

INTELLECTUAL PROPERTY LITIGATION

Expert Analysis

Supreme Court To Consider Petitions In Three Copyright Cases

In the United States, copyright can protect a broad variety of forms of art and expression, including not only printed text but graphically depicted characters, visual art, and musical compositions. At its first conference of the October 2020 Term, the Supreme Court will consider whether to hear three cases that could affect the scope of copyright protection for each of these forms of expression. *Daniels v. Walt Disney Co.*, 958 F.3d 767 (9th Cir. 2020) (characters), *petition for cert. filed*, No. 20-132 (Aug. 3, 2020); *Castillo v. G&M Realty*, 950 F.3d 155 (2d Cir. 2020) (visual art), *petition for cert. filed*, No. 20-66 (July 20, 2020); *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020) (musical compositions), *petition for cert. filed*, No. 20-142 (Aug. 6, 2020). We report here on these cases.

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Characters: 'Moodsters v. Disney'

Although graphically depicted characters are not among the

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listed “works of authorship” protectable by copyright, 17 U.S.C. §102(a), the Ninth Circuit has extended copyright protection to such characters that satisfy a three-part test: “First, the character must generally have ‘physical as well as conceptual qualities.’

Second, the character must be ‘sufficiently delineated’ to be recognizable as the same character whenever it appears Third, the character must be ‘especially distinctive’ and ‘contain some unique elements of expression.’” *DC Comics v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015) (citations omitted). Graphically depicted characters held to merit copyright protection include James Bond and Godzilla. *Id.* at 1020.

The Moodsters are five color-coded, anthropomorphic characters, each of which represents a different emotion. 958 F.3d at 770. The pink Moodster, for example, represents love, and the red Moodster represents anger. Denise Daniels created the first iteration of The Moodsters in 2005 and continued to revise their names and appearance over the next 10 years. In 2015, Disney released *Inside Out*, a movie in which five anthropomorphized emotions live inside the mind of an 11-year-old girl. Daniels sued Disney for copyright infringement. The district court granted Disney’s motion to dismiss,

holding that The Moodsters are not protectable by copyright. *Id.* at 770–771.

The Ninth Circuit affirmed, holding that “lightly sketched” characters such as The Moodsters are not protectable by copyright. *Id.* at 769. The court explained that The Moodsters meet part one of the *Towle* test because “each has physical as well as conceptual qualities.” *Id.* at 771. The court concluded, however, that the “second prong presents an insurmountable hurdle,” because “other than the idea of color and emotions, there are few other identifiable character traits and attributes that are consistent over the various iterations” of The Moodsters. *Id.* at 772. The court distinguished The Moodsters from “[c]onsistently recognizable characters” like Godzilla, James Bond, or the Batmobile, “whose physical characteristics may change over various iterations but who maintain consistent and identifiable character traits and attributes across various productions and adaptations.” *Id.* at 771. The court also explained 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.” *Id.* at 772. The court also held that “The Moodsters fail the third prong—they are not ‘especially distinctive’ and do not ‘contain some unique elements of expression,’” again distinguishing The Moodsters from the Batmobile,

because the Batmobile had a “‘unique and highly recognizable name,’ unlike each Moodster, which had three entirely different names.” *Id.* at 773.

The Ninth Circuit also analyzed The Moodsters using the alternate “story being told test,” under which a character may be protectable if it constitutes “‘the story being told’ in a work.” *Id.* The court explained that this “is a high bar, since few characters so dominate the story such that it becomes essentially a character study.” *Id.* at 774. According to the court, The Moodsters “are mere chessmen in the game of telling the story,” and none of the depictions of The Moodsters “exhibit[] any prolonged engagement with character development or a character study of The Moodsters.” *Id.*

Moodsters petitioned for certiorari, arguing that character copyright law “is in chaos” because “[e]very circuit court to address this subject employs a different test.” No. 20-132, Petition at 3. For example, the Second Circuit employs a “sufficient delineation” test, under which “the less developed the characters, the less they can be copyrighted,” and the Seventh Circuit “asks whether the character offers something more than a stock character.” *Id.* at 4, 15–17.

Visual Artwork: 'G&M Realty v. Castillo'

The Visual Artists Rights Act of 1990 (VARA) grants visual artists certain moral rights in their work, such as the right to prevent

destruction of their work if that work has achieved “recognized stature.” 17 U.S.C. §106A(a)(3)(B). VARA also prohibits modifications to existing artwork that are harmful to artists’ reputations. *Id.* §106A(a)(3)(A). An artist may obtain actual damages and profits or statutory damages for a violation of VARA, and may obtain enhanced damages for a willful violation. *Id.* §§ 504(b), (c).

Starting in 2002, Gerald Wolkoff had Jonathan Cohen, a distinguished aerosol artist, turn Wolkoff’s warehouses in Long Island City, New York, into an exhibition space for artists. 950 F.3d at 162. Cohen and other artists filled the walls with aerosol art, and the site—known as 5Pointz—became a global center for aerosol art, attracting thousands of daily visitors and extensive media coverage. Cohen unsuccessfully sought to have 5Pointz designated as a site of cultural significance, and to raise money to buy the site; he and other artists then sued under VARA to prevent destruction of the site. Wolkoff then banned the artists from the site and had the art whitewashed. Following a three-week bench trial, the district court found that 45 of the works had achieved recognized stature within the meaning of VARA, and that Wolkoff’s violation of VARA was willful. The court awarded enhanced statutory damages of \$150,000 per work—the maximum amount allowed by statute—for a total of \$6.75 million. *Id.* at 164. Wolkoff appealed.

The Second Circuit affirmed, holding that the works qualified as works of “recognized stature” under VARA and were thereby protected from destruction. *Id.* at 170. The court concluded that “a work is of recognized stature when it is one of high quality, status, or caliber that has been acknowledged as such by a relevant community,” *id.* at 166, and found no clear error in the district court’s conclusion that “the plaintiffs adduced such a plethora of exhibits and credible testimony, including the testimony of a highly regarded expert, that even under the most restrictive of evidentiary standards almost all of the plaintiffs’ works easily qualify as works of recognized stature.” *Id.* at 167.

Wolkoff filed a petition for certiorari, arguing that VARA’s “recognized stature” provision “egregiously runs afoul of the Fifth Amendment’s due process requirements because Congress neglected to define this novel phrase, which fails to provide a person of ordinary intelligence fair notice of what is prohibited” and that the “imposition of enhanced statutory damages for ‘willful’ violation of the ‘recognized stature’ provision violated due process.” No. 20-66, Petition at 6, 31.

Musical Compositions: 'Skidmore v. Led Zeppelin'

The 1909 Copyright Act protected unpublished musical compositions that were deposited with the Copyright Office: “copyright may also be had of the works of

an author of which copies are not reproduced for sale, by the deposit, within claim of copyright, of one complete copy of such work if it be a ... musical composition” Copyright Act of 1909, ch. 320 §11, 35 Stat. 1075, 1078 (1909) (repealed 1976).

Michael Skidmore sued Led Zeppelin, alleging that *Stairway to Heaven* infringes the copyright in *Taurus*, an unpublished musical composition written in 1967 by a guitarist in the band Spirit. 952 F.3d at 1057. Skidmore claimed that the opening notes of *Stairway to Heaven* are substantially similar to the eight-measure passage that begins the one-page copy of sheet music deposited with the Copyright Office when *Taurus* was registered for copyright in 1967. On Led Zeppelin’s motion for summary judgment, the district court held that under the 1909 Copyright Act the scope of copyright “was circumscribed by the musical composition transcribed in the *Taurus* deposit copy” and thus only the deposit copy, and not a sound recording, could be used to prove substantial similarity. *Id.* at 1058. Following a five-day trial, the jury found that the two songs were not substantially similar. *Id.* at 1060. Skidmore appealed as to several issues, including the district court’s ruling that substantial similarity must be proved using the deposit copy. *Id.*

The en banc Ninth Circuit affirmed, holding that “the 1909 Act controls and that the deposit

copy defines the scope of the *Taurus* copyright” because the “text [of the Act] is clear—for unpublished works, the author must deposit one *complete copy* of such work. The purpose of the deposit is to make a record of the claimed copyright, provide notice to third parties, and prevent confusion about the scope of the copyright.” *Id.* at 1062. The court rejected Skidmore’s argument that “the deposit copy is somehow archival in nature and more of a reference point than a definitive filing.” *Id.*

Skidmore petitioned for certiorari, arguing that “The Ninth Circuit’s *en banc* decision, holding that *only* paper sheet music deposits have copyright protection under the 1909 Act, will likely divest hundreds of thousands of songs of copyright protection.” No. 20-142, Petition at i. Skidmore also challenged the Ninth Circuit’s rulings as to originality, arguing that the “Ninth Circuit’s *en banc* opinion has redefined originality in a way that fundamentally contradicts this court’s decision in [*Feist Publications, Inc. v. Rural Telephone Service Co.*], and the essence of copyright law.” *Id.* at 24.