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Evaluating “Total Concept and Feel”: Ninth Circuit Revisits Subjective “Intrinsic” Test in Determining Infringement

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The Ninth Circuit is poised to rethink its use of a subjective “intrinsic” test to determine substantial similarity in copyright cases. On September 29, 2026, the Ninth Circuit, sitting en banc, heard argument in the appeal of photographer Jeff Sedlik, who lost at trial over claims that tattoo artist Kat Von D infringed his 1989 copyrighted photograph of Miles Davis when she copied the image for a tattoo design. The case has drawn wide attention because the Ninth Circuit’s framework is a relative outlier among the circuits.

In January 2024, a jury found that the tattoo, a sketch, and certain social media posts were not substantially similar to Sedlik’s photograph and were therefore not infringing. The jury also found that some of Von D’s social media posts displaying the tattoo were fair use. Sedlik argued that the Ninth Circuit’s two-part framework for evaluating substantial similarity allowed the jury to reject his infringement claim, even though there was evidence that Von D traced his photograph and used the resulting stencil to tattoo a client’s arm.

Primarily at issue was the Ninth Circuit’s “intrinsic” test for copyright infringement, which asks whether a lay, reasonable observer would find the works substantially similar in their “total concept and feel.” To find substantial similarity in the Ninth Circuit, a copyright holder must satisfy both the intrinsic test and the “extrinsic” test, which objectively compares similarities in the works’ protectable expression, filtering out unprotectable elements. The extrinsic test may be determined as a matter of law where appropriate, while the subjective intrinsic test is typically, but not always, left to the purview of the jury. Expert testimony is generally allowed on the extrinsic test but not on the intrinsic test, because the intrinsic test looks to the audience’s response to the works as a whole. The framework dates to *Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp.*, 562 F.2d 1157 (9th Cir. 1977), and took its current objective/subjective form in *Shaw v. Lindheim*, 919 F.2d 1353 (9th Cir. 1990).

In January 2026, a three-judge panel affirmed Von D's trial win. Because the intrinsic test is "uniquely suited for determination by the trier of fact," the panel was "reluctant to reverse a jury's application of the intrinsic test" and declined to disturb the jury's verdict. Nonetheless, two judges wrote separately to call for an end to the intrinsic test:

- Judge Wardlaw noted that the Supreme Court "has never blessed" the test. She wrote that its focus on "total concept and feel" conflicts with the Copyright Act's command that protection never extends to any "concept" and suggested that the court "consider dispensing with the intrinsic test."
- Judge Johnstone noted the test's drift from its origins as "a factual test for determining substantial similarity of an idea's overall expression" into "a subjective test based on the jury's own impression." He argued that the test leads to "unpredictable and asymmetrical results" and precludes summary judgment for "almost all copyright plaintiffs." He also warned that only defendants can correct erroneous verdicts, because the Circuit "ha[s] never reversed a jury's no-infringement verdict under the test." Calling the tattoo "100% exactly the same," he concluded that "a test that produces such a result cannot be right."

After granting rehearing in June, the "elephant in the room" for the en banc court was what happens when a jury finds that two works are not substantially similar when those works actually do look alike.

During the 2025 panel hearing, Judge Wardlaw observed, "I think what we're all struggling with here is that, we look at it, we say, 'This is the same photograph,' yet through all these machinations, it ended with the jury saying that it's not substantially similar." At the en banc argument, Sedlik picked up on that tension, arguing that "no matter what the jury does, it can't be reviewed," even though "everybody knows something went really wrong." He urged the court to replace the subjective intrinsic inquiry with an objective comparison anchored in protectable expression. Under his approach, the court would first identify the protectable elements, and jurors would be told which elements are unprotectable on their own and then directed to compare the protectable expression as a whole. "Objective means verifiable, identifiable features compared side-by-side," he said.

Von D argued in response that a controversial verdict does not justify abandoning a longstanding test. Von D warned that an objective, element-by-element comparison runs the risk of "missing the forest for the trees," overlooking how the works appear in their entirety.

The parties and amici have identified several possible paths forward:

1. Maintain the test: Copyright law professors supporting Von D contend that the jury properly relied on the "holistic impression of an ordinary non-expert observer" and argue that Sedlik's position "turn[s] the test for infringement into one merely for copying in fact by converting 'total concept and feel' into a 'heads I win, tails you lose' rule favoring plaintiffs."
2. Abolish the test: Sedlik, building on the panel concurrences, asks the court to discard the intrinsic test in favor of an objective comparison of protectable expression that judges can review on appeal and, in clear cases, resolve on summary judgment.
3. Revise the test: Photography trade associations urge "definition, not abolition" of the intrinsic test, which they contend has "erroneously developed, in some hands, into a standardless inquiry untethered from protectable expression." The amici propose confining the test to protectable expression, which they argue would allow cases to be "properly reviewed by the Courts, and in exceptional cases may be resolved as a matter of law."

The Ninth Circuit's framework is not the only way to approach substantial similarity, however, and the parties and amici drew sharp contrasts among the circuits' tests. Courts and commentators generally sort the circuits into two families: the two-step "extrinsic-intrinsic" approach of the Ninth, Fourth, and Eighth Circuits, and the more holistic "ordinary observer" test applied in the Second, Third, Fifth, Seventh, and D.C. Circuits. Still, every circuit filters out unprotectable material at some point and includes a holistic comparison of some kind. What sets the Ninth Circuit apart is how rigidly it treats the holistic step as a separate, independently dispositive test committed to the jury.

What It Means for Practitioners

Regardless of the Ninth Circuit's ultimate decision, each possible path forward carries consequences for litigants and copyright owners. Several stand out.

Abolishing or curtailing the intrinsic test would likely make summary judgment more available to plaintiffs in clear-copying cases, which today almost always must go to trial, and would give plaintiffs something they have never had on this prong: meaningful appellate review of a jury's no-infringement finding. But the change would cut both ways. If the holistic comparison becomes something judges can decide, defendants may find it easier to win early dismissals where the only similarities lie in unprotectable elements.

Whatever the en banc court decides, the case shows what can happen with general verdicts. The jury answered a single "substantially similar" question, so no one can say with certainty whether it rejected Sedlik's claim under the extrinsic test, the intrinsic test, or both. Litigants can instead consider requesting special interrogatories that separate the extrinsic analysis, the holistic comparison, and fair use, and should press for work-specific instructions that identify the unprotectable elements rather than relying on generic language.

Experts may also play a larger role in determining whether infringement has occurred. Experts have long helped to bridge the gap between a lay juror's initial reaction when seeing an allegedly infringing work and the rigorous analysis that is required when assessing infringement. For example, jurors and judges evaluating whether a piece of music is infringing may be guided by testimony from musicologists to understand the technical elements of the work. Experts also help jurors understand when apparent similarities between two works reflect conventions common to a genre rather than copying, but under current Ninth Circuit law, that testimony is confined to the extrinsic test. If the en banc court eliminates or curtails the intrinsic test, expert testimony on what is protectable, and on how much protected expression was taken, may carry more weight, and *Daubert* challenges to those experts will matter correspondingly more.

In short, the en banc court's decision will likely reshape how copyright cases are tried in the Ninth Circuit, from summary judgment and jury instructions to expert strategy and appellate review.

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