

No. 09-56317

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

FLEISCHER STUDIOS, INC.,

Plaintiff-Appellant,

v.

**A.V.E.L.A., INC., DBA ART & VINTAGE ENTERTAINMENT LICENSING
AGENCY; ART-NOSTALGIA.COM, INC.; X ONE X MOVIE ARCHIVE, INC.;
BEVERLY HILLS TEDDY BEAR CO.; LEO VALENCIA,**

Defendants-Appellees.

On Appeal From the United States District Court
for the Central District of California
The Honorable Florence-Marie Cooper
District Court Case No. 2:06-CV-06229-FMC-MAN

**BRIEF OF *AMICUS CURIAE*
INTERNATIONAL TRADEMARK ASSOCIATION
IN SUPPORT OF REHEARING OR REHEARING *EN BANC***

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.App.P. 26.1, *amicus curiae* International Trademark Association (“INTA”) states that it is not a publicly-held corporation or other publicly-held entity. INTA does not have any parent corporation and no publicly-held corporation or other publicly-held entity holds 10% more of INTA’s stock.

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INTRODUCTION

INTA submits this brief *amicus curiae* in support of Appellant's petition for rehearing or rehearing *en banc*, and to address two legal errors in the majority's decision.

First, in concluding that Appellant "is not using Betty Boop as a trademark, but instead as a functional product" (Slip Op. at 2780), the majority erred by *sua sponte* reincarnating the outdated and much-criticized aesthetic functionality doctrine of *International Order of Job's Daughters v. Lindeburg & Co.*, 633 F.2d 912 (9th Cir. 1980). In so doing, the majority essentially overruled *Au-Tomotive Gold, Inc. v. Volkswagen of America, Inc.*, 457 F.3d 1062 (9th Cir. 2006), in which this Court substantially limited the aesthetic functionality doctrine. Because the decision conflicts with another panel decision of this Court, *en banc* consideration is "necessary to secure and maintain uniformity of the [C]ourt's decisions." Fed.R.App.P. 35(b)(1)(a).

Second, the majority erred in its *dictum* that, when a copyrighted work falls into the public domain, the owner of a trademark comprised of that work cannot assert trademark rights because that would prevent the work "from ever entering the public domain." Slip Op. at 2782. That proposition is inconsistent with decisions from this Court and others recognizing that trademark and

copyright are independent rights that may coexist in the same product, and that trademark protection may remain even after a related copyrighted work has fallen into the public domain. That error was compounded by the majority's erroneous reliance on *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), which does not stand for the proposition that trademark rights cannot survive when a related copyright expires.

These two issues are of vital importance to brand owners. If the majority's opinion stands uncorrected, it will have far-reaching consequences for brand owners and consumers alike, undermining settled precedent within this Circuit, upsetting the balance between trademark and copyright law, creating conflict with other Circuits, and contributing to confusion. Accordingly, INTA urges this Court to grant rehearing or rehearing *en banc* so that these two legal errors can be corrected.

STATEMENT OF INTEREST OF AMICUS CURIAE

Founded in 1878, INTA is a not-for-profit organization dedicated to the support and advancement of trademarks and related intellectual property concepts as essential elements of trade and commerce. INTA has over 5,700

members in more than 190 countries.¹ Its members include trademark owners, law firms, and other professionals who regularly assist brand owners in the creation, protection and enforcement of trademarks. INTA's members share the goal of promoting an understanding of the essential role trademarks play in fostering informed decisions by consumers, effective commerce, and fair competition.

INTA's members frequently participate in trademark litigation as both plaintiffs and defendants and, therefore, are interested in the development of clear, consistent and fair principles of trademark law. INTA has substantial expertise and has participated as *amicus curiae* in numerous cases involving significant trademark issues, including before this Court.²

¹ Neither party is a member of INTA. The law firms representing Appellant are associate members of INTA. The parties and their counsel have not participated in, nor contributed any funds towards, the preparation and submission of this brief. This brief was authored solely by INTA and its counsel.

² Recent cases in which INTA has filed *amicus* briefs include *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, No. 09-16322 (9th Cir. Feb. 8, 2011); *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158 (2d Cir. 2010); *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97 (2d Cir. 2009); *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007); *ITC Ltd. v. Punchgini, Inc.*, 880 N.E.2d 852 (N.Y. 2007); *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559 (5th Cir. 2005); *KP Permanent Make-Up, Inc. v. Lasting Impression, Inc.*, 543 U.S. 111 (2004); *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020 (9th Cir. 2004); *Dastar Corp. v.*

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ARGUMENT

I. The Majority Erred In Holding That *Job's Daughters* Renders The Betty Boop Marks Unprotectable As “Aesthetically Functional.”

The majority *sua sponte* applied an outdated version of the aesthetic functionality doctrine this Court rejected in *Au-Tomotive Gold*, without even acknowledging the existence of, let alone that it was overruling, that later case. INTA urges the Court to reconsider the majority’s ruling on aesthetic functionality and conform its ruling to the reasoning of *Au-Tomotive Gold*.

A. The Utilitarian Functionality Defense To Trademark Infringement Prevents Conflict Between Patent And Trademark Laws.

The functionality defense was developed to prevent parties from using trademark law to obtain perpetual monopolies on useful articles that should instead be protected by limited-term patents. *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 169 (1995). Competitors’ legitimate need to use a utilitarian feature that is less expensive, of better quality, or more efficient to manufacture is the bedrock of the doctrine. By ensuring that competitors remain free to copy useful product features, the doctrine prevents trademark law from

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Twentieth Century Fox Film Corp., 539 U.S. 23 (2003); *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003); *TraFFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23 (2001); *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205 (2000).

undermining its and the patent law's pro-competitive objectives. *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23 (2001) (dual-spring design that keeps temporary road signs upright was functional and hence not protectable as trade dress); *Shakespeare Co. v. Silstar Corp. of Am., Inc.*, 9 F.3d 1091 (4th Cir. 1993) (clear tip at end of fishing rod was functional and hence not protectable as trade dress).

The Supreme Court has held that a product feature is functional “if it is essential to the use or purpose of the article,” “if it affects the cost or quality of the article,” or if ““exclusive use of [the feature] would put competitors at a significant non-reputation-related disadvantage.”” *TrafFix*, 532 U.S. at 32 (quoting *Qualitex*, 514 U.S. at 165). This case presents no issue of utilitarian functionality. No argument was presented that use of the Betty Boop trademarks makes the dolls, t-shirts, or handbags in question work better. *Cf. Vuitton Et Fils S.A. v. J. Young Enters., Inc.*, 644 F.2d 769, 776–77 (9th Cir. 1981) (“Vuitton luggage without the distinctive trademark would still be the same luggage. It would carry the same number of items, last just as long, and be just as serviceable.”).

B. This Court Has Severely Limited The Doctrine Of Aesthetic Functionality Since *Job's Daughters*.

In contrast to utilitarian functionality, the concept of “aesthetic functionality” considers whether purely aesthetic features might be considered “functional” because of a perceived competitive need to copy an ornamental (as distinguished from utilitarian) product feature.³ In *Au-Tomotive Gold*, 457 F.3d at 1064–74, this Court traced the “somewhat checkered history” of that doctrine. In the first case to apply the doctrine, *Pagliari v. Wallace China Co.*, 198 F.2d 339 (9th Cir. 1952), the Court found china patterns “functional” because hotels bought the china solely for its aesthetic characteristics, not because they relied on the patterns to indicate the source of the china.

The Court next addressed aesthetic functionality in *Job's Daughters*, but the holding in that case did not last long; as this Court subsequently recognized, its “broad language was soon clarified and narrowed.” *Au-Tomotive Gold*, 457 F.3d at 1069.⁴ Indeed, just one year after *Job's Daughters*, this Court reversed a

³ Although the aesthetic functionality doctrine was mentioned in *dictum* in *Qualitex* and *TrafFix*, as this Court has noted, the Supreme Court “has yet to address aesthetic functionality as it applies to logos and insignia, in contrast to product features.” *Au-Tomotive Gold*, 457 F.3d at 1070.

⁴ The *Job's Daughters* Court did not need to rely on aesthetic functionality in that case; it could have resolved the case by noting plaintiff's failure to prove

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district court finding that counterfeit handbags were permitted because their designs were aesthetically functional:

We disagree with the district court insofar as it found that any feature of a product which contributes to the consumer appeal and saleability of the product is, as a matter of law, a functional element of that product. Neither *Pagliero* nor the cases since decided in accordance with it impel such a conclusion.

Vuitton, 644 F.2d at 773.

The decisions of this Court after *Vuitton* further narrowed the aesthetic functionality doctrine, nearly to the point of extinction. In *First Brands Corp. v. Fred Meyer, Inc.*, 809 F.2d 1378, 1382 n.3 (9th Cir. 1987), the Court recognized that “the ‘aesthetic’ functionality test has been limited, if not rejected, in favor of the ‘utilitarian’ functionality test.” And, in *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1260 (9th Cir. 2001), the Court stated: “Nor has this circuit adopted the ‘aesthetic functionality’ theory, that is, the notion that a purely aesthetic feature can be functional.”

Most recently, this Court reiterated the extremely limited extent to which the aesthetic functionality doctrine might apply. It held that purely aesthetic

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that its members expected jewelry bearing the collective mark to be licensed. 1 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* §7:82 (4th ed. 2010) (“*McCarthy*”).

product features that are source-identifying and not functional are entitled to protection as trademarks; even aesthetic product features serving a significant non-trademark function are entitled to protection, unless granting trademark protection would stifle legitimate competition. *Au-Tomotive Gold*, 457 F.3d at 1064. Applying that reasoning, the Court rejected the argument that use of the Volkswagen and Audi trademarks on keychains and related items was aesthetically functional because the trademarks themselves were “the actual benefit that the consumer wishes to purchase.” *Id.* at 1062 (quoting *Vuitton*, 644 F.2d at 774). Rather, the Court held:

Volkswagen and Audi’s trademarks undoubtedly increase the marketability of Auto Gold’s products. But their “entire significance” lies in the demand for goods bearing those non-functional marks.... [S]uch poaching is not countenanced by the trademark laws.

Id. at 1074. Furthermore, if defendant’s position were accepted, it

would be the death knell for trademark protection. It would mean that simply because a consumer likes a trademark, or finds it aesthetically pleasing, a competitor could adopt and use the mark on its own products. Thus, a competitor could adopt the distinctive Mercedes circle and tri-point star or the well-known golden arches of McDonald's, all under the rubric of aesthetic functionality.

Taken to its limits, as Auto Gold advocates, this doctrine would permit a competitor to trade on any mark simply because there is some “aesthetic” value to

the mark that consumers desire. This approach distorts both basic principles of trademark law and the doctrine of functionality in particular.

Id. at 1064; accord *Bd. of Supervisors v. Smack Apparel Co.*, 550 F.3d 465, 487–88 (5th Cir. 2008); *Ferrari S.P.A. v. Roberts*, 944 F.2d 1235, 1246 (6th Cir. 1991); *American Greetings Corp. v. Dan-Dee Imps., Inc.*, 807 F.2d 1136, 1142 (3d Cir. 1986); *Univ. of Ga. Athletic Ass’n v. Laite*, 756 F.2d 1535, 1546 n.28 (11th Cir. 1985); *Chicago Bears Football Club, Inc. v. 12th Man/Tennessee LLC*, 83 U.S.P.Q.2d 1073, 1084 (T.T.A.B. 2007); *McCarthy* §7:81.

The majority, in applying the discredited *Job’s Daughters* approach to aesthetic functionality, did not cite or even consider *Au-Tomotive Gold* or any of the other cases since *Job’s Daughters*. By ignoring those precedents, the majority’s decision effectually overrules *Au-Tomotive Gold*, which puts its decision in conflict with decisions of other panels of this Court. It also puts the Ninth Circuit in conflict with every other Circuit that has considered this issue. Each of these conflicts provides an independent basis for rehearing *en banc*. Fed.R.App.P. 35(b)(1)(a). Because established precedents make clear that Appellees’ use of the Betty Boop trademarks should not be deemed aesthetically functional, INTA urges the full Court to grant rehearing and overrule the majority’s opinion on this issue.

II. The Majority Erred When It Suggested That The Expiration Of Copyright Precludes A Claim For Trademark Infringement.

Appellant alleged both copyright and trademark rights in the Betty Boop designs. Apparently troubled by the overlapping protection provided by copyright and trademark law, the majority suggested (in a passage that was *dictum* given the Court's ruling on aesthetic functionality) that *Dastar* precludes trademark protection for an image that previously was protected by copyright:

If we ruled that A.V.E.L.A.'s depiction of Betty Boop infringed Fleischer's trademarks, the Betty Boop character would essentially never enter the public domain.... Therefore, even if Fleischer owns trademarks in Betty Boop, it cannot assert a trademark infringement action against A.V.E.L.A.

Slip Op. at 2782. Because that *dictum* is inconsistent with U.S. intellectual property law and is unsupported by *Dastar*, INTA urges the Court to withdraw that part of the majority's decision.

A. Trademark And Copyright Protection Can Apply To The Same Work.

Courts long have recognized that trademark and copyright law can coexist in the same work. *Bach v. Forever Living Prods. U.S., Inc.*, 473 F.Supp.2d 1110, 1117–18 (W.D.Wash. 2007) (noting “the two areas of law protect against different wrongs” and rejecting argument that trademark claims were “piggybacking” on copyright claims); *Do It Best Corp. v. Passport Software*,

Inc., No. 01-C-7674, 2004 WL 1660814, at *16 (N.D.Ill. July 23, 2004) (“The Copyright Act does not preempt the Lanham Act, or vice versa, and therefore a party may recover under both statutes.”). That is because they are different types of intellectual property, protected for different policy reasons, and giving rise to different rights and limitations. *TriStar Pictures, Inc. v. Del Taco, Inc.*, 59 U.S.P.Q. 1091, 1093 (C.D.Cal. 1999) (“While a particular item might implicate both trademark and copyright issues, the two doctrines address and protect different aspects of that item.”).

Copyright law rests on the notion that authors are granted a limited monopoly, as an incentive to create works, in return for dedicating their works to the public after the expiration of copyright. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). While the copyright is valid, it prevents copying, distribution, performance, display, and the creation of derivative works, 17 U.S.C. §106, whether commercial or non-commercial, subject only to the limitations listed in 17 U.S.C. §§117–122.

Trademark law, in contrast, is not about incentivizing companies to create brands: it is about protecting consumers against confusion as to source, sponsorship or affiliation. *E.S.S. Entm’t 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1100 (9th Cir. 2008). Consistent with that rationale, trademarks

can be used by third parties as long as they are not likely to cause consumer confusion. Permitted uses include descriptive fair uses, nominative fair uses, non-confusing parodies, non-commercial commentary, and other uses that, by their nature, are not likely to cause confusion.

The Betty Boop marks are no exception. Following the expiration of copyright in a particular movie containing the Betty Boop character,⁵ third parties may reproduce and sell that work and nominatively refer to it as a movie featuring “Betty Boop.” Similarly, following expiration of copyright in a particular image of the Betty Boop character, third parties may publicly display that Betty Boop image or sell reproductions of it.

In no way, though, does the expiration of copyright vitiate the related, but separate, trademark rights in the Betty Boop brand. *See Coca-Cola Co. v. Rodriguez Flavoring Syrups, Inc.*, 89 U.S.P.Q. 36, 41 (Pat. Off. Exam.-in-Chief 1951) (rejecting contention that, “on the expiration of the copyright in any matter of this kind, any trademark rights ... which might have been mentioned in the copyrighted matter lapse and pass into the public domain”); *McCarthy* §6:14 (“Where there is an overlap between trademark and copyright protection,

⁵ INTA does not mean to suggest that Betty Boop copyrights have yet expired. That is a fact issue on which INTA takes no position.

expiration of the copyright does not bar a claim for trademark or trade dress.”). Rather, those trademark rights continue as a separate, enforceable right, and thus third parties reproducing the works previously protected by copyright need to avoid conduct likely to confuse consumers as to whether the products come from the brand owner.⁶ *McCarthy* §6:31 (“[I]f a cartoon character has achieved trademark significance, one should not, even after expiration of the copyright on the character or on a work in which the character appears, be able to take an image of the character and use it on merchandise when such a use is likely to cause confusion as to source, affiliation, or connection.”).

Indeed, many well-known trademarks are also works of visual art or music protectable by copyright, such as the Starbucks logo (Trademark Reg. 3,907,157, Copyright Reg. VA0000875932/1998-03-09) and the Harlem Globetrotters’ melody, “Sweet Georgia Brown” (Trademark Reg. 1,700,975, Copyright Reg. EP612187/1925).

This Court has often recognized that copyright and trademark can coexist in the same product. In *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109

⁶ Whether a particular use is likely to cause consumer confusion is typically a fact question, requiring consideration of factors including how the marks were presented, marketing channels used, and consumer sophistication. See *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979).

F.3d 1394 (9th Cir. 1997), the Court upheld a preliminary injunction against *The Cat NOT In the Hat! A Parody by Dr. Juice*—an illustrated, rhyming retelling of the O.J. Simpson trial—as violating the Dr. Seuss copyright and trademark rights. In *Comedy III Productions, Inc. v. New Line Cinema*, 200 F.3d 593 (9th Cir. 2000), a portion of a film featuring the Three Stooges characters was in the public domain and thus neither copyright nor trademark law could prevent defendant’s use of the clip. The Court noted, however, that had the defendant “used the likeness of the Three Stooges on t-shirts which it was selling, Comedy III might have an arguable claim for trademark violation.” 200 F.3d at 596. In other words, the expiration of copyright in a film featuring the Three Stooges did *not* give the defendant a right to use the Three Stooges trademark on merchandise in a way that would likely deceive consumers as to source.

Similarly, in *Bach*, the court held that *Dastar* did not preclude both trademark and copyright claims where defendants allegedly used copyrighted images from the *Jonathan Livingston Seagull* book as trademarks, holding “Plaintiffs’ claims sound in both trademark and copyright law. This is not a case like *Dastar* ... where plaintiffs were attempting to use trademark law to prosecute plagiarism of their creative work.” 473 F.Supp.2d at 1118.

Those holdings are consistent with precedent in other Circuits. In *Frederick Warne & Co., Inc. v. Book Sales Inc.*, 481 F. Supp. 1191 (S.D.N.Y. 1979), the court held that expiration of copyright in the *Peter Rabbit* book series did not preclude its publisher from asserting trademark rights in character illustrations from the books:

The fact that a copyrightable character or design has fallen into the public domain should not preclude protection under the trademark laws so long as it is shown to have acquired independent trademark significance, identifying in some way the source or sponsorship of the goods.... Because the nature of the property right conferred by copyright is significantly different from that of trademark, trademark protection should be able to co-exist, and possibly to overlap, with copyright protection without posing preemption difficulties.

Id. at 1196; *see also Huebbe v. Oklahoma Casting Co.*, No. CIV-06-306-D, 2009 WL 3245404, at *8-*9 (W.D.Okla. Sept. 30, 2009) (“The Court does not interpret *Dastar* as precluding all copyright infringement plaintiffs from asserting [Lanham Act] §43(a) claims.”); *Tempo Commc’ns, Inc. v. Columbian Art Works, Inc.*, 223 U.S.P.Q. 721, 722 (N.D.Ill. 1983) (holding copyrighted work also entitled to protection as a trademark; such protection did not amount to *sub rosa* perpetual copyright protection); *DC Comics, Inc. v. Filmmation Assocs.*, 486 F. Supp. 1273, 1277 (S.D.N.Y. 1982) (“[W]here the product sold

by plaintiff is ‘entertainment’ in one form or another, then not only the advertising of the product but also an ingredient of the product itself [here, a cartoon character,] can amount to a trademark protectable under §43(a) because the ingredient can come to symbolize the plaintiff or its product in the public mind.”).

B. *Dastar* Does Not Bar Trademark Protection For Images Also Protected by Copyright.

The majority’s reliance on *Dastar* for the proposition that Appellant “cannot assert a trademark infringement action” because the “depictions of Betty Boop” also had been protected by copyright, and that allowing such a trademark claim would “circumvent the Copyright Act and allow trademark holders perpetual rights to exploit their creative works” (Slip Op. at 2781–82), reflects a misinterpretation of the Supreme Court’s decision.

Dastar did not address whether a licensed character, having once been protected by copyright, can also be protected by trademark. Rather, *Dastar* involved whether a party copying a film for which copyright had expired is obligated to credit the original author. *Dastar* had copied, edited, renamed, and repackaged New Line’s video series based on General Eisenhower’s World War II book, *Crusade in Europe*. New Line could not prevent copying of its videotapes under copyright law because copyright had expired. Nor could it

assert a traditional “forward” passing off claim because “Dastar manufactured and sold the Campaigns video set as its own product,” making no reference to New Line, the *Crusade* series, or the book. Instead, New Line characterized its challenge as a reverse passing off claim on the theory that Dastar misattributed the underlying work to itself rather than the true creators. *Dastar*, 539 U.S. at 27.

The Supreme Court rejected that claim as an attempt to create a substitute cause of action for an expired copyright claim, believing it would be burdensome to impose an attribution requirement once a work went into the public domain. If New Line were given the right to stop Dastar’s use of the public-domain footage because it failed to give New Line attribution, that would undermine the policy goal of copyright by in effect creating a perpetual copyright in the footage. *Id.* at 37–38.

The Supreme Court noted that, had Dastar edited the video tapes and then tried to pass them off as New Line’s (*e.g.*, by using New Line’s trademarks on the edited videotapes), that could have supported a valid trademark claim. *Id.* at 36. That hypothetical is much closer to the facts in this case. Appellant is not claiming that Appellees copied old Betty Boop films and resold them without attribution (the reverse passing off claim). Rather, Appellant’s concern is that

Appellees have used the Betty Boop trademarks on Appellees' goods (examples of which are shown below, and in ER421-422 and ER434), including on hang tags, and are passing those goods off as Betty Boop-brand merchandise, confusing consumers as to the source of those goods.⁷ Unlike the claim in *Dastar*, that is the essence of a trademark infringement claim.



In fact, the Supreme Court noted that it did *not* intend to deny all trademark rights to the owner of an expired copyright work. For example, the Court noted that the wholesale appropriation of a work could state a reverse

⁷ Whether these uses are likely to cause such confusion is a question of fact. If there are genuine disputes of material fact about such confusion, the matter would not be appropriately resolved on summary judgment or at the appeals court level.

passing off claim, such as “if Dastar had bought some of New Line’s Crusade videotapes and merely repackaged them as its own.” *Id.* at 23–24. The Court also recognized that a Lanham Act claim for false advertising could lie if the defendant falsely advertised that it made changes to the original. *Id.* at 38.

In sum, the *Dastar* Court did not express any intention of denying trademark rights for products for which copyright had expired; it merely held that plaintiff could not use a “failure to attribute” theory to prevent reproduction of footage for which copyright had expired. Recharacterizing an expired copyright claim as a non-expired trademark claim would have undermined the copyright bargain, by preventing the footage from entering the public domain. Here, by contrast, the copyright bargain is respected—once the *copyrights* in particular Betty Boop works expire, the works *can* be used in ways previously prohibited by the Copyright Act, including reproduction, distribution, performance, display, and creation of derivative works. But under *trademark* law, the Betty Boop brand *cannot* be used in a way that will deceive consumers as to the source of those works, or sponsorship or affiliation.

CONCLUSION

The Court should grant rehearing, or, in the alternative, rehearing *en banc*, and acknowledge that (1) as recognized in *Au-Tomotive Gold*, the aesthetic

functionality doctrine does not immunize confusing usages of trademarks, even if they are aesthetically pleasing; and (2) neither *Dastar* nor any other precedent precludes trademark protection for images that also have been protected by copyright.

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