

In The
Supreme Court of the United States

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LISA R. KIRBY, NEAL L. KIRBY,
SUSAN N. KIRBY, BARBARA J. KIRBY,

Petitioners,

v.

MARVEL CHARACTERS, INCORPORATED,
MARVEL WORLDWIDE, INCORPORATED,
MVL RIGHTS, LLC, WALT DISNEY COMPANY,
MARVEL ENTERTAINMENT, INCORPORATED,

Respondents.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

—◆—
**BRIEF OF *AMICUS CURIAE* THE
CALIFORNIA SOCIETY OF ENTERTAINMENT
LAWYERS IN SUPPORT OF PETITIONERS**

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INTERESTS OF *AMICUS CURIAE*¹

Amicus curiae the California Society of Entertainment Lawyers (CSEL) is a recently formed non-profit, non-partisan, professional organization of attorneys representing authors, screenwriters, songwriters, and other creators of intellectual property in the entertainment industry, including television, film, and music. CSEL seeks to balance the influence of the international conglomerates within the television, film, and music industries through education, public-policy advocacy, legislation, and litigation, in this case as *amicus curiae*.

Due to their limited resources and relative ignorance of the law, individual creators in the entertainment industry are at a great disadvantage relative to corporate entities (such as studios and publishers) when attempting to protect or exploit their intellectual property. When creative professionals and studios face one another in court over alleged violations of intellectual property rights, these limitations most often result in decisive victories for

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certify that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made such a monetary contribution. The parties have been given at least ten days' notice of *amicus curiae's* intention to file this brief and both parties have consented to the filing.

studio and network defendants.² CSEL seeks to level the playing field by providing informative counseling and advice to creator-litigants as to best practices for protecting and enforcing their rights, as well as advocating their interests to those in a position to correct perceived deficiencies in their legal protections.

The federal work for hire doctrine is of profound significance to freelance authors, including many clients of CSEL members. In their petition for certiorari, Petitioners have demonstrated in detail the inconsistencies of the Second Circuit's ruling pertaining to the "instance and expense" test used to characterize work for hire, as well as the erroneous legal conclusions justifying this Court's intervention. CSEL agrees with Petitioner that the controversial use of the "instance and expense" test to recharacterize the copyrightable works created by independent contractors under the Copyright Act of 1909 as works made for hire is ripe for resolution by the court, as it directly affects the uniform application of a federal body of law. This case provides a clean vehicle for

² See Steven T. Lowe, *Death of Copyright*, L.A. LAWYER, Nov. 2010, at 32, 34-35, available at <http://www.loweandassociatespc.com/press/publications/death-of-copyright> (identifying 18 cases within the Second Circuit decided between 1991 and 2010 in which the studio or network defendants prevailed); Steven T. Lowe & Daniel Lifschitz, *Death of Copyright, the Sequel*, THE COMPUTER & INTERNET LAWYER, Sept. 2012, at 1, 7 nn.15, 18, available at <http://www.loweandassociatespc.com/press/publications/death-of-copyright-the-sequel> (identifying 3 more cases decided within the Second Circuit in 2010 and 2011 in which the studio or network defendants prevailed).

resolving the conflict, as the issue of whether or not the subject matter of the lawsuit constituted works for hire under the 1909 Act was dispositive of Petitioner’s copyright claim.



SUMMARY OF ARGUMENT

The decision rendered by the Second Circuit Court of Appeals in this case (the “Opinion”) is symptomatic of the inconsistent (and often incoherent) state of modern copyright jurisprudence. Despite the clear legal doctrines laid out by Congress and this Court pertaining to the adjudication of copyright claims, district and appellate courts frequently subvert those doctrines with contrary and outcome-oriented rulings, destabilizing the copyright ecosystem in the process. The instant case is yet another example of this worrisome trend in action.

As detailed in Petitioner’s brief (the “Cert Petition”), the problematic structure of the “instance and expense” test allowed the analysis of this case to be engineered in a wholly lopsided manner, inuring to the benefit of Respondents. The court of appeals acknowledged the fundamental gaps in the Second Circuit’s case law – the errant development of a test for labeling commissioned work as made for hire under the 1909 Copyright Act, based upon a misreading of decisions concerning implied licenses – only to brush those observations aside in favor of blind adherence to *admittedly incorrect law*. Going further, the court

compacted the deluge of factors relevant to exercising the test into a base-level hurdle that nearly any defendant can satisfy. Finally, the court brushed aside contrary facts (including contractual language indicating that Marvel simply *purchased* the material in question and received copyright *assignments*) by acting as fact-finder instead of allowing the issue to be considered by a jury.

The results-driven approach engaged in by the court of appeals is endemic in modern litigation, whereby federal judges have used contradictory case law to upend numerous core tenets of copyright law, from statutory limitations on work for hire to the protection of an author's work against infringement. For instance, until May of this year, judges had been abusing the equitable doctrine of laches to cut short the statute of limitations on copyright claims mandated by Congress in the Copyright Act. Thankfully, this Court stepped in to end that practice; Justice Ginsburg writing that "courts are not at liberty to jettison Congress' judgment" on such matters. *Petrella v. MGM*, 188 L. Ed. 2d 979, 986 (2014).

Now, as then, this Court should uphold Congress's clear intent and prevent its circumvention through errant judicial extrapolations regarding work for hire. It should abolish the Second Circuit's overbroad and unprincipled "instance and expense" test and replace it with a proper test for employment under the common law of agency, one rooted in the language of the 1909 Copyright Act and this Court's prior decisions. Doing so would be a very significant

step towards returning federal copyright law to one of balance, measure, and predictability.



ARGUMENT

A. The Second Circuit Employed Law Unsupported By Its Own Precedent, the Text of the Copyright Act, or the Language of This Court.

In copyright cases, as elsewhere, “it is appropriate to assume that the ordinary meaning of the language that Congress employed ‘accurately expresses the legislative purpose.’” *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985) (footnote omitted). *Accord INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987); *Consumer Product Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Aaron v. SEC*, 446 U.S. 680, 695 (1980); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). The work for hire provision of the 1909 Copyright Act, 17 U.S.C. § 26 (1976 ed.) (“Section 26”), provides simply that “the word ‘author’ shall include an employer in the case of works made for hire.” Although the statute did not define “employer” or “work made for hire,” it is well established that, under common law, “employer” refers to “the conventional master-servant relationship as understood by common-law agency doctrine” (*Community for Creative Non-Violence v. Reid* (“CCNV”), 490 U.S. 730, 739-40 (1989)), which excludes commissioning relationships. *See, e.g., Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S.

440, 445 n.5 (2003). Indeed, case law applied Section 26 *solely* to factual scenarios involving regular, salaried employees until 1965, by which point the text of the 1976 Copyright Act’s work for hire provision had been fully developed. See Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 890 n.215 (1987).

The Second Circuit complemented this plain reading of Section 26 with a common law presumption that, when dealing with a *commissioned* work, the author impliedly agrees to *assign* the copyright, along with the work itself, to the hiring party. See *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28 (1939), *cert. denied*, 309 U.S. 686 (1940). Unfortunately, this presumption was warped by a line of cases beginning with *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966) (“*Brattleboro*”), in which the courts found that, contrary to the plain language of the 1909 Copyright Act, Section 26 could apply to creations by an *independent contractor* made at the requesting party’s instance and expense.³ *Accord Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216 (2d Cir. 1972), *cert. denied*, 409 U.S. 997 (1972) (“*Picture Music*”) (misinterpreting implied assignment cases as work for hire decisions); *Playboy Enterprises, Inc. v. Dumas*, 53 F.3d 549, 554 (2d Cir.

³ The Second Circuit presumably took inspiration from *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965), the first case to coin the term “instance and expense” and which cited no authority for its promulgation.

1995) (“*Playboy*”) (““an independent contractor is an ‘employee’ and a hiring party an ‘employer’ for purposes of [Section 26] if the work is made at the hiring party’s ‘instance and expense’”)

The conclusion reached by these cases rested entirely on a misreading of prior decisions finding an implied *assignment* of copyright, which the Second Circuit all but admitted in *Estate of Burne Hogarth v. Edgar Rice Burroughs, Inc.*, 342 F.3d 149, 160 n.14 (2d Cir. 2003) (“*Hogarth*”). *Hogarth* further noted that this Court’s decision in *CCNV* reinforced the distinction that commissioned works under Section 26 were presumed to have been *assigned to*, not authored by, the commissioning party. *Hogarth* at 162 (citing *CCNV*, 490 U.S. at 744). Yet *Hogarth* brushed aside these concerns, finding itself compelled to follow the line of unsubstantiated “instance and expense” case law and discarding this Court’s confirmation in *CCNV* of the Second Circuit’s error as mere “dicta.” *Id.* at 161-63.

Marvel v. Kirby continues this unfortunate tradition of the Second Circuit uncovering past errors and then swiftly burying them. The court of appeals comes to the same conclusions as *Hogarth*, acknowledging that both this Court and the nation’s leading copyright treatise have criticized the Second Circuit’s approach to Section 26. Opinion at 37, n.8 (citing *CCNV*, 490 U.S. at 744 and 3 MELVILLE NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 9.03[D]). Yet the court goes on to apply this very same erroneous approach to unfairly deprive the Kirby family of

valuable statutory rights, apparently resigning itself to perpetuate bad law and inequitable decisions unless and until this Court requires it to stop doing so.

The Section 26 cases that currently control the Second Circuit's analyses amount to a policy preference disguised as adherence to precedent. Yet while *stare decisis* may promote judicial predictability and consistency, "[it] is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). The circuits are acutely aware that their current application of Section 26 to non-employee cases is an unprincipled legal aberration, and despite multiple opportunities to self-correct, have deferred to compounding legal error. In doing so, the circuits contort copyright law in favor of the publishers and media conglomerates, who are the primary beneficiaries of the uncertainty created by their decisions.

B. The Court of Appeals' Ability to Engage In Outcome-Oriented Jurisprudence Stems Directly From Its Curation Of Nebulous and Inconsistent Case Law.

The approach to copyright cases retained by the court of appeals in spite of its lack of doctrinal support persists, in large part, because it affords judges unparalleled discretion by which to conduct their analyses. Copyright litigation often hinges upon close

questions of fact, making summary judgment in its context traditionally frowned upon. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir. 1980). Yet the vast majority of copyright claims filed against major studios or publishers are now dismissed in short order on summary judgment or earlier, depriving litigants of due process and their right to trial by jury.⁴ In short, judicial economy has been prioritized over constitutional mandates, and the route taken to accomplish this has resulted in a breakdown of coherent law.

As plainly illustrated by the Opinion, the Second Circuit has been unable to afford any measure of predictability to its analyses under the “instance and expense” test. When the court of appeals surveyed its “not so tidy” case law for “a set of principles applicable” to determining work for hire under Section 26 (Opinion at 37), those it derived cut in every conceivable direction and often conflicted. *See, e.g.*, Opinion at 37-39 (creative contributions to work strongly suggesting work for hire in some cases, but not in others), 39 (finding *CCNV* factors such as the provision of tools “controlling” in some cases, having “no

⁴ *See* fn. 2, *supra*; *see also*, Hon. W.G. Young, *Vanishing Trials – Vanishing Juries – Vanishing Constitution*, 40 SUFFOLK U. LAW REV. 67, 78 (2006); Arthur L. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Cliches Eroding Our Day In Court And Jury Trial Commitments?*, 78 N.Y.U. LAW REV. 982, 1064; 1066; 1071-1072; 1133-1134 (2003); Robert P. Burns, *The Death of the American Trial* (2009).

bearing” in others). The subsequent application of these factors to the facts of the case was no less contradictory. *See, e.g.*, Opinion at 50-51, 53-54 (claiming Kirby did not have to “speculate” that Marvel would use his work, yet also noting Marvel *had and exercised* the right to reject Kirby’s work).

The latitude with which the court was thus able to conduct its examination, and the seemingly low work for hire threshold it enunciated, calls back to an unpredictable style of jurisprudence in which courts interpret defined language “in the light of the mischief to be corrected and the end to be attained.” *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 325 (1992) (quoting *United States v. Silk*, 331 U.S. 704, 713 (1947)). The court was able to mix and match components of various factors to marshal what it believed to be a preponderance of evidence in the Respondents’ favor, ignoring clear legal impediments along the way – such as that Respondents’ payment of a “sum certain” should have only satisfied the “expense” prong if paid pursuant to a financial *commitment* to Kirby at the time he created his works, and that Marvel had none. *See Hogarth*, 342 F.3d at 163 (publisher was contractually obligated to pay a guaranteed fixed sum); *Twentieth Century Fox Film Corp. v. Entertainment Distribution*, 429 F.3d 869, 881 (9th Cir. 2005) (“*Twentieth Century*”) (publisher was contractually obligated to pay a “nonrefundable” cash advance); *Brattleboro*, 369 F.2d at 568 (hiring party was obligated to bear expense of creating work whether or not accepted or used).

As noted by Petitioner, the standard for determining instance and expense utilized by the Second Circuit broadly encapsulates publishing arrangements so diverse that copyright vesting in the actual creator is the exception rather than the rule.⁵ Cert Petition at 24-26. Even though the question of whether a work is “made for hire” under Section 26 turns on “the mutual intent of the parties” (*Martha Graham*, 380 F.3d at 634 n. 17), and such “questions . . . as to the parties’ intent . . . are generally for the trier of fact” (NIMMER ON COPYRIGHT § 12.10[A]), the court of appeals saw fit to operate as fact-finder and negate contrary evidence based on its own beliefs and speculation. *See, e.g.*, Opinion at 47-48 (dismissing the evidentiary value of assignment agreements between the parties due to the “likelihood” that they were “redundancies” desired by Marvel). That the court could claim it viewed the evidence in the light most favorable to Petitioners, yet explicitly and repeatedly construe said evidence against them, merely illustrates how far removed copyright litigation has become from any pretense of adhering to principles of due process.

⁵ Yet the standard is also malleable enough to swing in the complete opposite direction. *See, e.g., Martha Graham School & Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.*, 380 F.3d 624, 635 (2d Cir. 2004) (“*Martha Graham*”) (holding that a work created by a traditional employee “as a special job assignment, outside . . . [his] regular duties” is not “work for hire,” even though the employer pays for (i.e., “expense”) and has a right to supervise the work (i.e., “instance”).

The federal courts' curating of inconsistent case law has been key to their ability to conduct copyright analyses in this nearly *ad hoc* fashion. Much as the Second Circuit has ignored *CCNV*, other seminal copyright cases by this Court have gone unheeded in the lower courts as well. Compare *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361-62 (1991) (articulating a "selection and arrangement" test for copyright protection) and *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 135-136 (2d Cir. 2003) (replacing the selection and arrangement test with a contrary "filtration" test). This pattern of practice substantially undermines the predicable and uniform adjudication of copyright law and presents compelling grounds for this Court to intervene. See R. Stern et al., *SUPREME COURT PRACTICE* 232 (8th ed. 2002) ("A direct conflict between the decision of the court of appeals of which review is being sought and a decision of the Supreme Court is one of the strongest possible grounds for securing the issuance of a writ of certiorari").

C. The Second Circuit's Use Of The "Instance and Expense" Test Creates Unnecessary Uncertainty In Copyright Law, Chilling Authors' Rights.

The Second Circuit's use of Section 26 to reclassify the commissioned work of independent contractors as the work-for-hire of an employee is not only problematic from a textual and doctrinal standpoint, but from a policy standpoint as well. The "instance

and expense” test injects pronounced uncertainty into the status of countless copyright transactions conducted under the 1909 Copyright Act, many of which will require complex *post hoc* determinations as to their ownership status. See 1 P. Goldstein, GOLDSTEIN ON COPYRIGHT (2005) § 4.3, at 4:38 (“Many works now protected under the 1976 Act were created at a time when the 1909 Act was in effect,” and “[i]t is the 1909 Act and not the 1976 Act that governs the determination whether these works are works made for hire”).

In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), this Court noted that “it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible.” *Fogerty*, 510 U.S. at 526-27; accord *Matthew Bender & Co. v. West Publ’g Co.*, 240 F.3d 116, 122 (2d Cir. 2001). The same is true of ensuring that the word “employer” is understood the same way from statute to statute in order to “enhanc[e] predictability and certainty of copyright ownership.” *CCNV*, 490 U.S. at 740, 749. The decisions of the Second Circuit, at issue, have served only to obscure and complicate these issues rather than to clarify them.

Because of the substantial ambiguity in the current body of federal case law, modern copyright litigation has become unjustifiably unpredictable, with the determination of each case resting almost entirely on the unfettered discretion of the judiciary. Judge William H. Pauley III of the Southern District of New York admitted in a recent copyright decision that “[i]t is hard to discern the difference between the legal

analysis a district judge undertakes at the motion to dismiss stage when the works in question are attached, and the factual analysis the same judge undertakes during a bench trial.” *Hallford v. Fox Entm’t Group, Inc.*, 2013 U.S. Dist. LEXIS 19625, 9-10 (S.D.N.Y. 2013) “The uncertainty of this distinction,” he wrote, “has the potential to remove questions of fact from a jury, authorize district judges to resolve such questions, and empower appellate judges to review what are essentially factual determinations *de novo*.” *Id.*

With district judges so tasked to resolve copyright claims *de novo* through the filter of incoherent law, creators simply cannot know what method of analysis will be employed or factors accorded the greatest (or *any*) weight in adjudicating their claims, chilling the filing of copyright suits to enforce their rights. This results not only in haphazard doctrinal development, but also in the fundamental destabilization of copyright law, as judicially-constructed tests prove capable of eclipsing the plain text and meaning of statutes and ultimately swallowing them whole. The legal confusion that inevitably follows is contrary to both the language and spirit of this Court’s rulings in *CCNV* and *Fogerty*, and the Second Circuit’s exacerbation of these problems warrants reversal here.

To the extent that the Second Circuit’s decision in *Hogarth* and this case is predicated on purported gaps, ambiguities, or dicta in this Court’s prior decisions, the Court should reassert the observations regarding work for hire contained in *CCNV* with the

full vigor of a binding, on-point decision that eliminates any potential for further wiggle room in circuit case law. The current climate of hostility towards true authors and copyright plaintiffs can only be tempered by bringing the legal standards that govern the litigation of their claims back towards a sensible equilibrium, and that begins by returning a semblance of reasoned objectivity to the judiciary's toolkit.

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CONCLUSION

For the foregoing reasons, as well as for the reasons stated in the Cert Petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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