

**In the
Supreme Court of the United States**

SHOSH YONAY, ET AL.,

Petitioners,

v.

PARAMOUNT PICTURES CORPORATION,

Respondent.

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

**BRIEF OF AMICUS CURIAE
NATIONAL SOCIETY OF ENTERTAINMENT & ARTS LAWYERS
IN SUPPORT OF PETITIONERS**

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INTEREST OF THE AMICUS CURIAE¹

Pursuant to Supreme Court Rule 37, the NATIONAL SOCIETY OF ENTERTAINMENT & ARTS LAWYERS (“NSEAL”) respectfully submits this brief as *Amicus Curiae* in support of Petitioners Shosh Yonay and Yuval Yonay. This organization, previously known as the CALIFORNIA SOCIETY OF ENTERTAINMENT LAWYERS (“CSEL”), is a non-profit 501(c)(3) organization, founded in 2013, devoted to safeguarding the interests of creative professionals in the entertainment industry through dedicated legal advocacy. It comprises attorneys across the United States who represent authors, screenwriters, songwriters, musicians, and other creative professionals in the entertainment and arts industries. Its members have argued for and obtained crucial decisions at the appellate court level in cases involving artists’ rights and entertainment law. The organization has submitted an amicus brief in support of the prevailing party in four previous cases in this Court, *viz.*, *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014); *Unicolors, Inc. v. H&M Hennes & Mauritz, L. P.*, 595 U.S. 178 (2022); *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023); and *Warner Chappell Music, Inc. v. Nealy*, 601 U.S. 366 (2024), all of which involved important issues of copyright law, and all of

¹ In accordance with Sup. Ct. R. 37.6, counsel for amicus curiae certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than amicus curiae, its members, or its counsel have made a monetary contribution intended to fund the preparation or submission of this brief. In addition, amicus curiae timely notified the parties of its intent to file in accordance with Sup. Ct. R. 37.2.

which reached conclusions consistent with the reasoning in NSEAL's briefs.



SUMMARY OF ARGUMENT

“True story.” For TV and film audiences, and for readers, this is a powerful phrase. For studio execs, producers, and publishers too. The phrase promises both “truth”—illustrating how the real world works—and a “story”—entertaining, exhilarating, moving, in a way everyday life seldom is.

A good true story, in a script, an article, a book, or any other medium, displays the ingenuity and originality of its author. “Top Guns,” for example, is a good true story, a virtuosic display of Ehud Yonay’s talents. Such a work’s value—aesthetic and economic—flows not from its constituent facts but from its authors’ creative expression of those facts: their selection, sequence, and arrangement. This is a form of value copyright law ought to recognize, as copyright protects “choices as to selection and arrangement” that “entail a minimal degree of creativity.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348 (1991).

The circuit split identified in the Petition has especially profound consequences for works like “Top Guns”: expressive factual works. It leads to starkly different treatment of these works in different jurisdictions.

The first part of the Ninth Circuit’s two-part test entails filtering out a work’s unprotectable individual

elements. Because raw facts are not protected by copyright, this filtration process can lead a court to disregard nearly all the elements of an expressive factual work before even considering its similarity to the defendant's work—no matter the creativity or expression embodied in the original author's selection and arrangement of those elements. In contrast, the Second Circuit, and courts following its approach, can still recognize the substantial similarity in works' combination of elements, even if the individual, factual elements, on their own, are not protected by copyright.

In addition to this substantive difference, the circuit split also creates procedural differences. Courts following the Ninth Circuit's approach undertake the first part of the analysis at summary judgment—and they can rule against the claimant on substantial similarity before the works at issue ever come before a jury, using a different test from the one the jury would employ. The result can be an unfavorable ruling for a claimant at summary judgment even when a jury would have found the defendant's work substantially similar to the claimant's. In contrast, the Second Circuit's approach can recognize substantial similarity in works' selection and arrangement of elements even at the summary judgment stage.

Finally, the circuit split determines the practical value of statutory termination rights. By law, after a set time, a copyright holder has the right to terminate a grant of rights in a copyrighted work and renegotiate. This reduces the long-term risk to authors of initially selling rights at too low a price: If an authorized derivative work creates a large potential market for similar works (as happened with *Top Gun*), the original author can demand more favorable terms for future

derivative works. After the original author has exercised termination rights, under the Ninth Circuit's approach, another author can put out a later, unauthorized derivative work, and then argue that it copies only the unprotected facts of the original. Indeed, that is exactly what happened here. In contrast, because the Second Circuit's approach provides clearer protection to expressive factual works, it can deter unauthorized derivative works like these.

The difference matters. It means that in Hollywood, an author of an expressive factual work may have the opportunity to show similarity only after a court has reduced her work to isolated, unprotectable pieces, while in New York, the same author may argue that the defendant appropriated the work's overall look, feel, and expressive arrangement. Copyright protection should not turn on geography.

This Petition is an ideal vehicle to resolve this conflict. The Ninth Circuit affirmed summary judgment for Paramount by applying the filtration-first extrinsic test to a paradigmatic expressive factual work: Ehud Yonay's article "Top Guns." The result would have been different under the Second Circuit's approach.

The issue is nationally important. Congress designed copyright to protect original works of authorship while leaving facts and ideas free. Congress also recognized, in creating termination rights, that authors often bargain from an unequal position and may not know a work's value until it has been exploited. The circuit split at issue here muddles these policies in the modern entertainment market. The resulting uncertainty is a drag on creativity and on the market for rights in artistic works. This Court should grant certiorari to resolve the split, restore uniformity, and

clarify how to assess substantial similarity for expressive factual works—indeed, for all works.



ARGUMENT

THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT AT ISSUE TO CLARIFY THE SCOPE OF COPYRIGHT PROTECTION FOR EXPRESSIVE FACTUAL WORKS

I. Copyright Protects Expressive Factual Works

A. Expressive Factual Works Possess Great Commercial and Artistic Value

Raw facts possess little entertainment or market value. Yet creative expressions of fact possess great value. They hold our attention and occupy a growing portion of the entertainment marketplace.

The value of expressive factual works flows not from the facts but from the way they are presented: The emphasis on certain details and omission of others; the sequence; the tone; the mixture of personal, historical, and scientific facts; the translation into a *story* of the jumbled events that constitute a life or an episode in history. See Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516, 535–542 (1981).

“We gotta buy this,” producer Don Simpson said about Petitioners’ story “Top Guns.” Paul Attanasio, *The Twin Titans of ‘Top Gun’*, WASH. POST (May 16, 1986), <https://www.washingtonpost.com/archive/lifestyle/1986/05/16/the-twin-titans-of-top-gun/db86b5f9-f7ad-4f3e->

bd97-81ccf6522c2a/ (last visited July 23, 2026). Not because of the raw facts—those were already free for the taking, and of slight interest on their own. No, legendary producer Don Simpson wanted to purchase Petitioners’ 1983 story in *California Magazine* because of Ehud Yonay’s unique expression of those facts. Pet. at 7–8. That’s why it’s still a “story,” even though it’s a *true* story.

So, in 1983, Paramount acquired all rights to the article for a fixed sum and agreed to credit Yonay in qualifying films. And the 1986 film *Top Gun* was expressly credited as “[s]uggested by” the article. Pet. at 7–8; Pet.App.26a.

Paramount would not have wanted or needed a license just to state the raw facts of the matter—that flying can cause disorientation; that the sky and the sea sometimes look the same color; that a pilot nicknamed Yogi had wanted to fly fighter jets since childhood. Paramount wanted to buy Yonay’s expression of those facts, and how his expression makes you feel Yogi’s exhilaration:

There are no ups or downs here, no rights or lefts, just a barely perceptible line separating one blue from another, and that line is spinning and racing like mad in the distance. Yogi was still in junior high school when he realized that flying straight and level might be okay for some people, but if you like yanking and banking—the feeling of riding inside one of those storm-in-a-bottle souvenirs—then there’s just one place for you, and that’s the cockpit of a fighter plane.

Pet.App.50a.

Paramount bought the rights to “Top Guns” because Paramount saw the unique, original value in the story’s expression of the facts. *Cf. Incarcerated Ent., LLC v. Warner Bros. Pictures*, 261 F. Supp. 3d 1220, 1232 (M.D. Fla. 2017) (“[A] test screening for *War Dogs* revealed that one of the main things people liked was that it was based on a real story.”).

Top Gun: Maverick is a derivative work that exists in conversation with the original. Its derivative nature is made plain in its very title. *See Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1112 (9th Cir. 1998) (holding that “telling new . . . tales” involving work’s main character meets the definition of a derivative work); 4 David Nimmer, NIMMER ON COPYRIGHT § 2.12[A][4] (“Subsequent works in a series (or sequels) are derivative works . . .”). Like the original *Top Gun*, the sequel *Maverick* uses the same facts as Petitioners’ story, and the same expressive design, to make viewers feel the same exhilaration. *See* Pet.App.8a–11a. The difference is that Paramount did not pay to adapt that expression into *Top Gun: Maverick*—and that *Maverick* has earned \$1.5 billion in theatrical box-office receipts, of which Paramount has given not one dollar to Petitioners.²

Given the obvious link between the two films, it is hard to understand why Paramount needed to buy the rights to Petitioners’ story in 1983 to produce the original *Top Gun*, yet not to make *Maverick*. *See* 17 U.S.C. § 106(2) (“the owner of copyright under this

² *Top Gun: Maverick* (2022), Box Office Mojo by IMDbPro, <https://www.boxofficemojo.com/title/tt1745960/> (last visited July 23, 2026).

title has the exclusive right[] . . . to prepare derivative works based upon the copyrighted work”).

As a successful film based on an expressive, factual writing, *Top Gun: Maverick* is not unusual. Indeed, franchises, sequels, and previously established stories and characters now dominate the box office. The modern entertainment industry depends heavily on expressive factual works. *The Fast and the Furious*, inspired by Kenneth Li’s “Racer X,” has become the foundation of a multibillion-dollar franchise. The film *Hustlers*, based on Jessica Pressler’s “The Hustlers at Scores,” grossed approximately \$157 million. *Dallas Buyers Club*, based on “Buying time: World traveler Ron Woodroof smuggles drugs—and hope—for people with AIDS” by Bill Minutaglio received six nominations at the 86th Academy Awards. Many TV shows are also based on expressive factual writings and critically acclaimed, for example, *Boardwalk Empire*, *Band of Brothers*, and *Orange Is the New Black* (all based on non-fiction books). This list grows each year, fueled by true stories, ambitiously and expressively told.

The widespread prominence of expressive, fact-based works grew from the pathbreaking “new journalism” of the 1960s (think Tom Wolfe, Norman Mailer, Joan Didion, Hunter S. Thompson). This movement held that “nonfiction writing could be vivid, personal, topical, and literary all at once.”³ Its proponents wrote nonfiction, but they “started from scenes, not facts”;

³ The source of this and other quotations in this paragraph is Eric Bennett, *The War Over Creative Nonfiction*, CHRON. HIGHER EDUC. (May 31, 2024), <https://www.chronicle.com/article/the-war-over-creative-nonfiction> (last visited July 23, 2026).

they “evoked characters through dialogue, not summary”; in short, they “infused observations with the distinct flavor of the observing mind,” that is, the mind of the author. The many stylish, successful films and TV shows based on true stories—often first presented in original, expressive writings—reflect new journalism’s continuing influence.

These works succeed based on their authors’ transformation of facts through selection, structure, characterization, imagery, voice, and point of view. That their commercial and artistic value rests on their original expression, not their constituent facts, ought to place them within the protective domain of copyright law. Otherwise, despite the persistent, growing demand for well-told true stories, the law and marketplace will deny that these stories’ value derives from their authors’ originality.

B. Copyright Law Has Long Recognized the Value of Expressive Factual Works

The Copyright Act “prohibit[s] any copyright in facts.” *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 356 (1991) (citing 17 U.S.C. § 102(b)). But the only thing truly unprotected is raw factual information itself.

The moment that an author selects and arranges a set of facts and expresses them in some way, copyright law steps in to protect the result. *Feist*, 499 U.S. at 348 (copyright protects “choices as to selection and arrangement” that “entail a minimal degree of creativity”). Indeed, the very act of setting facts into words necessarily entails selection, arrangement, and expression. And in a well-crafted factual work like “Top Guns,” the selection, arrangement, and expression are

everything. “Top Guns” is just a collection of facts like *The Starry Night* is just a collection of brushstrokes.

Copyright law has always protected original expressions of facts. “The first congress of the United States” enacted laws protecting authors’ right to their “writings,” which notably extended to “any map, chart, book, or books.” *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 56–57 (1884). It is striking that this first copyright statute listed maps first; what better synthesizes fact and expression than a map? *See id.* at 57 (“This statute not only makes maps and charts subjects of copyright, but mentions them before books in the order of designation.”).

In those early days of copyright law, 140 years ago, the Supreme Court considered whether a photo of Oscar Wilde was protected by copyright. The defendant—foreshadowing Paramount’s arguments below—said the photo was just raw visual facts: “mere mechanical reproduction of the physical features or outlines of some object.” *Burrow-Giles*, 111 U.S. at 59.

The Court disagreed. The photo arose “entirely from [the photographer’s] own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.” *Id.* at 60. The raw visual facts of Oscar Wilde’s appearance on that day in that room gave rise to an original, expressive photo reflecting the photographer’s creative selection

and arrangement of those facts. The resulting work was worthy of copyright protection.

The *Trade-Mark* Cases similarly identified originality and “creative powers of the mind” as the foundation of copyright—without concern for whether those powers were exercised on factual or fictional raw materials. *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879). *Feist* later reaffirmed that the originality standard defined by *Burrow-Giles* and the *Trade-Mark* cases remains the “touchstone of copyright protection” and that even a “minimal degree of creativity” is sufficient. *Feist*, 499 U.S. at 345, 347.

This Court has applied the same distinction to factual writing. *Harper & Row* recognized that President Ford’s “personal viewpoint” on public events was protected expression and explained that copyright encourages the creation of material with historical value. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 546 (1985). And *Feist* identifies two protectable dimensions of factual works: the author’s “original collocation of words” and “the manner in which” the author selects and arranges the facts. *Feist*, 499 U.S. at 348–349; *see also Int’l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918).

II. The Circuit Split Over Substantial Similarity Especially Affects the Scope of Copyright Protection for Expressive Factual Works

All works rely on unprotectable elements. Language uses common words; music relies on a shared inventory of notes and rhythms; drama uses stock settings and recurring themes. As Augustine Birrell noted, in his historical lectures on copyright, “That a particular leg of mutton is mine is capable of easy proof or disproof,

but how much of my book is mine is a nice question.” Augustine Birrell, *SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS* 170 (1899) (emphasis omitted).

For example, expressive factual works must rely on true facts, real people, historical events, and observed, real-world settings. The effect on this type of work of dissection and filtration—the Ninth Circuit’s approach—is plain. When a court examines each factual element in isolation, and filters out shared factual components, it overlooks the originality that lies in how those elements operate together. As the Second Circuit warned, this approach risks leaving “almost nothing” protected by copyright, because most works can be reduced to basic, unprotectable components. *Boisson v. Banian, Ltd*, 273 F.3d 262, 272 (2d Cir. 2001).

A. The Two-Step Substantial Similarity Test Employed in the Fourth, Eighth, and Ninth Circuits Limits the Scope of Copyright Protection for Expressive Factual Works

The Fourth, Eighth, and Ninth Circuits evaluate substantial similarity through a two-step framework. *See* Pet. at 20–21. In the Ninth Circuit, the first step—the extrinsic test—objectively compares protectable expression after identifying and filtering out unprotectable elements. *Id.* Only if that test is satisfied does the inquiry proceed to the intrinsic test, which asks whether an ordinary audience would perceive substantial similarity in the works’ overall expressive effect. *See* Pet. at 21.

The Ninth Circuit explains that filtering and selection-and-arrangement are “not truly distinct tests”

and that a court must ensure that “protectable elements, standing alone,” are substantially similar. Pet.App. 15a–16a (emphasis omitted).

Feist does not support conflating those questions in the way the Ninth Circuit typically does. *Feist* holds that facts are not copyrightable, but that an author’s original selection, coordination, and arrangement of facts may be. *Feist*, 499 U.S. at 348–51. Whether copyright protects each individual fact should not determine whether it protects the author’s creative choices in combining and arranging those facts. A court cannot give meaningful effect to *Feist* if it erases the constituent elements before examining the arrangement they form.

Earlier Ninth Circuit decisions reflected that principle. *Apple Computer* recognized that the selection and arrangement of otherwise unprotectable elements may be protected. *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1446 (9th Cir. 1994). *Shaw* recognized that an original sequence of elements may be significant and protectible even when individual elements are not original. *Shaw v. Lindheim*, 919 F.2d 1353, 1363 (9th Cir. 1990). And *Metcalf* held that the cumulative arrangement of otherwise generic dramatic elements created a sufficiently concrete expressive pattern to make substantial similarity a triable issue. *Metcalf v. Bochco*, 294 F.3d 1069, 1073–74 (9th Cir. 2002). Those decisions ask whether unprotectable elements operate together as an original design—not whether each element survives filtration standing alone.

Under *Feist*, the proper limiting principle is originality, not quantity. The proper question is not the number of similar elements between two works, but whether the original combination of elements in one is substantially similar to the combination in the

other. See *Skidmore ex rel. Randy Craig Wolfe Trust v. Led Zeppelin*, 952 F.3d 1051, 1074–75 (9th Cir. 2020) (en banc) (rejecting copyright claim because elements did not form a sufficiently original combination). A long list of similar elements between two works does not establish substantial similarity if the list fails “to address the underlying issue of whether a lay observer would view the *works as a whole* substantially similar to one another.” *Herzog v. Castle Rock Ent.*, 193 F.3d 1241, 1257 (11th Cir. 1999) (emphasis added). And a relatively short list of similar elements *can* establish substantial similarity, through copying of an original overarching design.

The decision below illustrates why that distinction is especially important for expressive factual works. Petitioners identified an expressive combination of details appearing in both “*Top Guns*” and *Top Gun: Maverick*, including the Big Brass Bell tradition, the bull’s-eye metaphor, a sailing interlude, a push-up penalty, the “Welcome to Fightertown U.S.A.” sign, national-security framing, a compressed training deadline, and an invitation to return as an instructor. Pet.App.52a–71a. The court filtered out those elements it found unprotected, then determined that there were not enough remaining elements to establish substantial similarity. The court never considered whether the particular selection, sequence, emphasis, and narrative function of those details in “*Top Guns*,” operating together, forms an original expressive design that was copied in *Top Gun: Maverick*.

The case would have turned out differently in the Second Circuit and courts following its approach. See Pet. at 16–20. There, while the Yonays could not assert a claim over any single factual detail, they would be

able to assert a claim to the expressive combination of facts as a whole. This case thus illustrates the effects of the circuit split at issue for expressive factual works in particular.

B. The Two-Step Substantial Similarity Test Imposes Procedural Barriers on Expressive Factual Works

The two-step test also imposes daunting procedural barriers.

The test limits whether a copyright claim ever reaches a factfinder. Under the Ninth Circuit's framework, the court applies the first step, the filter-based extrinsic test, at summary judgment, erasing unprotectable elements and comparing only what remains. If the claimant cannot satisfy that threshold inquiry, the case ends before the claimant can present the claim to a jury to apply the intrinsic test and decide whether an ordinary audience perceives substantial similarity. *See Shaw*, 919 F.2d at 1359–60.

This gateway presents a higher obstacle for expressive factual works because their originality lies in relationships among facts rather than in isolated fictional components. If a court filters out all the components of these relationships at the extrinsic stage—because they are factual—the author's expressive arrangement disappears before a jury has the chance to consider it. The result is a mismatch between the two stages of the test. It might be that a jury viewing the two works from the perspective of the ordinary audience would perceive substantial similarity in their sequence, tone, pacing, design, and other protected expressive elements. But the works never get before the jury.

For expressive factual works, expert testimony can be especially important at the earlier, extrinsic stage. Literary experts can help courts identify narrative structure, point of view, pacing, tone, characterization, genre conventions, and the distinction between factual content and expressive presentation. *See* Fed. R. Evid. 702. They can explain how individual elements operate together in an expressive design that the court might otherwise overlook.

This case illustrates this issue. The district court excluded testimony of Petitioners' literary expert, Henry Bean, because he did not filter out the article's factual material. The Ninth Circuit affirmed, discounting Bean's observations that the article's "'facts are expressed with the feeling of fiction' and that nothing in the article 'constitutes a naked 'fact.'" Pet.App.19a–20a. But requiring an expert to filter out all factual elements before explaining how they operate together is the practical equivalent of excluding the testimony altogether. For these works, this requirement leaves claimants with no effective way to establish substantial similarity at the summary judgment stage.

That procedural consequence is especially significant because substantial similarity is frequently decided before trial. Scholarship has documented the outsize role in copyright cases of motions to dismiss and for summary judgment. Professor Daryl Lim reports that modern copyright claimants have only about a one in ten chance of winning. He attributes much of the decline to defendants' effective use of pretrial motions and to how courts handle substantial similarity before trial. *See* Daryl Lim, *Saving Substantial Similarity*, 73 FLA. L. REV. 591 (2021). Steven T. Lowe similarly warns that, under the current doctrine, courts may

continue to rule for defendants in literary copyright infringement cases “at least 95 percent of the time.” Steven T. Lowe, *Death of Copyright 3: The Awakening*, L.A. LAW., July/August 2018, at 29. Those data underscore how often the first step of the two-step test precludes the claimant from ever seeking a factual determination at the second step.

Moreover, even when a case reaches trial, the court’s threshold determinations continue to shape the jury’s inquiry. The court determines which elements are unprotectable and whether the copyright is broad or thin. Then the court instructs the jury whether infringement requires showing the usual substantial similarity, or instead requires showing “virtual identity,” which is a great deal more difficult. *Mattel, Inc. v. MGA Entertainment, Inc.*, 616 F.3d 904, 913–18 (9th Cir. 2010). The jury may consider the works as a whole, but only within the legal boundaries the court has already drawn.

In contrast, in the Second Circuit and jurisdictions following its approach, *see* Pet. at 16–20, courts and juries can consider whether works’ combinations of elements display substantial similarity, even if the elements are individually unprotected. Even when this approach is applied to expressive factual works, it does not end up conferring copyright protection on facts. Claimants must still prove ownership, copying of protected expression, and substantial similarity. And defendants may still rely on the defenses of independent creation, merger, *scènes à faire*, public domain, fair use, and de minimis use. *See* Lydia Pallas Loren & R. Anthony Reese, *Proving Infringement: Burdens of Proof in Copyright Infringement Litigation*, 23 LEWIS & CLARK L. REV. 621, 658–70, 674–75 (2019).

These jurisdictions rely on these existing safeguards to preserve the free use of facts and ideas. They do not add a threshold test that excludes relevant expert analysis and prevents a factfinder from ever considering whether an author’s original arrangement was copied.

C. The Two-Step Substantial Similarity Test Limits the Practical Power of Termination Rights for Expressive Factual Works

Last, the decision below alters the long-term economics of expressive factual works. Sometimes an original work’s vast market value becomes apparent only after a studio develops and distributes a derivative work—having paid its author comparatively little for the right to do so.

Congress sought to mitigate this problem through Section 203 of the Copyright Act, which entitles authors and their successors to terminate the grant of rights—and renegotiate the terms of further derivative works.⁴ The House Report explains that termination

⁴ Section 203(a)(3) provides:

“Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.”

Section 203(a)(5) further provides:

“Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.”

¹⁷ U.S.C. § 203(a)(3), (5).

rights protect authors from “unremunerative transfers” caused by their “unequal bargaining position” and the difficulty of determining a work’s value before exploitation. H.R. Rep. No. 94-1476, at 124 (1976). Section 203, therefore, permits authors and their statutory successors to terminate qualifying grants during a specified period, notwithstanding an agreement to the contrary. 17 U.S.C. § 203(a)(3), (5). The provision gives authors another opportunity to bargain after the work’s market value becomes known. *See Stewart v. Abend*, 495 U.S. 207, 229–30 (1990).

Counterbalancing this, Congress also protected ongoing reliance on existing adaptations. A derivative work prepared before termination may continue to be used under the terms of the original grant; that privilege does not extend to preparing new derivative works after termination. 17 U.S.C. § 203(b)(1).⁵ The statute thus preserves rights in existing works while restoring control to the author over future uses.

The Ninth Circuit’s approach, as illustrated below, weakens that congressional policy for expressive factual works. The facts of this case give studios a practical roadmap for getting more out of these works than they originally paid for: First, acquire rights in a promising true story, at a discount; next, build a franchise or adaptation market; last, when the time of termination arrives, make a new derivative work and

⁵ Section 203(b)(1) provides: “A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.” 17 U.S.C. § 203(b)(1).

argue that it uses only unprotected facts, ideas, and generic conventions. *See* Pet. at 2; Pet.App.3a–4a. The Ninth Circuit’s approach does not invalidate termination rights. But it does reduce their value for authors of expressive factual works by making the reclaimed copyright far more difficult to enforce.

In contrast, courts following the Second Circuit’s approach can more readily recognize substantial similarity between the new derivative work and the original, copyrighted work. This reflects basic copyright principles. The copyright in a derivative work protects only the new material contributed by the derivative author; it does not extinguish the copyright in the preexisting work. *Stewart*, 495 U.S. at 223–24. Thus, if protected expression from the original work (“Top Guns”) is carried forward through an authorized derivative work (*Top Gun*) into a later unauthorized work (*Maverick*), the author’s claim should not fail merely because the later work also contains new elements, or because the copied expression consists, at an elemental level, of facts.

This sharp difference in the practical value of authors’ termination rights intensifies the circuit split. It is yet another reason for this Court to grant the Petition and resolve the split.



CONCLUSION

This Court has not addressed substantial similarity in copyright infringement since 1991. The situation has grown dire, with the Circuit Courts at an impasse on this issue—in a state of fundamental disagreement on the very meaning of copyright protection. The circuit split profoundly affects expressive factual works in particular, intensifying the need for review.

More than thirty-five years after *Feist*, and after dramatic changes in how expressive works are created, licensed, adapted, and consumed, lower courts need guidance on how to apply copyright's foundational rules without diminishing human creativity. Authors need consistency and predictability in establishing and enforcing their rights—not two totally different sets of rights, depending on where their copyright claims are adjudicated. The federal copyright law should not protect that expression in one circuit and filter it away in another.

The Court should therefore grant review to restore clarity, preserve meaningful protection for original expression, and ensure that copyright law continues to promote human creativity.

Respectfully submitted,

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