

No. 26-61

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 *Amici Curiae* Profs. Daryl Lim and
Eugene Volokh in Support of Petitioners**

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Interest of the *Amici Curiae*¹

Amici submit this brief to explain (1) the history of the ordinary observer test, used by the Second, Third, Fifth, Seventh, and D.C. Circuits, and the extrinsic/intrinsic test, used by the Fourth, Eighth, and Ninth Circuits, and (2) the broad scholarly recognition that the tests are not equivalent.

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¹ No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this *amicus* brief, and had received notice of the planned filing at least 10 days before the deadline.

copyright law for several years, and is the co-author of, among other articles, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147 (1998), and *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 Yale L.J. 2431 (1998).

Summary of Argument

The circuit courts are sharply split on how to analyze one of the central questions in copyright law. This Court should grant certiorari in this case to provide clarity and consistency on this question.

Copying copyright-protected expression may constitute a copyright violation. But copying facts and ideas is not a copyright violation, because they are generally “free as the air to common use,” *Goldstein v. California*, 412 U.S. 546, 570 (1973) (quoting *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting)).

The line between copying expression and copying facts and ideas is thus a key feature of copyright law, especially when the allegation is of nonliteral copying. Drawing the line correctly—and, as significantly, consistently—becomes extremely important. And it is important as to the whole panoply of works that copyright law protects, including literary works (as in this case), musical works, audiovisual works, and more.

As the Petition explains, the circuits are sharply split on this question, which is generally called the “substantial similarity” question. The split in approaches is likely to influence the results in many cases. And the split will persist regardless of what conclusion the Ninth Circuit en banc court eventually

reaches in considering *Sedlik v. Von Drachenberg*, 163 F.4th 667 (9th Cir. 2026), *en banc granted and panel opinion vacated*: Even if the *Sedlik* *en banc* decision moves from the “extrinsic/intrinsic test” to the “ordinary observer” test—which is far from certain—the extrinsic/intrinsic test would remain the law in the Fourth and Eighth Circuits. *See* Petn. 30 n.7.

Amici do not express a view on which circuits’ position is right. But they do agree that this Court should step in to resolve the circuit split.

Argument

I. The Circuits’ substantial similarity tests are materially different

A. The ordinary observer test

The traditional test for substantial similarity is the “ordinary observer test,” which has been adopted by the Second, Third, Fifth, Seventh, and D.C. Circuits. *See* Petn. 3 (citing cases). The test’s roots go back to *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), *abrogated in part as to other matters, as recognized in Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319 (2d Cir. 1975), where composer Ira Arnstein sued the great Cole Porter, alleging infringement of Arnstein’s songs. The test, created by Judge Jerome Frank joined by Judge Learned Hand, aims to compare the two works from the perspective of a hypothetical lay reasonable observer, and focuses on the similarities between the works, not on their differences. And it makes the jury central to substantial similarity inquiries, at least in the bulk of cases where reasonable factfinders can differ on the question.

The Second Circuit in *Arnstein* identified “two separate elements essential to a plaintiff’s case” in a copyright suit: “(a) that defendant copied from plaintiff’s copyrighted work and (b) that the copying (assuming it to be proved) went so far as to constitute improper appropriation.” *Id.* at 468.

The first question is a pure question of historical fact: Did defendant copy *something* from plaintiff, or did the defendant independently create defendant’s work? As to this first question,

the evidence may consist (a) of defendant’s admission that he copied or (b) of circumstantial evidence—usually evidence of access—from which the trier of the facts may reasonably infer copying. Of course, if there are no similarities, no amount of evidence of access will suffice to prove copying. If there is evidence of access and similarities exist, then the trier of the facts must determine whether the similarities are sufficient to prove copying.

On this issue, analysis (“dissection”) is relevant, and the testimony of experts may be received to aid the trier of the facts. If evidence of access is absent, the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result.

Id. (paragraph break added).

The second question—of “improper appropriation”—is a different matter, even though it too considers “similarity.” There “the test is the response of the ordinary lay hearer,” so “‘dissection’ and expert testimony are irrelevant.” *Id.*

Assuming that adequate proof is made of copying, that is not enough; for there can be “permissible copying,” copying which is not illicit. Whether (if he copied) defendant unlawfully appropriated presents, too, an issue of fact. The proper criterion on that issue is not an analytic or other comparison of the respective musical compositions as they appear on paper or in the judgment of trained musicians. . . .

The question . . . is whether defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.

Id. at 472-73 (paragraph break added). And this second question—whether “defendant took . . . [too] much”—is “an issue of fact which a jury is peculiarly fitted to determine.” *Id.* at 473. (A finding that “defendant took . . . [too] much” is often labeled “substantial similarity,” as opposed to the “probative similarity” that is part of the analysis under the first question. *See Design Basics, LLC v. Signature Constr., Inc.*, 994 F.3d 879, 888 (7th Cir. 2021) (“To preserve the distinction between these two concepts, we will follow the Second Circuit’s lead and use the term ‘probative similarity’ to refer to the degree of similarity necessary to support an inference of actual copying and the term ‘substantial similarity’ to refer to the test for wrongful copying or unlawful appropriation.”).)

To be sure, the similarity in this inquiry must be similarity *of expression*, and not just similarity stemming from similarity of facts and of ideas. Pictures of, say, two dolphins crossing underwater will inevitably

be similar to some extent, just because they portray the same real species engaged in the same movement. Courts that follow the ordinary observer test therefore add that

a “more refined analysis” is required where a plaintiff’s work is not “wholly original,” but rather incorporates elements from the public domain. In these instances, what must be shown is substantial similarity between those elements, and only those elements, that provide copyrightability to the allegedly infringed compilation.

Boisson v. Banian, Ltd., 273 F.3d 262, 272 (2d Cir. 2001) (cleaned up). But,

In applying this test, a court is not to dissect the works at issue into separate components and compare only the copyrightable elements. To do so would be to take the “more discerning” test to an extreme, which would result in almost nothing being copyrightable because original works broken down into their composite parts would usually be little more than basic unprotectible elements like letters, colors and symbols. This outcome—affording no copyright protection to an original compilation of unprotectible elements—would be contrary to the Supreme Court’s holding in *Feist Publications*. . . .

[W]e have . . . always recognized that the test is guided by comparing the “total concept and feel” of the contested works.

Id. (cleaned up).

The test requires a comprehensive, holistic side-by-side comparison of the works to see if enough was misappropriated, a task simple enough that jurors can perform it. And it grounds the legal inquiry in a lay audience’s perception rather than in the technical sensibilities of an expert blended with the rarified tastes of judges imbibing the works from their chambers. *See* Daryl Lim, *Saving Substantial Similarity*, 73 Fla. L. Rev. 591, 607 (2021).

B. The extrinsic/intrinsic test

The test used by the Fourth, Eighth, and Ninth Circuits (*see* Petn. 21 (citing cases)) is quite different. It stems from *Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp.*, 562 F.2d 1157 (9th Cir. 1977), *overruled in part as to other matters by Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051, 1066 (9th Cir. 2020) (en banc), which set forth a different two-step test:

(1) The first step is a showing of defendant’s “access to the copyrighted work” owned by the plaintiff. *Id.* at 1164.

(2) The second step asks whether there is “substantial similarity not only of the general ideas but of the expressions of those ideas as well.” *Id.* And that has two separate subparts, one focused on similarity of ideas and one on similarity of expression:

(a) “The determination of whether there is substantial similarity in ideas may often be a simple one. . . . The test for similarity of ideas is still a factual one, to be decided by the trier of fact.” *Id.* at 1164.

This is called the “extrinsic test,”

because it depends not on the responses of the trier of fact, but on specific criteria which can be listed and analyzed. Such criteria include the type of artwork involved, the materials used, the subject matter, and the setting for the subject. Since it is an extrinsic test, analytic dissection and expert testimony are appropriate. Moreover, this question may often be decided as a matter of law.

Id.

Later decisions have stressed the “may often be decided as a matter of law” conclusion rather than emphasizing the “still a factual one, to be decided by the trier of fact” inquiry. Many copyright cases in the Ninth Circuit are therefore resolved on summary judgment under the extrinsic test, as this case indeed was. *See, e.g.,* Petn. 7a-8a; *Cavalier v. Random House, Inc.*, 297 F.3d 815, 823 (9th Cir. 2002). And some Ninth Circuit extrinsic-test cases are even decided on a motion to dismiss. *See, e.g., Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1118, 1123-24 (9th Cir. 2018), *overruled in part as to other matters by Skidmore*, 952 F.3d at 1067-68.

(b) “The determination of when there is substantial similarity between the forms of expression is necessarily more subtle and complex.” *Krofft*, 562 F.2d at 1164.

This is called the “intrinsic test,” and it “depend[s] on the response of the ordinary reasonable person.” Here, “[b]ecause this is an intrinsic test, analytic dissection and expert testimony are not appropriate.” *Id.*

The *Krofft* opinion suggested that this test was the “same type of bifurcated test” as the one set forth in *Arnstein*, *id.* at 1164-65. But it acknowledged that there may be differences between the two:

We do not resurrect the *Arnstein* approach today. Rather, we formulate an extrinsic-intrinsic test for infringement based on the idea-expression dichotomy. We believe that the *Arnstein* court was doing nearly the same thing. But the fact that it may not have been does not subtract from our analysis.

Id. at 1165 n.7.

The *Krofft* test forms the foundation for the decision below. The decision is structured around the “extrinsic test” and “intrinsic test.” Petn. 7a-8a. And it relies (Petrn. 7a, 11a, 16a, 18a) on leading Ninth Circuit precedents that in turn relied heavily on *Krofft*, *e.g.*, *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018), *Rentmeester*, 883 F.3d 1111, and *Shaw v. Lindheim*, 919 F.2d 1353 (9th Cir. 1990), *overruled in part as to other matters by Skidmore*, 952 F.3d at 1068-69. See *Williams*, 895 F.3d at 1120; *Rentmeester*, 883 F.3d at 1117; *Shaw*, 919 F.2d at 1356-62.

C. The difference between the tests

In the decades since *Krofft* it has become clear that the two tests are indeed substantively different. Because of the inherent subjectivity of some of the concepts—the idea/expression line can rarely be drawn with mathematical certainty—it can be hard to know for sure whether any particular case would have been decided differently had the other test been applied.

But there is good reason to think that the tests point decisionmakers in different directions.

The leading copyright treatises, which this Court has cited on many occasions, make this clear. The treatise by William Patry² puts the matter thus, first criticizing *Krofft* (a matter on which the *amici* take no position) but then making clear that the *Krofft* test differs sharply from the *Arnstein* test (a matter on which the *amici* agree with the treatise):

Regrettably, not only does *Krofft* provide a poor foundation, the obvious weaknesses in it have led the court of appeals to erect Rube Goldberg-like work arounds

. . . .

[W]hile both [the Second and Ninth] circuits use a two-step analysis, and *Krofft* purported (erroneously) to derive its test from *Arnstein*, if one thing is clear, it is that the two tests bear no resemblance to each other.

3 Patry on Copyright § 9:235.

Arnstein’s first element may be traced back to early decisions stating the obvious: since independent creation is an absolute defense to a claim of infringement, “[c]opying is essential to establish an infringement of copyright.” *Krofft*’s first step, by contrast, assumes copying and

² Cited by this Court in eight cases. See, e.g., *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 586 U.S. 296, 309 (2019); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 412 (2017); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 683 (2014).

focuses on establishing similarity of ideas between the two works sufficient to determine whether the second step—that of material copying—should be permitted to go to a jury. This is entirely different from *Arnstein*.

Id. § 9:236; *see also id.* § 9:170 (faulting another case, outside the Second and Ninth Circuits, for “combining the different tests of infringement set forth by the Second Circuit in *Arnstein v. Porter* and by the Ninth Circuit in [*Krofft*],” and noting that *Krofft* is “a decision that conflicts with *Arnstein* on a number of points”).

The Nimmer treatise³ similarly notes the difference between the tests, and similarly (but perhaps less harshly) expresses doubts about *Krofft*:

In invoking the extrinsic test, *Krofft* referred to it as a test to determine “similarity in ideas.” Yet ideas themselves lie beyond copyright protection! . . .

. . . Under the *Arnstein* bifurcated test, the court is first to determine whether there has been any copying, including “permissible copying.” *Krofft* interpreted this ruling to mean that the court should determine only whether there has been a copying of ideas, without reference to whether there has also been a copying of expression.

This interpretation probably reflects an incorrect reading of *Arnstein*, in view of *Arnstein*’s

³ Cited by this Court in 24 cases. *See, e.g., Warner Chappell Music, Inc. v. Nealy*, 601 U.S. 366, 373 n.2 (2024); *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 20-21 (2021); *Fourth Est. Pub. Benefit Corp.*, 586 U.S. at 308.

citation of authorities elucidating the phrase “permissible copying.” Although not without ambiguity on the point, the *Arnstein* version of the preliminary—extrinsic—test probably calls for a determination of whether there is substantial similarity of expression (not merely of idea), but this evaluation is to be made regardless of the protectability of that expression, whereas the second—intrinsic—test of substantial similarity is confined to that plaintiff’s protectable expression.

Admittedly, *Krofft* was careful to state that its articulation of the rule was not dependent on whether it correctly read *Arnstein*. Still, in the interest of justice, and of avoiding nuisance litigation, the hope arose that future decisions would view the scope of the extrinsic test as that suggested by *Arnstein*, rather than that adopted in *Krofft*. But events took a different course.

4 Nimmer on Copyright § 13D.19[A] (footnotes omitted, paragraph break added).

Paul Goldstein’s copyright treatise⁴ likewise criticizes *Krofft*, while acknowledging that it “is the leading infringement decision in the Ninth Circuit,” Goldstein on Copyright § 9.3.2.1:

In developing this new [extrinsic/intrinsic] taxonomy, *Krofft* made a consequential misstep by framing the inquiry under the extrinsic text as

⁴ Cited by this Court in five cases. See, e.g., *Fourth Est. Pub. Benefit Corp.*, 586 U.S. at 308; *Star Athletica, L.L.C.*, 580 U.S. at 422; *Quality King Distributors, Inc. v. L’anza Rsch. Int’l, Inc.*, 523 U.S. 135, 149 n.21 (1998).

whether there is “substantial similarity of ideas” between the plaintiff’s and defendant’s works. The error is that, while similarity in ideas—similarity in title, plot and setting, for example—may help to prove *copying*, it cannot prove that the defendant appropriated the plaintiff’s *protected expression*. . . .

This misstep in elaborating the extrinsic test led *Krofft* to mischaracterize the intrinsic, audience test as well, phrasing the test as whether the defendant’s work captured the “total concept and feel” of the plaintiff’s work. . . .

Unlike Patry and Nimmer, Goldstein appears to take the view that later Ninth Circuit cases have tended to “return to the more traditional formulations of copyright infringement.” *Id.* But even Goldstein acknowledges that those decisions tend to “repeat[] the misstep” of *Krofft*. *Id.*

Other scholars have similarly recognized that the *Arnstein* and *Krofft* tests (and their progeny) differ. “Scholars noted a substantial difference between the Second and Ninth Circuit tests.” Lim, 73 Fla. L. Rev. at 611. “The Second and Ninth Circuits differ substantially.” Daniel Gervais, *Improper Appropriation*, 23 Lewis & Clark L. Rev. 599, 610 (2019). “The Ninth Circuit states that its test is the ‘same type of bifurcated test’ that was announced in *Arnstein*. While both tests are bifurcated, the *Krofft* test is plainly different and deeply confusing.” Peter S. Menell, *Reflections on Music Copyright Justice*, 49 Pepp. L. Rev. 533, 567 n.137 (2022) (citation omitted). See also Alan Latman, “Probative Similarity” as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 Colum. L. Rev. 1187, 1202-03 (1990) (noting *Krofft*’s differen-

ces from *Arnstein*, despite *Krofft*'s claiming that its approach was consistent with *Arnstein*); Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. Copyright Soc'y U.S.A. 719, 724-25 (2010) (discussing how *Krofft* differs from *Arnstein*); Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 Nw. U. L. Rev. 1821, 1829 (2013) (noting that *Krofft* "consciously adapted" its test from *Arnstein*, but concluding that the two tests are different, with the *Krofft* test being "worse in some ways than *Arnstein*" but being in other ways "an improvement over the *Arnstein* test"—partly because the Ninth Circuit in *Krofft* "misunderstood the *Arnstein* first step").

To be sure, it is not completely clear who benefits most from the ordinary observer test and who from the extrinsic/intrinsic test. On one hand, as noted at Petn. 22-24, the extrinsic/intrinsic test may lead to more cases being dismissed on summary judgment, as courts exclude supposedly unprotected elements—and may perhaps in the process exclude the protected selection, arrangement, and coordination of those elements. On the other, as noted by some of the scholars quoted above, the extrinsic/intrinsic test may overprotect some works by considering "substantial similarity in ideas" as a factor in favor of infringement (even though ideas are not protected by copyright).

Quite possibly, the extrinsic/intrinsic test favors some plaintiffs as well as some defendants, while the ordinary observer test favors other plaintiffs as well as other defendants. See Samuelson, *supra* (discussing the various ways in which the two tests differ). But regardless, it appears the two tests are indeed different, as their different formulations reflect. In any particu-

lar case, the outcome may turn (whether in the plaintiff's favor or the defendant's) on which test is applied.

Conclusion

“Condemned to the use of words, we can never expect mathematical certainty from our language.” *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). But we can expect something better than the sharp difference, in wording and in substance, between the copyright infringement test used by the Second, Third, Fifth, Seventh, and D.C. Circuits and the copyright infringement test used by the Fourth, Eighth, and Ninth Circuits. This Court should grant certiorari to set forth a uniform nationwide standard for this important question of federal law.

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