, “for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks omitted).

III. Discussion

The Court notes at the outset that Plaintiffs were not granted leave to amend their implied-in-fact contract breach claim (the first cause of action), but it remains in the amended complaint “in order to preserve the claim for appellate review.” SAC 24 n. 6. The Court will therefore not address it here. What remains are Plaintiffs’ copyright infringement claims

regarding each individual character and the ensemble of characters.

A. Claims Three through Six: Individual Characters

Plaintiffs allege that Defendants infringed their copyrights in the Happy (count 3), Sadness (count 4), Anger (count 5), and Fear (count 6) characters. *See generally SAC*. In its prior Order, the Court determined that Plaintiffs' characters did not meet the Ninth Circuit's rigorous standard for copyrightability of a stand-alone character outside of the work it inhabits. *See Order* at 9. Characters standing alone "are not ordinarily entitled to copyright protection." *Blizzard Entm't, Inc. v. Lilith Games (Shanghai) Co.*, 149 F. Supp. 3d 1167, 1173-74 (N.D. Cal. 2015). To be copyrightable independent of the underlying work in which the character appears, the 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." *DC Comics v. Towle*, 802 F.3d 1012, 1020-21 (9th Cir. 2015). The test is conjunctive; Plaintiffs must establish that all three elements are met. The parties agreed that the first element of the test was met, because *The Moodsters* characters are graphically depicted in both the bible and pilot. The Court previously determined, however, that the characters were neither sufficiently delineated nor especially distinctive, and therefore not independently protectable. *See Order* at 6-9. The Court determined that the characters lacked "specific traits on par with

those of the iconic characters” that had achieved independent copyrightability, such as Sherlock Holmes, Tarzan, Superman, and James Bond. *Id.* at 7. The Court distinguished those characters, who are “instantly recognizable as the same character[s] whenever they appear,” from the Moodsters. *Id.* The Court further stated,

Plaintiffs’ characters have been distributed only twice: once in *The Moodsters* bible, and once in the YouTube pilot. With a viewership of only 1,400, the pilot did not likely engender the kind of “widely identifiable” recognition of the characters’ traits envisioned by the Ninth Circuit; that court denied protection for a character that had “appeared in only one home video that sold approximately 17,000 copies,” for lack of “consistent, widely identifiable traits.” *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003). More problematic for Plaintiffs is the requirement that such traits be persistent enough, over time or over multiple iterations, to produce such recognition. Here, the characters have appeared only twice—and their names had all changed from the first appearance to the second.

Id. at 7-8.

That the first element of the three-part test is met is again undisputed. *See generally Mot., Opp.*

Plaintiffs' amended complaint, and the factual allegations regarding each specific character, contain two new arguments: that the existence of the "second generation" of characters demonstrates the characters are sufficiently delineated, and the development process for each character demonstrates they are especially distinctive. The Court will address each new argument in turn.

i. Sufficiently Delineated: "Second Generation" Moodsters

Plaintiffs continue to assert that the characters, "as reflected in *The Moodsters Bible* and *Pilot*, sufficiently delineate these characters so they are recognizable whenever they appear." SAC ¶¶ 143, 205, 242, 279, 315. To bolster this claim, Plaintiffs now contend that there is a "second generation" of Moodsters that was developed in 2012-13 by a company called JellyJam. SAC ¶ 156; *Mot.* 4. Merchandise based on the second generation characters was sold at Target and later through many online retailers. SAC ¶ 156. Plaintiffs did not mention the second generation Moodsters in their first two complaints; nevertheless, Plaintiffs now argue that this second generation of characters is evidence that *The Moodsters* characters "have persisted over time." *Opp.* 10. Plaintiffs allege that "both Moodsters iterations"—the bible and pilot being the first iteration, and the JellyJam characters being the second iteration—"retain core characteristics and traits." SAC ¶ 158; *Opp.* 16.

Defendants begin by arguing that Plaintiffs are not even the copyright owners of the second generation

characters; JellyJam is. *Mot.* 4. Plaintiffs assert that JellyJam is simply “another company owned by Ms. Daniels,” and as owner of the copyright in the original characters, she retains certain rights to the JellyJam characters as well. *Opp.* 16; *see also Towle*, 802 F.3d at 1023 (“The owner of the underlying work retains a copyright in that derivative work with respect to all elements that the derivative creator drew from the underlying and employed in the derivative work.”). Defendants also argue that it is “misleading and impermissible” for Plaintiffs to allege copyright infringement of JellyJam’s products, which were developed *after Inside Out*. *Mot.* 7. Neither of Defendants’ arguments are relevant, however, because Plaintiffs are not alleging that Defendants infringed the JellyJam characters. Rather, they present the second generation characters as evidence that traits and attributes which appeared in the 2005 bible and 2007 pilot have persisted over time, in additional works and media (the second generation), and “continue to this day.” *SAC* ¶ 156; *Opp.* 10.

Plaintiffs assert that the second generation characters bolster their claim that *The Moodsters* are instantly “recognizable wherever they appear,” because their traits “have persisted from creation through—and beyond—the pilot episode in 2007.” *SAC* ¶ 243. The second generation characters, however, undermine that very argument. In its prior Order, the Court noted that the (first generation) characters’ names had not even remained constant from the bible to the pilot. *See Order* at 7-8. The JellyJam characters *again* have new names, constituting the third set of names in as many

iterations. *See* SAC ¶¶ 57; *Mot.* 3.¹ The fear character, for instance, began as Shake in the bible and became Scootz in the pilot; in the JellyJam products, he is called Quigly. SAC ¶ 57; *Mot.* 3. Additionally, the first generation of Moodsters lived in a world called Moodsterville, which had its own geographic landmarks and destinations, while the new characters live in a magician’s top hat under a child’s bed. *Mot.* 3. The characters are now “mood detectives” and “little detectives,” and wear detective hats and capelettes. *Id.* 3; SAC ¶ 156.

In addition to these basic biographical changes, the second generation characters bear little *physical* resemblance to the first. The first set of characters have an alien- or insect-like appearance, with elaborate antennae and eyes, and sometimes horns, sitting atop their heads. *See* SAC ¶ 53. They are very thin with large, furry feet, and arms that reach nearly to the ground.

See id. The JellyJam characters have a wholly different look. They are plump and round, with traditional placement of the eyes in the face. They have no antennae or horns; they wear glasses, hats, and costumes. *See id.* ¶ 156. They have regularly-

¹ Defendants request that the Court take judicial notice of the “Meet the Moodsters” storybook in which the second generation characters are described. *See* Dkt. # 56, Request for Judicial Notice, Ex. C. Plaintiffs do not object. *See* Dkt. # 60, Plaintiffs’ Opposition to Disney’s Request for Judicial Notice at 3. The storybook is also referenced in the complaint. *See* SAC ¶¶ 156, 194. Defendants’ request for judicial notice of the “Meet the Moodsters” Storybook is therefore GRANTED.

proportioned arms, hands, and feet. *See id.* Their hands are now humanoid, while their feet are no longer covered in large fur tufts. *See id.* They have a soft, teddy-bear-like shape and appearance, unlike the bug or alien-like appearance of the first characters. Only each character's color is the same as in the first generation of characters. *See id.* ¶¶ 53, 156.

Characters that courts *have* found sufficiently delineated despite changes in appearance over time include James Bond and Godzilla. The Ninth Circuit explained,

The character “James Bond” qualifies for copyright protection because, no matter what the actor who portrays this character looks like, James Bond always maintains his “cold-bloodedness; his overt sexuality; his love of martinis ‘shaken, not stirred;’ his marksmanship; his ‘license to kill’ and use of guns; his physical strength; [and] his sophistication.” Similarly, while the character “Godzilla” may have a different appearance from time to time, it is entitled to copyright protection because it “is always a pre-historic, fire-breathing, gigantic dinosaur alive and well in the modern world.”

Towle, 802 F.3d at 1020.

The Court is unpersuaded that the second generation Moodsters could be “widely” or “instantly” recognized as being the same characters as those in

the bible and pilot despite their wholesale changes in appearance. The inclusion in the amended complaint of the second generation characters undermines Plaintiffs' argument; it demonstrates that the majority of the characters' traits, including such basic qualities as their names, are fluid. The underlying traits that remain the same do not give rise to the instant recognition enjoyed by James Bond or Godzilla.

Plaintiffs further argue that if this second generation of characters is "relevant to the copyrightability of *The Moodsters*," it would confirm that copyright arose in 2005 when the original characters were "sufficiently fixed." *Opp.* 16. Where character traits change or develop over time, however, courts look to when the character first "displayed *consistent, widely identifiable* traits" and "attributes [that are] *consistently* portrayed" to assess when copyright arose. *Fleisher Studios, Inc. v. A.V.E.L.A., Inc.*, 772 F. Supp. 2d 1135, 1147 (C.D. Cal. 2008) (emphasis added). Therefore, even if the second generation characters *did* render *The Moodsters* characters distinctive enough for independent copyrightability, the characters would become protectable at the point when they displayed consistent, widely identifiable traits—in other words, when the second generation characters were developed. As Defendants note, "it would not have retroactive effect to make the 'first generation' characters independently protectable *at the time of the alleged copying.*" *Reply* 6 (emphasis added). A derivative work is "independent of, and does not affect or enlarge the scope . . . of, any copyright protection in the preexisting material." 17 U.S.C. § 103(b). The

Court agrees that even if the second generation characters “could have helped the Moodsters cross the threshold into independent copyrightability,” *Reply 6*, the first generation characters, who had not yet demonstrated consistent, widely identifiable traits, would not retroactively become protectable—and thus would not have been subject to copyright at the time of the alleged infringement.

ii. Especially Distinctive: Development Process

Plaintiffs have also added facts surrounding the development of the characters, which Plaintiffs point to as evidence that the characters are especially distinctive. The Court begins by noting that the specific traits and attributes of each character, which the Court in its prior Order found were *not* especially distinctive—and thus did not meet the third element of the test—remain the same from the first to the second amended complaint. *Compare, e.g., FAC* ¶¶ 168, 169, 170 *with SAC* ¶¶ 199, 200, 205 (describing the Happy character), and *FAC* ¶¶ 182, 183, 184 *with SAC* ¶¶ 236, 237, 242 (describing the Sadness character). Plaintiffs allege that development of *The Moodsters* characters was aided by emotional intelligence experts who advised Plaintiffs “about the script and attributes and traits of the characters, including suggesting facial expressions and dialogue for particular characters based on their review and interpretation of scientific research on emotions.” *SAC* ¶¶ 147, 209, 246, 283, 310. Plaintiffs also used “focus groups with children and their parents,” led by “leading professors at Yale University,” in developing the characters. *Id.* ¶¶ 146, 148, 210, 247, 284, 320. The

children “understood, recognized, and enjoyed the characters,” and 96% of children polled liked the show. *Id.* ¶ 148. Moreover, the pilot “cost over a third of the \$3.3 million invested in The Moodsters Co.” *Id.* ¶ 146. Finally, Plaintiffs add that “[l]eading entertainment companies reviewed” *The Moodsters*, including PBS, Toys “R” Us, and Nickelodeon, and none of them remarked that the characters lacked detail. *Id.* ¶ 154.

Plaintiffs assert that these new facts are “objective evidence that the characters are not so lightly sketched.” *Opp.* 9. The Court disagrees. None of the new contentions bear on the finished product: the characters that appeared in *The Moodsters* bible and pilot, which the Court has already considered. For instance, the Court has already noted that characters must be especially distinctive “vis-à-vis *other characters*, outside of the work in which they appear.” *Order* at 8 (emphasis in original). That children in a focus group recognized the characters as distinct from one another (rather than from other characters outside of the pilot) is immaterial; similarly, that the children enjoyed the show or that their focus group was led by leading professors has no bearing on the Court’s analysis of the characters themselves and how they were represented in the bible and pilot once Plaintiffs’ extensive development process was complete.

The Court in its prior Order assessed the distinctiveness of the characters and determined that they fell short of the Ninth Circuit’s rigorous test for independent copyrightability. The process by which those characters were developed does not change the finished result.

The Court determines that Plaintiffs' amended complaint suffers from the same deficiencies as the first amended complaint, and the characters are not independently copyrightable. Plaintiffs have failed to meet both the second and third prongs of the Ninth Circuit's three-part test. Accordingly, the Court **GRANTS** Defendants' motion to dismiss Plaintiffs' third, fourth, fifth, and sixth causes of action.

B. Claim Two: Ensemble of Characters

Plaintiffs also include a claim for infringement of the ensemble of characters. SAC ¶ 135. Plaintiffs begin by devoting numerous paragraphs to detailing Disney's past efforts to protect their own copyrights, such as by lobbying for the "Mickey Mouse Protection Act," which extended the term of copyright protection, and noting that Disney "recognizes the importance of copyrights to its business," and "provides notice to the world that [the *Inside Out*] characters are protected by copyright." *Id.* ¶¶ 126, 124, 128. That "Disney-Pixar is famous for aggressively protecting its works—and specifically its animated characters—by copyright" has no bearing on the Court's analysis. *Id.* ¶ 125.

In its prior Order, the Court determined that "Plaintiffs have failed to advance an argument" as to how the ensemble of "lightly sketched" characters merits copyright protection. *Order* at 9. Plaintiffs now allege that *The Moodsters* ensemble of characters is independently copyrightable under either the Ninth Circuit's three-part test, or the "story being told" standard. *Id.* ¶ 140; *Opp.* 7, 12. They first argue that the three-part test is met because the "traits and

attributes of the ensemble of Moodsters characters, as reflected in *The Moodsters Bible* and *Pilot*, sufficiently delineate these characters so that they are recognizable whenever they appear.” *Id.* ¶ 143. Plaintiffs also allege that the characters are “unique” and “individual,” and “no previously animated works featured a collection of five characters each represented by a single emotion.” *Id.* ¶ 164. The “originality of these characters” renders them “especially distinctive.” *Id.* Plaintiffs’ amended complaint regarding the ensemble claim includes the same new contentions regarding the characters’ development and the second generation characters to support their argument that the ensemble merits copyright protection under the Ninth Circuit test. The Court has already addressed the three-part test as to the individual characters, and agrees with Defendant that the characters are neither delineated nor distinctive “to a degree ‘sufficient to afford copyright protection to a character taken alone,’” and thus as an ensemble, under the Ninth Circuit test.

Plaintiffs next allege, in the alternative, that the ensemble is protectable as “the story being told” because “*The Moodsters only* exists because of *The Moodsters* characters.” *Id.* ¶¶ 166-67. Defendants argue that there is no longer any such standard after *Towle*, which consolidated relevant precedent when it established the three-part test. *Mot.* 7. Plaintiffs disagree, countering that “courts have not hesitated to apply the [story being told] standard,” and that Defendants therefore have offered “no substantive response” to Plaintiffs’ “story being told” claim. *Opp.* 12. Defendants are correct, however, that the cases cited by Plaintiffs were decided *before Towle*, not after

it; furthermore, in cases that dealt with visually depicted characters (rather than literary characters), “the story being told test’ [was] inapplicable.” *Anderson v. Stallone*, No. 87–0592 WDKGX, 1989 WL 206431, at *6-7 (C.D. Cal. Apr. 25, 1989); *see also Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1295-96 (C.D. Cal. 1995) (questioning the continued viability of the story being told test as applied to graphic characters). As Defendants note, after *Towle*, copyright in graphically depicted characters “is available only ‘for characters that are especially distinctive.’ To meet this standard, a character must be ‘sufficiently delineated’ and display ‘consistent, widely identifiable traits.’” *Towle*, 820 F. 3d at 1019 (quoting *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170 (9th Cir. 2003)).

Because the Court has determined that Plaintiffs’ characters, either individually or as an ensemble, do not meet this standard, it **GRANTS** Defendants’ motion to dismiss Plaintiffs’ second cause of action.

IV. Leave to Amend

Whether to grant leave to amend rests in the sound discretion of the trial court. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). The Court considers whether leave to amend would cause undue delay or prejudice to the opposing party, and whether granting leave to amend would be futile. *See Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996). Generally, dismissal without leave to amend is improper “unless it is clear that the complaint could not be saved by any amendment.” *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003).

Because the Court has already granted Plaintiffs leave to amend their complaint and they have failed to alleviate the Court's concerns, the Court determines that amendment would be futile. Leave to amend is therefore **DENIED**.

V. Conclusion

For the foregoing reasons, the Court **GRANTS** Defendants' motion to dismiss Plaintiffs' second, third, fourth, fifth, and sixth causes of action. Plaintiffs' first cause of action has already been dismissed, but remains in the amended complaint to preserve it for appellate review. This order therefore closes the case.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 17-4527 PSG (SK) Date January 31, 2018

Title Denise Daniels and The Moodsters Company v.
Walt Disney Company, et al.

Present: The Honorable Philip S. Gutierrez, United
States District Judge

Wendy Hernandez
Deputy Clerk

Not Reported
Court Reporter

Attorneys Present for
Plaintiff(s):
Not Present

Attorneys Present for
Defendant(s):
Not Present

**Proceedings (In Chambers): The Court
GRANTS Defendants' Motion to Dismiss**

Before the Court is Defendants Walt Disney Company, Disney Enterprises, Inc., Disney Consumer Products and Interactive Media, Inc., Disney Interactive Studios, Inc., Disney Shopping, Inc., and Pixar's ("Defendants" or "Disney") motion to dismiss Plaintiffs Denise Daniels and The Moodsters Company's ("Plaintiffs") complaint. Dkt. # 32 ("*Mot.*"). Plaintiffs timely opposed, *see* Dkt. # 40 ("*Opp.*") and Defendant replied, *see* Dkt. # 41 ("*Reply*"). The Court

heard oral arguments on January 29, 2018. See Fed. R. Civ. P. 78; L.R. 7–15. After considering the parties’ papers and arguments, the Court **GRANTS** Defendants’ motion.

I. Background

Plaintiff Denise Daniels is a nationally recognized child development expert with over 40 years of experience working in the field of children’s social and emotional development. See Dkt. # 27, *First Amended Complaint* (“FAC”) ¶¶ 26-35. She co-founded the national non-profit National Childhood Grief Institution; she has been called upon to help children cope with grief and loss, after such events as Desert Storm, Hurricane Katrina, Columbine, and September 11. *Id.* ¶¶ 28-29. She has appeared on national television and has published nine children’s self-help books relating to emotional wellbeing. *Id.* ¶ 35.

Daniels developed *The Moodsters*, a cartoon world populated by characters that embody individual emotions, to help children understand and regulate their emotions. *Opp.* 3. Each Moodster is color-coded and anthropomorphic—happiness (yellow), sadness (blue), anger (red), fear (green), and love (pink). *Id.* ¶ 53. Daniels and The Moodsters Company recruited top industry talent and emotional intelligence experts to develop and produce *The Moodsters*. *Opp.* 3. In November 2005, Plaintiffs published a “bible” for *The Moodsters*, a contemplated “animated TV show for preschoolers.” *FAC*, Ex. 3 at 69. In 2007, Plaintiffs

posted the pilot episode for *The Moodsters* to YouTube. *FAC*, Ex. 4 (2007 pilot).

Between 2006 and 2009, Plaintiffs allege they pitched *The Moodsters* to Disney every year; many high-ranking Disney executives received the pitch materials, allegedly passing them around to other division heads. *Id.* ¶¶ 67-69. Ultimately, Plaintiffs allege a conversation between Daniels and Pete Docter, director of *Inside Out*, about *The Moodsters* (the “Docter Phone Call”). *Id.* ¶ 71. In 2010, Disney Pixar began development on *Inside Out*, a feature film about the anthropomorphized emotions that live inside the head of an 11-year-old girl. The film features five color-coded emotions as characters—joy (yellow), sadness (blue), anger (red), fear (purple), and disgust (green). *Id.* ¶¶ 86-90. *Inside Out* grossed more than \$350,000,000 domestically and over \$850,000,000 worldwide. *Id.* ¶ 93.

Plaintiff Daniels filed suit on June 19, 2017, alleging breach of implied-in-fact contract arising from Plaintiffs’ disclosure of *The Moodsters* to Disney, which Disney then allegedly used without compensating Plaintiffs. *See* Dkt. # 1, *Complaint*. Daniels amended her complaint on September 20, 2017, adding Plaintiff The Moodsters Company and adding five copyright infringement claims. *See* Dkt. # 27, *First Amended Complaint (“FAC”)*. Plaintiffs do not allege that *Inside Out* infringes *The Moodsters* as a work; rather, they allege Defendants infringed their copyright in four of the Moodsters characters and in the ensemble of characters. *See id.* Defendant now

moves to dismiss the implied-in-fact contract claim and all of the copyright infringement claims. *See Mot.*

II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a claim may be dismissed if plaintiff fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). To survive a 12(b)(6) motion to dismiss, a complaint must “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When deciding a Rule 12(b)(6) motion, the court must first accept the facts pleaded in the complaint as true, and construe them in the light most favorable to the plaintiff. *Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013); *Cousins v. Lockyer*, 568 F.3d 1063, 1067–68 (9th Cir. 2009). The court, however, is not required to accept “legal conclusions . . . cast in the form of factual allegations.” *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *see Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555.

After accepting all non-conclusory allegations as true and drawing all reasonable inferences in favor of the plaintiff, the court must then determine whether the complaint alleges a plausible claim to relief. *See Iqbal*, 556 U.S. at 679–80. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a

‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* at 678. “Generally, the scope of review on a motion to dismiss for failure to state a claim is limited to the contents of the complaint.” *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006); *see also Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002) (“Ordinarily, a court may look only at the face of the complaint to decide a motion to dismiss.”). Courts may also, however, consider “attached exhibits, documents incorporated by reference, and matters properly subject to judicial notice.” *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014), *cert. denied sub nom. Cohen v. Nvidia Corp.*, 135 S. Ct. 2349 (2015).

III. Judicial Notice

Under Federal Rule of Evidence 201, the court “can take judicial notice of ‘[p]ublic records and government documents available from reliable sources on the Internet,’ such as websites run by governmental agencies.” *Gerritsen v. Warner Bros. Entm’t Inc.*, 112 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015) (quoting *Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 08-CV-1166-IEG (POR), 2009 WL 6598891, at *2 (S.D. Cal. Dec. 23, 2009)); *see also L’Garde, Inc. v. Raytheon Space & Airborne Sys.*, 805 F. Supp. 2d 932, 937-38 (C.D. Cal. 2011) (noting that public records from the Internet are “generally considered not to be subject to reasonable dispute”) (internal quotation marks omitted). Further, “[p]ublic records and government documents are generally considered ‘not to be subject to reasonable dispute.’”

United States ex rel. Dingle v. BioPort Corp., 270 F. Supp. 2d 968, 972 (W.D. Mich. 2003) (citing *Jackson v. City of Columbus*, 194 F. 3d 737, 745 (6th Cir.1999)). Rule 201(b) of the Federal Rules of Evidence permits judicial notice of facts that can be “accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).

Defendant requests judicial notice of over 200 exhibits comprising over 1,300 pages of documents; the Court will consider only those which figure into its analysis below. *See* Dkt. # 33, *Defendants’ Request for Judicial Notice* (“RJN”).

III. Discussion

A. Implied-in-Fact Contract Claim

Plaintiffs allege that Defendants used ideas from *The Moodsters* in creating *Inside Out* without compensating Plaintiffs for the use. *FAC* ¶¶ 112-21. Defendants argue that this claim is time-barred and that it fails as a matter of law. The Court determines that the second issue is dispositive, so it need not address the first.

A plaintiff cannot predicate an implied-in-fact contract claim on a work that was publicly disclosed *before* plaintiff disclosed it to defendant in exchange for payment if it is used. The California Supreme Court established the principle underlying this type of claim in *Desny v. Wilder*, 46 Cal. 2d 715 (1956), holding that “after voluntary communication to

others, [ideas are] free as the air to common use.” *Id.* at 731-32. However, a duty to pay compensation may arise where a person has clearly conditioned the disclosure upon an obligation to pay, and the offeree, with knowledge of that duty, voluntarily accepts the information and uses the idea. *Id.* at 738-39. The court further stated that “[t]he law will not imply a promise to pay for an idea from the mere facts that the idea has been conveyed, is valuable, and has been used for profit; this is true even though the conveyance has been made with the hope or expectation that some obligation will ensue.” *Id.* at 739. The *Desny* court cautioned that “[t]he law will not in any event, from demands stated subsequent to the unconditioned disclosure of an abstract idea, imply a promise to pay for the idea, for its use, or for its previous disclosure.” *Id.*

Citing *Desny*, the court in *Quirk v. Sony Pictures Ent., Inc.*, No. C 11-3773 RS, 2013 WL 1345075, at *12 (N.D. Cal. Apr. 2, 2013), held that a plaintiff’s publication of a work prior to defendant’s acquisition of the work constituted “unconditional disclosure,” and no implied promise to pay for freely available ideas could be implied. *Id.* at *11-12. That court held that the “touchstone” of such a claim is “whether the plaintiff can be said to be disclosing something that is not otherwise freely available to the defendant.” *Id.* at *12. The issue, then, is whether Plaintiffs made *The Moodsters* freely available prior to their disclosure of the work to Disney.

Daniels and her team “contacted Disney Pixar in 2006, 2007, 2008, and 2009 about *The Moodsters*.”

FAC ¶ 61. Plaintiffs allege that they submitted *The Moodsters* to Disney, and did so “as is custom and common in the entertainment industry, with a reasonable expectation that Disney Pixar would compensate Daniels if Disney Pixar used their ideas. Thus, Daniels . . . provided ideas and materials to Disney Pixar for sale in exchange for compensation and credit if Disney Pixar used such ideas or materials.” *FAC* ¶ 114. They further allege that Disney “accepted the disclosure of the ideas in *The Moodsters* with an expectation that it would have to compensate Daniels and The Moodsters Company if Disney Pixar used this idea in any television, motion picture, merchandise, or otherwise.” *Id.* ¶ 115. Plaintiffs have offered limited facts in support of the assertion that Disney affirmatively accepted disclosure or had an expectation that it would compensate Daniels; certainly, they have alleged no conversation or writing between the parties to that effect. Plaintiffs’ *FAC* alleges that Daniels “contacted a number of individuals” at Disney, and those individuals “received information” about *The Moodsters*. *FAC* ¶¶ 62-69. Plaintiffs do not provide details of what “sharing the materials” entailed, such as whether there were live discussions, meetings, or simply mailings, and what those discussions entailed. Nonetheless, Plaintiffs have alleged that in 2006 and 2007, Plaintiffs shared *The Moodsters* with Playhouse Disney; that in 2008, Daniels shared the materials with Thomas Staggs (CFO of Walt Disney Company); and that in 2008 Staggs shared them with Roy E. Disney and Rich Ross (President of Disney Channels Worldwide). *Id.* ¶¶ 66-69. Additionally, Plaintiffs have alleged that Daniels spoke directly by telephone

to Pete Docter, walking him “through in detail the characters, curriculum, and concept underlying *The Moodsters*.” *Id.* ¶ 71.

However, Plaintiffs registered *The Moodsters* bible with the Copyright Office in 2005, and registered *The Moodsters* pilot on July 27, 2007 (as well as posting it to YouTube in 2007). *FAC* ¶¶ 131, 132, 61; *RJN*, Ex. B-1, B-2. The Court takes judicial notice of Plaintiffs’ copyright registration in *The Moodsters* bible, as “[p]ublic records and government documents available from reliable sources on the Internet,” such as websites run by governmental agencies” are properly subject to judicial notice.

Defendants argue that the 2005 registration constitutes “publication” of the work, which “dooms [Plaintiffs’] implied-in-fact contract claim.” Indeed, Plaintiffs’ copyright registration in *The Moodsters* bible asserts that the “date of publication” of the bible was November 8, 2005. *RJN*, Ex. B-2. “Publication” refers to “the distribution of copies or phonorecords of a work to the public . . .” or “offering to distribute copies or phonorecords to a group of persons for purposes of further distribution.” 17 U.S.C. § 101. A work is “published” if it is distributed with “no explicit or implicit restrictions with respect to [the] disclosure of [the] contents” of the work. H.R. Rep. No. 94-1476 at 138 (1976). Plaintiffs’ registration states that the work was published in 2005 with no implicit or explicit restrictions, thus constituting publication. Having been unconditionally disclosed both in 2005 and 2007 (with the pilot’s copyright registration and posting online), *The Moodsters* work was freely available

when Plaintiffs made contact with Disney. Any contact the parties had after November 2005 cannot, therefore, give rise to an implied-in-fact contract claim.

Accordingly, the Court **GRANTS** Defendants' motion to dismiss the implied-in-fact contract claim.

B. Copyright Infringement: *The Moodsters* Characters

Plaintiffs registered *The Moodsters* pilot with the United States Copyright Office on July 27, 2007. *FAC* ¶ 131. They also registered *The Moodsters* bible. *Id.* ¶ 132. Plaintiff claims copyright protection in—and infringement by Defendants of—the individual Moodsters (the characters), not *The Moodsters* work itself. *See generally FAC*. Defendants argue that Plaintiffs' copyright infringement claims fail because the characters are not protectable in the first instance, either independently or as an ensemble, and because the *Inside Out* characters are not substantially similar to *The Moodsters*. *See generally Mot*. Because the Court finds the first issue dispositive, it need not reach the second.

Plaintiffs assert infringement claims only with respect to the individual characters and the ensemble of characters, rather than in the work itself, so the Court analyzes Plaintiffs' copyright protection claims through the lens of the Ninth Circuit's three-part test to determine whether a character deserves copyright protection independent of the work in which it appears.

Characters standing alone “are not ordinarily entitled to copyright protection.” *Blizzard Entm’t, Inc. v. Lilith Games (Shanghai) Co.*, 149 F. Supp. 3d 1167, 1173-74 (N.D. Cal. 2015). To be copyrightable independent of the underlying work in which the character appears, a 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.’” *DC Comics v. Towle*, 802 F.3d 1012, 1020-21 (9th Cir. 2015).

i. Physical Qualities

The Moodsters have physical as well as conceptual qualities, as they have appeared graphically in both the bible and the pilot. They are not “mere literary character[s],” as they have physical attributes embodied in the 2-dimensional renderings of the characters. Indeed, Defendants argue only that the second and third elements of the three-part test are not met. *See Mot.* 1. The characters therefore meet the first element.

ii. Sufficiently Delineated

“[C]ourts have deemed the *persistence of a character’s traits* and attributes to be key to determining whether the character qualifies for copyright protection.” *Id.* (emphasis added). To be protectable, a character must be “recognizable as the same character whenever it appears.” *DC Comics*, 802 F.3d at 1020-21. Characters such as Sherlock Holmes,

Tarzan, Superman, and James Bond have been deemed to have “certain character traits that have been developed over time, making them instantly recognizable wherever they appear.” *MGM, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995). In finding James Bond sufficiently delineated, the court looked to his “character traits that have been developed over time through the sixteen films in which he appears,” finding that his “cold-bloodedness; his overt sexuality; his love of martinis ‘shaken, not stirred;’ his marksmanship; his ‘license to kill’ and use of guns; his physical strength; [and] his sophistication” so delineated the character that his “specific qualities remain constant despite the change in actors.” *Id.* Similarly, in finding the character of Batman protectable, the court cited to Batman’s 63 years of fighting crime, and his “unique, protectable characteristics, such as the iconographic costume elements and his unique life story.” *Sapon v. DC Comics*, No. 00 CIV. 8992(WHP), 2002 WL 485730, at *3-4 (S.D.N.Y. Mar. 29, 2002).

Where, on the other hand, characters are “lightly sketched through only short summaries and ‘whatever insight into their characters may be derived from their dialogue and action,’” they are not entitled to protection. *Fun with Phonics, LLC v. LeapFrog Enterprises, Inc.*, CV 09-916- GHK (VBXx), 2010 WL 11404474, at *5-6 (C.D. Cal. Sept. 10, 2010). Plaintiffs’ characters have been sketched through the short summaries contained in *The Moodsters* bible, and in the pilot episode. The description of the character Zazz (the happy character), for instance, states that he “wakes up each morning with a smile on his face and

a friendly attitude,” “he’s usually quite optimistic and enthusiastic,” and “he spreads cheer wherever he goes.” Dkt. 27-3 Ex. 3, *The Moodsters Bible* at 3. The anger character is described as “the most likely Moodster to get frustrated and ‘blow her top,’” she’s “very generous,” and “she’s determined to do her best.” *Id.* at 4. The sadness character is “prone to doom and gloom,” “weeps copiously,” and is “a totally sweet guy” who feels “particularly dejected when he’s left out of things.” *Id.* at 6. These are not specific traits on par with those of the iconic characters noted above, such that they would be “instantly recognizable wherever they appear.”

Further, Plaintiffs’ characters have been distributed only twice: once in *The Moodsters* bible, and once in the YouTube pilot. With a viewership of only 1,400, the pilot did not likely engender the kind of “widely identifiable” recognition of the characters’ traits envisioned by the Ninth Circuit; that court denied protection for a character that had “appeared in only one home video that sold approximately 17,000 copies,” for lack of “consistent, widely identifiable traits.” *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003). More problematic for Plaintiffs is the requirement that such traits be persistent enough, over time or over multiple iterations, to produce such recognition. Here, the characters have appeared only twice—and their names had all changed from the first appearance to the second. See *FAC* ¶¶ 54-59.

iii. Especially Distinctive

Courts look at “visual depictions, name, dialogue, relationships with other characters, actions and conduct, personality traits, and written descriptions—to determine whether [a character] is sufficiently delineated such that it is a unique expression.” *Fun with Phonics*, 2010 WL 11404474, at *5-6. Characters are “not particularly distinctive” when they “fit general, stereotypical categories Consequently, these characters are not entitled to copyright protection.” *McCormick v. Sony Pictures Entm’t*, 2009 WL 10672263, at *14 (C.D. Cal. July 20, 2009), *aff’d*, 411 F. App’x 122 (9th Cir. 2011).

In their analysis of the “especially distinctive” prong, Plaintiffs originally pointed to the *Fun with Phonics* case, calling the court’s analysis of character copyright protection “particularly relevant to this case” where it concluded that “a yellow letter I dripping with green slime to illustrate the word ‘icky’ was a copyrighted character.” *Opp.* 8. They further argued that the “icky” character was found to be “protectable expression,” which “supports the conclusion that . . . so are the expressions of *The Moodsters* characters.” *Id.* In fact, the court in that case came to the *opposite* conclusion, finding “Plaintiff’s ‘characters’ *do not* warrant independent copyright protection.” *Fun with Phonics*, 2010 WL 11404474, at *6 (emphasis added). Plaintiffs submitted a notice of errata conceding this mistake, *see* Dkt. # 45, *Notice of Clarification/Errata*, but continue to argue that “the principle of law in *Leapfrog* . . . supports the conclusion that certain

expressive elements are protectable expression.” *Id.* 2. Though that may be so, *characters* must nevertheless meet the elements of the Ninth Circuit’s test to be independently protectable.

Plaintiffs claim that their characters are “recognizable as the same character whenever they appear because they are identified by individual colors and emotions” such that “there is no confusion which character is which when one comes on scene.” *Opp.* 7. As Defendants correctly note, distinguishing the characters from one another when they appear within the work itself “is not the Ninth Circuit’s standard for copyright protection of a character.” *Reply* 4. Rather, the characters’ actions and conduct, personality traits, and other characteristics must do more than “fit general, stereotypical categories” such that they are especially distinctive vis-à-vis *other characters*, outside of the work in which they appear.

Defendants note that “Plaintiffs’ efforts to draw parallels between the Moodsters and [the *Fun with Phonics*] characters—rather than characters with adequately developed and especially distinctive traits—only confirm that the Moodsters are lightly-sketched characters that fail to satisfy the Ninth Circuit’s test.” *Reply* 3. The Court agrees.

The Court determines that the characters within *The Moodsters* do not meet the Ninth Circuit’s rigorous test for granting independent copyright protection to characters. Accordingly, Plaintiffs’ copyright infringement claim for each character fails,

and Defendants' motion to dismiss them is **GRANTED**.

C. Copyrightability of the Moodsters Ensemble

Having found the individual characters unprotectable, the Court now turns to whether the ensemble of the characters is copyrightable. Plaintiffs cite to *Paramount Pictures Corp. v. Axanar Prod., Inc.*, No. 2:15-CV-09938-RGK-E, 2017 WL 83506 (C.D. Cal. Jan. 3, 2017), for the position that unprotectable characters can, as an ensemble, be protected. *Opp.* 9. Plaintiffs' reading of this case, however, is incorrect. Plaintiffs contend that the court "found groups of characters to be protected by copyright." *Id.* In fact, the court expressly declined to decide whether the ensemble of Klingons and Vulcans characters was protectable, because "Plaintiffs' allegation [wa]s that Defendants infringe[d] the Star Trek Copyrighted Works as a whole." The court stated that such characters "may be entitled to copyright protection," but discussed the issue only in the context of the characters as one point of comparison, along with plot, costumes, setting, and other elements, in the substantial similarity analysis. *Id.* at *4-5.

Plaintiffs also point to the "more general" proposition that "[o]riginal selection, coordination, and arrangement of unprotectable elements may be protectable expression." *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 849 (9th Cir. 2012) (holding that "selecting, coordinating, and arranging floral elements in stylized fabric designs" may be

protectable expression). While it is indeed black letter law that original selection and arrangement of unprotectable elements can render the configuration of those elements protectable, Plaintiffs have failed to advance an argument as to how that principle supports protection of the ensemble of “lightly sketched” characters here, offering only the conclusion that “the combination of those unique characters only further adds to the originality and copyrightability.” *Opp.* 9.

Accordingly, the Court **GRANTS** Defendants’ motion to dismiss Plaintiffs’ Second cause of action, infringement of the ensemble of characters.

IV. Leave to Amend

Whether to grant leave to amend rests in the sound discretion of the trial court. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). The Court considers whether leave to amend would cause undue delay or prejudice to the opposing party, and whether granting leave to amend would be futile. *See Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996). Generally, dismissal without leave to amend is improper “unless it is clear that the complaint could not be saved by any amendment.” *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003).

At the January 29 hearing, Plaintiffs requested leave to amend their complaint, thus indicating to the Court that the FAC could be saved by amendment. Leave to amend is therefore **GRANTED**, only as to the copyright infringement claims.

V. Conclusion

For the forgoing reasons, the Court **GRANTS** Defendant's motion to dismiss the First cause of action (implied-in-fact contract) **WITHOUT LEAVE TO AMEND**, and **GRANTS** Defendants' motion to dismiss Plaintiffs' Second (ensemble of characters), Third (Happy character), Fourth (Sadness character), Fifth (Anger character), and Sixth (Fear character) causes of action **WITH LEAVE TO AMEND**. Plaintiffs' second amended complaint is due no later than **March 1, 2018**.

IT IS SO ORDERED.