In the Supreme Court of the United States



MARKHAM CONCEPTS, INC. ET AL.,

Petitioners,

v.

HASBRO, INC., ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE CALIFORNIA SOCIETY OF ENTERTAINMENT LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STEVEN T. LOWE

COUNSEL OF RECORD

LOWE & ASSOCIATES P.C.
8383 WILSHIRE BLVD.
SUITE 1038

BEVERLY HILLS, CA 90211
(310) 477-5811
STEVEN@LOWELAW.COM

DECEMBER 15, 2021

COUNSEL FOR AMICUS CURIAE

SUPREME COURT PRESS

 $(888)\ 958-5705$

BOSTON, MASSACHUSETTS



i

TABLE OF CONTENTS

Page
TABLE OF AUTHORITIESii
INTEREST OF THE AMICUS CURIAE 1
SUMMARY OF ARGUMENT 3
ARGUMENT4
I. THE FIRST CIRCUIT HAS A SINGULAR CASE OF PRECEDENT APPLYING THE "INSTANCE AND EXPENSE" TEST WHICH IS NOT SUPPORTED BY THE TEXT OF THE COPYRIGHT ACT OR THE HOLDING OF THIS COURT
II. THE FIRST CIRCUIT'S EMPLOYMENT OF THE "INSTANCE AND EXPENSE" TEST CREATES UNNECESSARY UNCERTAINTY IN COPYRIGHT LAW, CHILLING CREATORS' RIGHTS
CONCLUSION



TABLE OF AUTHORITIES

Page
CASES
Brattleboro Publishing Co. v. Winmill Publishing Corp., 369 F.2d 565 (2nd Cir. 1996)5
Brumley v. Albert E. Brumley & Sons, Inc., 822 F.3d 926 (6th Cir. 2016)
Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)
Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994)
Forward v. Thorogood, 985 F.2d 604 (1st Cir. 1993)
Helvering v. Hallock, 309 U.S. 106 (1940)
Horror Inc. v. Miller, 15 F.4th 232 (2d Cir. 2021)2
Kelley v. Southern Pacific Co., 419 U.S. 318 (1974)5
Lin-Brook Builders Hardware v. Gertler, 352 F.2d 298 (9th Cir. 1965)5
Marvel Characters, Inc. v. Kirby, 726 F.3d 119 (2d Cir. 2013)8
Michael Found. v. Urantia Found., 61 F. App'x 538 (10th Cir. 2003)3
Mills Music, Inc. v. Snyder, 469 U.S. 153 (1985)
NLRB v. Amax Coal Co., 453 U.S. 322 (1981)5



TABLE OF AUTHORITIES - Continued

Page

Payne v. Tennessee, 501 U.S. 808 (1991) 6 Penguin Grp. (USA) Inc. v. Steinbeck, 537 F.3d 193 (2d Cir. 2008) 8, 9 Perrin v. United States, 444 U.S. 37 (1979) 5 Playboy Enters., Inc. v. Dumas, 53 F.3d 549 (2d Cir. 1995) 3 Robinson v. Baltimore & Ohio R. Co., 237 U.S. 84 (1915) 5 Stewart v. Abend, 495 U.S. 207 (1990) 4 CONSTITUTIONAL PROVISIONS U.S. Const. art. I, § 8, cl. 8 4 STATUTES 4



JUDICIAL RULES

iv



DOCKET

Explore Litigation Insights



Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time** alerts and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.

