

No. 26-61

IN THE
Supreme Court of the United States

SHOSH YONAY AND YUVAL YONAY,
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 IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Whether the Court should grant certiorari to determine whether the Ninth Circuit properly applied its “substantial similarity” standard for copyright infringement, when that standard is materially identical to the standard applied by other circuits; when the Ninth Circuit is currently considering the scope of its substantial similarity test en banc; and when the decision below does not implicate any purported circuit conflict in any event.

CORPORATE DISCLOSURE STATEMENT

Respondent Paramount Pictures Corporation is a wholly owned subsidiary of Paramount Global. Paramount Global is a wholly owned subsidiary of Skydance Corporation (SKYD), formerly named Paramount Skydance Corporation, a publicly traded company.

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INTRODUCTION

The Petition for Certiorari should be denied because the circuit conflict on which its request for review is based does not exist, and this case would be a poor vehicle even if it did.

Petitioners are the heirs of Ehud Yonay, who in 1983 wrote a non-fiction article called “Top Guns” about the Navy’s Fighter Weapons School in Southern California. Paramount’s hit 1986 movie, *Top Gun*, was credited as being “suggested by” Yonay’s article. In 2022, Paramount released a sequel to *Top Gun* called *Top Gun: Maverick*, which Petitioners allege infringes their copyright in the Yonay article.

All agree that Petitioners’ infringement claim turned on whether *Maverick* was “substantially similar” to *Top Gun*. To answer that question, the court of appeals applied its so-called “extrinsic” test for determining substantial similarity. Because the copyright laws protect only an author’s original expression and not general “ideas or ... facts,” *Feist Publications, Inc. v. Rural Telephone Services Co.*, 499 U.S. 340, 345 (1991) (quotation omitted), the court of appeals first filtered out the two works’ non-protectable elements and then compared their protectable elements—including how the works’ (protected and unprotected) elements were selected and arranged—to determine whether they are substantially similar. The court of appeals concluded they are not, in large part because the similarities between the works that Petitioners had identified were unprotectable facts about the Top Gun program, whereas the original expressive elements of Yonay’s article are not found in *Maverick*. As the court of appeals explained, “what is protected

is not similar, and what is similar is not protected.” Pet. App. 9a.

Petitioners contend that the substantial similarity test the court of appeals applied conflicts with the test applied by several other circuits, most notably the Second. Petitioners note that the Second Circuit applies a test that considers the “total concept and feel” of the works from the perspective of an “ordinary observer,” whereas (according to the Petition) the Ninth Circuit’s “extrinsic” test does not consider the ordinary observer’s perspective or the works’ total concept and feel. Petitioners contend that this is a substantive disagreement between the circuits that results in differing outcomes and thus warrants this Court’s review.

That contention is wrong, as courts and commentators—including Petitioners’ own amicus—have repeatedly recognized. The circuits do use different verbal formulations to describe their substantial similarity tests, but the differences are semantic; the substance of the tests is materially identical. As one commentator summarized, “[a]lthough each substantial similarity test is framed using different language, each test engages in substantially the same, and at times exactly the same, analysis.” Gabriel Godoy-Dalmau, *Substantial Similarity: Kohus Got It Right*, 6 Mich. Bus. & Entrepreneurial L. Rev. 231, 251 (2017). That is why Petitioners’ amicus, Professor Lim, concluded after empirical analysis that “the chosen [i.e., the Second or Ninth Circuit] test generally made little difference to the outcome.” Daryl Lim, *Saving Substantial Similarity*, 73 Fla. L. Rev. 591, 621 (2021). Similarly, Professor Lippman concluded

after conducting her own analysis that “[d]espite the confusion engendered by the tests and the criticism launched against them, ... their differences are inconsequential.” Katherine Lippman, *The Beginning of the End: Preliminary Results of an Empirical Study of Copyright Substantial Similarity Opinions in the U.S. Circuit Courts*, 2013 Mich. St. L. Rev. 513, 563 (2013). Professor Nimmer has likewise noted that the differences between the tests are “more cosmetic than substantive, in terms of actual results.” 4 Nimmer & Nimmer on Copyright § 13D.21[D] (2025). And the Seventh Circuit has labeled the supposed circuit split on which Petitioners rely “a ‘pseudo-conflict’: despite the conflicting and confusing verbiage, the outcomes do not appear to differ.” *Peters v. West*, 692 F.3d 629, 633 (7th Cir. 2012) (quotation omitted).

There is thus simply no conflict for the Court to resolve. And even if there were, there would be several reasons to deny certiorari in any event. First, the Ninth Circuit is currently reconsidering the scope of its substantial similarity test en banc. The result of that review may alter or eliminate any disagreement between the circuits. Second, this case is a poor vehicle through which to resolve any circuit conflict. For one thing, the court of appeals applied exactly the analysis the Second Circuit would have applied, so even if there is some disparity between those courts’ tests as a general matter, it is not implicated here. What’s more, this case arises in a unique posture—*viz.*, the (heirs of the) author of a *non-fiction* article charging copyright infringement by a fictional motion picture. In that context, it is unsurprising that most of the similarities between the works that

Petitioners have alleged amount to descriptive facts about the Top Gun program, which are not protected by copyright law. Petitioners may continue to disagree with the Ninth Circuit’s conclusion on that score, but any such challenge amounts to a request for fact-bound error correction unsuitable for this Court’s review.

When this Court was last asked to resolve the supposed circuit conflict the Petition alleges, it declined. *See Johannsongs-Publishing, Ltd. v. Peermusic Ltd.*, No. 21-1196 (cert. denied Apr. 25, 2022). The Court should do so again. The Petition should be denied.

STATEMENT

A. Factual Background

1. In 1983, *California Magazine* published an 11-page non-fiction article by Ehud Yonay entitled “Top Guns.” Pet. App. 2a. The article discusses the history, culture, and setting of the Navy’s Fighter Weapons School, colloquially known as the “Top Gun” program, in addition to vividly describing the experience of flying an F-14 aircraft. *Id.* “Top Guns” focuses on two lieutenants, callsigns “Yogi” and “Possum,” describing their decision to become fighter pilots, their experiences in naval aviation and the Top Gun program, and their personal background. *Id.*

Shortly after “Top Guns” was published, Yonay granted the rights therein to Paramount. Pet. App. 3a. In return, Paramount paid Yonay a fixed sum and agreed to credit him in any movies “produced by [Paramount] hereunder and substantially based upon or adapted from” the article. *Id.*

2. In 1986, Paramount released the feature film *Top Gun*, credited as being “[s]uggested by” Yonay’s piece. Pet. App. 3a. The film follows Navy lieutenants, callsigns “Goose” and “Maverick,” through their experiences at Top Gun. *Id.* Maverick competes with another lieutenant—“Iceman”—to be the top trainee; but after Goose dies in a plane flown by Maverick, Maverick considers quitting. *Id.* Nevertheless, he continues in the program and graduates with his class. *Id.* Thereafter, Maverick is deployed with Iceman for a dangerous mission. *Id.* The film concludes with the mission’s success, the two becoming friends, and Maverick making peace with his guilt over Goose’s death. *Id.*

3. Yonay died in 2012. Pet. App. 4a. His widow Shosh and his son Yuval (Petitioners here) subsequently acquired the copyright to “Top Guns.” *Id.* In 2020, the two Petitioners terminated the Paramount grant by invoking their termination rights under 17 U.S.C. § 203(a)(3). *Id.*

In 2022, Paramount released *Top Gun: Maverick*, a sequel to *Top Gun*. *Maverick* picks up decades after the original film. Pet. App. 4a. Iceman is now the admiral leading the U.S. Pacific Fleet and Maverick’s commanding officer. *Id.* After Maverick crashes an experimental jet, Iceman orders him back to Top Gun to train new graduates for a mission to destroy an enemy’s uranium-enrichment plant. *Id.* Among those graduates is Goose’s son, callsign “Rooster,” who resents Maverick because he blocked Rooster’s application to the Naval Academy in an effort to protect him from suffering his father’s fate. *Id.*

The graduates are trained by flying a course that simulates the topography of the planned mission, but none can complete the course quickly enough to avoid enemy attack. Pet. App. 4a. During training, Iceman dies of cancer. Maverick, inspired by Iceman, takes an unauthorized flight through the course to demonstrate it is possible to complete the mission in time. *Id.* Based on this performance, Maverick is selected to lead the mission, and decides that he and Rooster will each lead a flight team. *Id.* Simultaneously, Maverick pursues a romantic relationship with Penny Benjamin, a former admiral's daughter. *Id.*

During the mission, Maverick shields Rooster from enemy missiles but is shot down. Pet. App. 4a-5a. As an enemy helicopter closes in on him, Rooster returns to destroy it, only to be shot down himself. Pet. App. 5a. Stranded together, the two steal an F-14 from a nearby enemy air base and head for the carrier, but enemy fighters intercept them. *Id.* Just as all seems lost, a fellow Top Gun graduate arrives to save them. *Id.* The three land safely, Maverick and Rooster having finally reconciled. *Id.* The film closes with Maverick and Penny flying his plane into the sunset. *Id.*

Yonay was not credited or compensated for *Maverick*. Pet. App. 5a.

B. Procedural Background

1. After *Maverick*'s release, Petitioners filed suit against Paramount in the Central District of California, asserting that (i) *Maverick* infringed their copyright in "Top Guns" and (ii) Paramount breached its

contract with Yonay by failing to provide his article attribution in the film. Pet. App. 5a.

Only the copyright infringement claim is at issue here. That claim is based on Petitioners' assertion that *Maverick* and "Top Guns" are "substantially similar" in their "original expression." Pet. App. 7a.

2. The district court granted Paramount summary judgment, holding that the Yonay article and *Maverick* are not "substantially similar" in their protectable expression. Pet. App. 37a-43a. The district court also rejected Petitioners' contract claim. Pet. App. 43a-45a.

3. Petitioners appealed and the court of appeals affirmed.

a. The court of appeals first set forth the general legal principles at issue in Petitioners' copyright claim. The court noted that the only question here is whether Paramount "unlawfully appropriate[d]" Petitioners' work by "cop[ying]" "original" aspects of the article. Pet. App. 6a.

The court explained that "ideas" and "concepts" are not protectable under the Copyright Act, and that "copyright law also does not protect the facts set forth in a work, so a defendant is not liable for copying them," Pet. App. 6a-7a—a principle of "particular relevance" (Pet. App. 7a) in this case because Yonay's was a nonfiction article. Thus, "[t]o show unlawful appropriation, plaintiffs must ... demonstrate that the works in question share substantial similarity in *protectable* expression, not merely in facts, ideas, or concepts." Pet. App. 7a (quotation omitted). "To do so, they must satisfy both an extrinsic and intrinsic

test.” *Id.* The extrinsic test “assesses the objective similarities of the two works,” whereas the intrinsic test is entirely subjective and reserved for the jury. *Id.* (quotation omitted). Thus, “only the extrinsic test is relevant at the summary-judgment stage.” *Id.*

Under the extrinsic test, the court explained, “a court must filter out and disregard the non-protectible elements.” Pet. App. 7a (quotation omitted). “For literary works” such as those here, the “test focuses on articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events in two works.” Pet. App. 7a-8a (quotation omitted). But the court emphasized that “even if none of the artistic elements in those categories reveals substantial similarity, works can be substantially similar if they share the ‘selection and arrangement’ of those elements,” including the “original selection and arrangement of unprotected elements.” Pet. App. 8a (quotation omitted).

b. Consistent with this standard, the court began its extrinsic analysis by assessing alleged similarities between the plot, sequence of events, characters, dialogue, themes, mood, setting, and pace of the two works. Pet. App. 6a-14a. And the court “agree[d] with the district court that [Petitioners] cannot show meaningful similarities in any of those categories.” Pet. App. 8a.

But before delving into each artistic category, the court noted “a problem that pervades the Yonays’ arguments: Although ‘Top Guns’ contains much original, protected expression—most notably, its vivid phrasing and innovative structure—none of that ex-

pression appears in *Maverick*.” Pet. App. 8a-9a. Indeed, Petitioners “identify similarities between the article and the film only by describing both works at such a high level of abstraction that the similarities do not involve protected expression.” Pet. App. 9a. “Their claim of substantial similarity” thus “fails because what is protected is not similar, and what is similar is not protected.” *Id.*

The court then went on to analyze the alleged similarities between the protected literary elements just described, and explained how the alleged similarities are either not similar or not protected (either because the alleged similarities are unprotectable facts or generalized ideas). Pet. App. 9a-14a.

c. The court’s analysis did not end there, however, because “[g]iven the lack of similarity in protectable elements, [Petitioners] understandably focus[ed] on a selection-and-arrangement argument.” Pet. App. 14a. The court explained that a “selection and arrangement copyright protects ... the particular way in which the artistic elements form a coherent pattern, synthesis, or design,” even if those elements are not themselves protectable. *Id.* (emphasis omitted). But “a plaintiff can[not] prevail under a selection-and-arrangement theory simply by showing that the two works share many similar elements, whether unprotectable or protectable.” Pet. App. 15a. Rather, the court explained, to be substantially similar under a “selection and arrangement” theory, “the works must share a pattern, synthesis, or design that is both particular and coherent.” Pet. App. 16a (quotations omitted).

Here, the court explained, Petitioners “identif[ied] no such shared pattern of expression.” Pet. App. 16a. Petitioners “identif[ied] multiple factual similarities between the works when discussing selection and arrangement: for example, that ‘only the best of the best get invited back to Top Gun as instructors,’ that ‘pilots live in a communal world,’ that the program involves ‘grueling training,’ and that lieutenants ‘carous[e] at the bar, which has a big brass bell and where those who break “house rules” must buy a round for everyone.’” Pet. App. 16a-17a. “But those are unprotectable facts about the Top Gun program,” Pet. App. 17a, the court explained, and “a copyright plaintiff cannot establish substantial similarity by reconstituting the copyrighted work as a combination of unprotectable elements and then claiming that those same elements also appear in the defendant’s work, in a different aesthetic context,” *id.*

Petitioners also attempted to show substantial similarity in selection and arrangement of elements by “articulat[ing] patterns that the works share.” Pet. App. 17a. For example:

[T]hey point out that “[r]ather than offer an encyclopedic narration of the naval base’s operations, Yonay focused on the personal backgrounds and idiosyncrasies of ambitious fighter pilots to engage his audience and humanize” the characters in “Top Guns.” They assert that Yonay “patterned contradictory character elements to engage his audience and enhance his Story: e.g., pilots are fierce, but playful; regimented, but irreverent; macho, but sensitive.” And they say that, in both works, “passages of idyllic flying over the beach in Southern

California are juxtaposed suddenly and violently with gut-wrenching climbs, dives, and dogfights,” causing “beauty and terror” to “spring from each other.”

Id. But the court explained that such “abstract ideas are not the [Petitioners’] original expression.” *Id.* After all, “[s]howing characters’ backgrounds and personalities, giving them contradictory traits, and displaying action in aesthetically pleasing places have all been done before.” *Id.* “And even if they had not,” the court went on, Petitioners “cannot claim an exclusive right to ideas or concepts at that level of generality, even in combination,” because recognizing such a claim “would withdraw those ideas or concepts from the ‘stock of materials’ available to other artists, thereby thwarting copyright’s ‘fundamental objective’ of ‘foster[ing] creativity.’” Pet. App. 17a-18a (quotations omitted).

d. The court of appeals then rejected Petitioners’ remaining arguments concerning the district court’s exclusion of an expert and their breach of contract claim. Pet. App. 19a-24a. The Petition does not present either of those issues to this Court. *See* Pet. 32 n.8.

4. Petitioners sought rehearing en banc, but that request was denied without any judge voting in favor. Pet. App. 46a-47a.

REASONS FOR DENYING THE PETITION

There is no basis for this Court’s review. The Petition alleges a decisional conflict between the circuits over the proper test for determining whether two

works are substantially similar in a copyright-infringement analysis. In fact, however, while these circuits use different language to describe their substantial similarity tests, those tests are materially identical as a substantive matter—as courts and commentators, including one of Petitioners’ own amici, have repeatedly recognized. What’s more, this case would not present an appropriate vehicle to resolve any circuit conflict that did exist. And Petitioners’ various challenges to the decision below and Ninth Circuit doctrine more generally are meritless.

The Petition should be denied.

A. This Case Does Not Implicate A Circuit Conflict Warranting This Court’s Review

The Petition’s principal asserted basis for certiorari is that the Second and Ninth Circuits (and the various other circuits that follow the Second or the Ninth) have adopted conflicting tests for determining whether two works are “substantially similar” for purposes of copyright infringement. In particular, the Petition attempts to describe two materially distinct tests for determining whether two works are “substantially similar” for copyright infringement purposes: the Second Circuit’s “ordinary observer” test,¹

¹ The Petition alleges that the Third, Fifth, Seventh, and D.C. Circuits have followed the Second Circuit in describing its test this way. The Third and D.C. Circuits have expressly adopted the Second Circuit’s formulation of the substantial similarity test. See *Tanksley v. Daniels*, 902 F.3d 165, 175 (3d Cir. 2018); *Atkins v. Fischer*, 331 F.3d 988, 993 (D.C. Cir. 2003). That is not true of the Fifth Circuit. See *Batiste v. Najm*, 28 F. Supp. 3d 595, 602 (E.D. La. 2014) (“Although the Fifth Circuit has expressly

on the one hand, and the Ninth Circuit’s “extrinsic/intrinsic” test,² on the other.

In fact, however, these tests use different words to describe materially identical approaches to substantial-similarity analysis. As the Seventh Circuit has explained in describing various circuits’ formulations of the test for unlawful copying (including substantial similarity), “[d]espite all of this confusing nomenclature,” any differing verbal formulations are “a ‘pseudo-conflict’: despite the conflicting and confusing verbiage, the outcomes do not appear to differ.” *Peters*, 692 F.3d at 633 (quotation omitted).

adopted neither [the Ninth Circuit or Second Circuit articulations of the ‘substantial similarity’ test] outside of the computer software arena, aspects of both have permeated into this Circuit’s jurisprudence.”). The Seventh Circuit’s approach is unclear. In some cases, it appears to have adopted some version of the “ordinary observer” framework. *See, e.g., Incredible Techs., Inc. v. Virtual Techs., Inc.*, 400 F.3d 1007, 1011 (7th Cir. 2005) (quotation omitted). In others, that court has applied a generic “objective” test for substantial similarity without elaboration. *See JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910, 916 (7th Cir. 2007). And in yet others, the Seventh Circuit has surveyed different formulations of the test for copyright infringement (including substantial similarity) and concluded that there is no difference in substance “[d]espite all of this confusing nomenclature.” *Peters*, 692 F.3d at 633; *see id.* at 633-34 (“[f]undamentally,” the relevant question is whether “the two works share enough unique features to give rise to a breach of the duty not to copy another’s work”).

² As the Petition states, the Fourth and Eighth Circuits have largely followed the Ninth Circuit’s extrinsic/intrinsic formulation of the substantial similarity test. *See Copeland v. Bieber*, 789 F.3d 484, 489 (4th Cir. 2015); *Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958, 966 (8th Cir. 2005).

1. *Different circuits have adopted different verbal formulations for materially identical legal tests for substantial similarity.*

This Court in *Feist* set forth several of the basic principles that guide the question whether an author has unlawfully appropriated another’s work. The Court explained that “[t]o qualify for copyright protection, a work must be original to the author.” 499 U.S. at 345. It noted that such protection does not extend to “ideas or ... facts.” *Id.* (quotation omitted). And it held that “[i]f the selection and arrangement [of otherwise non-protectable elements of a work] are original, these elements of the work are eligible for copyright protection.” *Id.* at 349.

In light of these principles, the circuits have elaborated various verbal formulations for determining whether one work has unlawfully appropriated the protectable aspects of a prior work—i.e., whether the protectable aspects of the two works are “substantially similar.” As shown below, however, these various verbal formulations all result in the same substantive approach to determining substantial similarity.

a. According to the Petition, the Second Circuit applies an “ordinary observer” test under which courts “ask ‘whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.’” Pet. 16 (quoting *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1003 (2d Cir. 1995)). But as the very case on which the Petition relies makes clear, that is not the proper approach in cases (like this one) where the court must

compare works “that contain both protectible and unprotectible elements.” *Knitwaves*, 71 F.3d at 1002. In such cases, the test is “more discerning,” *id.* (quotation omitted)—the court “must attempt to extract the unprotectible elements from [its] consideration and ask whether the protectible elements, standing alone, are substantially similar.” *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 66 (2d Cir. 2010) (quoting *Knitwaves*, 71 F.3d at 1002).

According to the Petition, “[t]hat filtration process does *not*, however, require courts to ‘dissect’ works ‘into their separate components, and compare only those elements which are in themselves copyrightable.’” Pet. 16 (quoting *Knitwaves*, 71 F.3d at 1003). But that assertion is misleading, because the Second Circuit expressly recognizes that “the infringement analysis *must begin* by dissecting the copyrighted work into its component parts in order to clarify precisely what is not original.” *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134 (2d Cir. 2003) (emphasis added).

Certainly, as explained in the next paragraph, the analysis does not *end* there, which is why the *Gaito Architecture* case the Petition quotes says that courts do not “compare *only* those elements which are in themselves copyrightable.” *Gaito Architecture*, 602 F.3d at 66 (emphasis added and quotation omitted). But as *Tufenkian* recognizes, separating out the protectable elements of the two works being compared is a crucial aspect of substantial similarity analysis. *See also Tanksley*, 902 F.3d at 175 (“After excising all unprotectable ideas and *scènes à faire*, courts have sought to compare dramatic works across a number of

components: plot and sequence of events, dialogue, characters, theme, mood, setting, and pace.”); *Atkins*, 331 F.3d at 993 (“When comparing the designs, *it is not sufficient* to dissect separate components and dissimilarities” (emphasis added)).

The step of the Second Circuit analysis on which the Petition focuses—and the step it incorrectly asserts that the Ninth Circuit’s approach does not include, *see infra* at 20-21—is to compare what the Second Circuit has called the works’ “total concept and overall feel” in considering whether they are substantially similar, even when the works are not substantially similar in their protectible elements. *See, e.g., Gaito Architecture*, 602 F.3d at 66 (quotation omitted); *Knitwaves*, 71 F.3d at 1002.

Crucially—and contrary to the Petition’s suggestion—the Second Circuit’s evaluation of “total concept and feel” is not a general comparison of the works’ “overall look and feel.” Pet. 20. Rather, the cases on which the Petition relies make clear that the “total concept and overall feel” analysis “focuses on whether the alleged infringer has misappropriated the original way in which the author has ‘selected, coordinated, and arranged’ the elements of his or her work.” *Gaito Architecture*, 602 F.3d at 66 (quotation omitted); *see also Knitwaves*, 71 F.3d at 1004 (comparing works’ “total concept and feel” means considering “the original way in which the author has ‘selected, coordinated, and arranged’ the elements of his or her work” even if those elements are not themselves protectable (quoting *Feist*, 499 U.S. at 358)); *Tufenkian*, 338 F.3d at 134-35 (“total-concept-and-feel locution” recognizes artistic elements must be considered “in relation to

one another” to determine whether a work’s “similarities are due to protected aesthetic expressions original to the allegedly infringed work, or whether the similarity is to something in the original that is free for the taking”). The Second Circuit has expressly explained that “this Circuit’s protection of a complex work’s ‘total concept and feel’” derives from “the Supreme Court’s statement in *Feist* that compilations of unprotectible elements merit copyright protection insofar as they contain an original and non-mechanical selection, coordination or arrangement of those elements.” *Tufenkian*, 338 F.3d at 134 n.7 (citation omitted); *see also, e.g., Hord v. Jackson*, 281 F. Supp. 3d 417, 427 (S.D.N.Y. 2017) (“The ‘total concept and feel’ of a work is comprised of the way an author ‘selected, coordinated and arranged the elements of his or her work.’” (quoting *Feist*, 499 U.S. at 358)).

Unsurprisingly, the other circuits that have adopted the Second Circuit’s test (*see supra* at n.1) also consider the similarity of the works’ selection, coordination, and arrangement in the “total concept and feel” analysis. *See Tanksley*, 902 F.3d at 175 (“The total concept and feel approach recognizes that ‘a work may be copyrightable even though it is entirely a compilation of unprotectable elements,’ because ‘[w]hat is protectable ... is “the author’s original contributions”—the original way in which the author has “selected, coordinated, and arranged” the elements of his or her work’” (quoting *Knitwaves*, 71 F.3d at 1003-04)); *Atkins*, 331 F.3d at 993 (“When comparing the designs, it is not sufficient to dissect separate components and dissimilarities. The original way that the

author ‘selected, coordinated, and arranged the elements’ of her work is the focus of the court.” (quotation omitted)); *see also JCW Inves., Inc.*, 482 F.3d at 916 (finding substantial similarity based on “the execution and combination of features”).

b. The Ninth Circuit has adopted a two-step “extrinsic/intrinsic” test for substantial similarity. “The extrinsic test ‘assesses the objective similarities of the two works.’” Pet. App. 7a (quoting *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1118 (9th Cir. 2018)). The intrinsic test, in contrast, “is subjective and tests ‘for similarity of expression from the standpoint of the ordinary reasonable observer, with no expert assistance.’” *Id.* (quoting *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 637 (9th Cir. 2008)). A plaintiff must satisfy both tests to prevail. But “[b]ecause ‘the intrinsic test is reserved exclusively for the trier of fact,’ only the extrinsic test is relevant at the summary-judgment stage.” *Id.* (quoting *Williams v. Gaye*, 895 F.3d 1106, 1119 (9th Cir. 2018)).

As the Petition acknowledges, then, the “intrinsic” portion of the Ninth Circuit’s test played no role in this case, because the court of appeals affirmed the grant of Paramount’s motion for summary judgment applying only the “extrinsic” test. Pet. 23, 31. So Petitioners’ contention is that the Ninth Circuit’s “extrinsic” test conflicts with the Second Circuit’s approach. Pet. 20-22, 31. In fact, however, the two tests are materially identical.

As in the Second Circuit, courts in the Ninth Circuit “must filter out and disregard the non-protectible elements.” Pet. App. 7a (quoting *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002)); *accord*

Gaito Architecture, 602 F.3d at 66 (courts “must attempt to extract the unprotectible elements from our consideration and ask whether the protectible elements, standing alone, are substantially similar” (quoting *Knitwaves*, 71 F.3d at 1002)).

Then, “[f]or literary works, ‘[t]he test focuses on articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events in two works.’” Pet. App. 7a-8a (quoting *Cavalier*, 297 F.3d at 822). This is what the Petition pejoratively calls “dissection” and alleges that the Second Circuit rejects. Pet. 21. But as explained, the Second Circuit itself disagrees: it holds that the “infringement analysis must begin by dissecting the copyrighted work into its component parts in order to clarify precisely what is not original.” *Tufenkian*, 338 F.3d at 134 (emphasis omitted). Thus, when considering whether literary works are substantially similar, the Second Circuit, too, has examined similarities of the two works in “theme, characters, plot, sequence, pace, and setting.” *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996); *see also, e.g., Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir. 1986) (considering works’ “plot, theme, dialogue, mood, setting, pace and sequence”); *DiTocco v. Riordan*, 815 F. Supp. 2d 655, 667 (S.D.N.Y. 2011) (“In an analysis of literary works for substantial similarity, courts often consider such aspects as narrative structure, characters, themes, setting, plots and scenes, as well as total concept and overall feel.”), *aff’d* 496 F. App’x 126, 128 (2d Cir. Sep. 13, 2012) (affirming district court’s “well-reasoned opinion”).

Of course, the Second Circuit does not stop there, *see supra* at 15-17, and contrary to the impression the Petition attempts to leave, neither does the Ninth. Rather, as the court below expressly explained, “even if none of the artistic elements in those categories reveals substantial similarity, works can be substantially similar if they share the ‘selection and arrangement’ of those elements—or, in other words, ‘the particular way in which the artistic elements form a coherent pattern, synthesis, or design.’” Pet. App. 8a (emphasis omitted) (quoting *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051, 1074 (9th Cir. 2020) (en banc)). For such a claim to succeed, “the elements themselves need not be protectable.” *Id.* “Rather, ‘a copyright plaintiff may argue ‘infringement . . . based on original selection and arrangement of unprotected elements.’” *Id.* (quoting *Skidmore*, 952 F.3d at 1074). The court “consider[s] selection-and-arrangement arguments because of the possibility that the original expression a defendant has copied from a plaintiff cannot be categorized as one, or even a combination, of plot, themes, dialogue, mood, setting, pace, characters, or sequence of events.” Pet. App. 14a.

The Ninth Circuit’s “selection-and-arrangement” analysis is thus materially identical to what the Second Circuit describes as an analysis of “total concept and overall feel”—*viz.*, “whether the alleged infringer has misappropriated the original way in which the author has ‘selected, coordinated, and arranged’ the

elements of his or her work.” *Gaito Architecture*, 602 F.3d at 66 (quotation omitted); *see supra* at 16-17.³

c. The Petition eventually concedes, as it must, that the court below did not merely “dissect” the protectable elements of the works here, but also analyzed at length whether the selection and arrangement of elements (protectable or not) of the two works was substantially similar. Pet. 23-24. That concession undermines entirely the Petition’s allegation of a decisional conflict, since (as explained) this analysis of selection and arrangement mirrors the Second Circuit’s “total concept and feel” approach.

³ Petitioners attempt to sow confusion by asserting that the Ninth Circuit does not consider the “total concept and feel of the works” until the “intrinsic” portion of its test, which is reserved for a jury and can apply only if the court finds substantial similarity under the extrinsic test. Pet. 23 (quoting *Williams*, 895 F.3d at 1119). That is true as far as it goes, but it is meaningless semantics. As already explained, what the Second Circuit means by “total concept and feel” is the comparison of the works’ selection and arrangement of elements, *see supra* at 16-17—an analysis that the Ninth Circuit performs as part of the extrinsic test, as just shown. The Ninth Circuit means something completely different—it has sometimes used the “total concept and feel” formulation to describe the jury’s role under the intrinsic test, which is to “examine[] an ordinary person’s subjective impressions of the similarities between two works.” *Funky Films, Inc. v. Time Warner Ent. Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006), *overruled on other grounds by Skidmore*, 952 F.3d 1051. The Second Circuit’s approach does not include this subjective “intrinsic” test, but as already explained, the intrinsic test played no role in this case because the Ninth Circuit resolved the case at summary judgment under the extrinsic test. *See supra* at 18.

Petitioners attempt to resuscitate their assertion of a circuit conflict by arguing that the Ninth Circuit’s analysis of selection and arrangement conflicts with the Second Circuit’s because the Ninth Circuit considers similarity between “the *particular* way in which the artistic elements” were selected or arranged in the two works, Pet. 23 (quoting Pet. App. 14a), whereas (according to Petitioners) the Second Circuit considers “the *overall* look and feel of the two works,” Pet. 24.

But Petitioners mischaracterize the Second Circuit’s approach. Commentators had criticized the Second Circuit for applying precisely the type of free-wheeling approach that Petitioners ascribe to it—as the Second Circuit described it, the “‘total concept and feel’ standard” had been criticized on the ground that “‘feel can seem a ‘wholly amorphous referent,’” and that “a copyright doctrine whose aspiration is to protect a work’s ‘concept’ could end up erroneously protecting ‘ideas.’” *Tufenkian*, 338 F.3d at 134 (quoting 4 Nimmer on Copyright § 13.03[A][1][c] (2003)); *see also* 17 U.S.C. § 102(b) (copyright protection does not “extend to any *idea*, procedure, process, system, method of operation, *concept*, principle, or discovery ...” (emphasis added)).

In response, the Second Circuit confirmed that its “caselaw is not so incautious.” *Tufenkian*, 338 F.3d at 134. Rather, where the Second Circuit has “described possible infringement in terms of whether two [works] have or do not have a substantially similar ‘total concept and feel,’ we generally have taken care to identify *precisely the particular* aesthetic decisions—original to the plaintiff and copied by the defendant—that

might be thought to make the [works] similar in the aggregate.” *Id.* (emphasis added).

Thus, when considering a selection-and-arrangement substantial similarity claim, the Second Circuit looks *only* to the *precise* and *particular* way artistic elements are selected or arranged—exactly the approach for which the Petition criticizes the court below. Pet. 23.

There is thus no material difference between the substantial similarity tests the two courts (or any other courts) apply. At best, Petitioners are challenging the Ninth Circuit’s factbound application of a common legal standard, which is not a basis for certiorari. *See* S. Ct. R. 10.

2. *The circuits’ differing substantial similarity verbal formulations are generally recognized by courts and commentators as materially identical.*

Petitioners also err in asserting that the circuit conflict they allege is “openly acknowledged.” Pet. 24.

a. To begin, Petitioners cite remarks by several courts and commentators noting that the Ninth Circuit’s formulation of the substantial similarity test includes an intrinsic portion that the Second Circuit’s test does not possess. *See, e.g.*, Pet. 24 (citing *Swirsky v. Carey*, 376 F.3d 841, 849 n.16 (9th Cir. 2004) (noting that the Second Circuit test “does not differentiate between extrinsic and intrinsic analysis”)). But as explained, Petitioners do not rely on that alleged conflict because it is not implicated here—the court below did not apply the intrinsic test, which is left for the jury and is generally not applied at summary judgment.

See supra at 18. The Petition’s principal allegation is that the Second Circuit’s approach conflicts with the Ninth Circuit’s extrinsic test. *See id.* Unsurprisingly, the Petition cites no court or commentator recognizing any such conflict.

Indeed, one of Petitioners’ own amici, Professor Lim, has demonstrated empirically that there is no difference between the Second Circuit’s test and the Ninth Circuit’s extrinsic test. Because only the extrinsic test applies at summary judgment, the conflict Petitioners allege would be expected to result in a significant disparity in summary-judgment grant rates between the circuits (with the Second Circuit granting defendants summary judgment less often on Petitioners’ theory). Yet Professor Lim found essentially identical summary judgment grant rates: “The Second Circuit granted defendants’ summary judgments and motions to dismiss in 67% of its caseload. In comparison, the Ninth Circuit did so in 66% of its caseload.” Lim, *supra*, at 629. This empirical study confirms what the circuits’ own articulation of their respective tests already makes clear—the courts use different words to describe the same legal analysis, with predictably similar results. *See supra* Section A.1.

b. Nor is there any material difference between the circuits’ approaches even when the Ninth Circuit’s “intrinsic” test is considered. As one commentator has explained, “[a]lthough each substantial similarity test is framed using different language, each test engages in substantially the same, and at times exactly the same, analysis.” Godoy-Dalmau, *supra*, at 251. Specifically, the “substantial similarity inquiry

identifies similarities in its various degrees of generality (literal and non-literal similarity), separates unprotected from protected material, and compares the remaining protected expression for quantitatively and qualitatively meaningful similarity.” *Id.* Thus, “although each test is textually different, the actual substantive inquiry is substantially the same.” *Id.*

That conclusion, too, has been confirmed by empirical analysis. As Professor Lippman has explained in light of her own extensive analysis, “[i]f one pays no heed to additional variables, the probability that the copyright holder will prevail remains the same, regardless of which test is applied.” Lippman, *supra*, at 546. And Petitioners’ amicus, Professor Lim, again confirms this conclusion, noting that while Second and Ninth Circuits apply different tests, “the chosen test generally made little difference to the outcome.” Lim, *supra*, at 621. Thus, “[d]espite the confusion engendered by the tests and the criticism launched against them,” empirical analysis shows “that their differences are inconsequential.” Lippman, *supra*, at 563. The Petition does not cite a single contrary empirical finding.⁴

⁴ The amicus brief submitted by Professors Volokh and Lim contends that the purported circuit split identified by the Petition “is likely to influence the results in many cases,” Volokh & Lim Br. 2, but cites no empirical study to that effect, and strangely ignores Professor Lim’s own contrary finding. Petitioners’ other two amici likewise fail to advance the ball. The National Society of Entertainment & Arts Lawyers contends that the alleged circuit conflict is especially relevant to copyright analysis for factual works, see Nat’l Soc’y Br. 5-20, but that argument rests on

In light of all this, Professor Nimmer has recognized that the differences between the circuits’ substantial similarity tests are “more cosmetic than substantive, in terms of actual results.”⁴ Nimmer & Nimmer on Copyright § 13D.21[D] (2025). Thus, as “the Seventh Circuit commented after surveying the various substantial similarity tests, ‘Despite all of this confusing nomenclature, this strikes us as a “pseudo-conflict”: despite the conflicting and confusing verbiage, the outcomes do not appear to differ.’” *Id.* (quoting *Peters*, 692 F.3d at 633); *see also supra* at 13 (discussing *Peters*).

Again, none of this should be surprising in light of the demonstrable substantive similarity between the various lower court approaches. *See supra* Section A.1. But these studies and commentaries nonetheless confirm that there is no real circuit conflict here, and thus no basis for this Court’s review.

3. *Even if there were a circuit conflict that warranted this Court’s review in theory, the Ninth Circuit is currently reevaluating its substantial similarity test en banc.*

Finally, even if there were currently a circuit conflict worthy of this Court’s review, the Ninth Circuit’s recent grant of en banc review in *Sedlik v. Von Drachenberg*, 163 F.4th 667, *reh’g en banc granted*,

the false premise that there is a circuit conflict. And the brief of the Music Artists Coalition and Independent Book Publishers Association focuses on the interplay between copyright “termination rights” and the right to create “derivative” works, *see* Music Artists Coalition Br. 5-23—an issue not raised by the Petition or passed upon below.

opinion vacated, 177 F.4th 964 (9th Cir. 2026), would render a certiorari grant now premature because the en banc Ninth Circuit may well reformulate its substantial similarity test.

Sedlik arose from an assertion of copyright infringement by a photographer who alleged that a tattoo artist unlawfully copied his photograph of Miles Davis. 163 F.4th at 670-71. The district court denied summary judgment, the case went to trial, and the jury concluded that the works were not substantially similar under both the extrinsic and intrinsic tests. *Id.* at 673. A Ninth Circuit panel affirmed that jury verdict based solely on the jury’s application of the intrinsic test, but two judges wrote concurring opinions criticizing the intrinsic test. *See id.* at 676-79 (Wardlaw, J., concurring); *id.* at 679-85 (Johnstone, J., concurring). Judge Wardlaw’s concurrence argued that the intrinsic test “has fundamental flaws, and we should consider dispensing with it altogether,” *id.* at 676, which is presumably what prompted the full court to grant rehearing.

As explained earlier, the Ninth Circuit’s intrinsic test itself was not applied below and is thus not relevant here. But obviously, if the Ninth Circuit eliminates the intrinsic portion of its substantial similarity test as Judge Wardlaw has urged, it may also alter the extrinsic test. Even if that court does not eliminate the intrinsic test, it may well change the way its test in general is formulated and applied. In short, even if there were now a true conflict between the Second Circuit’s and Ninth Circuit’s approaches, the landscape may well be different after *Sedlik*.

Petitioners recognize the problem *Sedlik* poses to their Petition in a footnote, Pet. 30 n.7, but argue that the Court should ignore it based principally on the assertion that even if the Ninth Circuit alters its test, the Fourth and Eighth Circuits' test would still differ from the Second's. Again, there is in fact no material difference between any of these tests. But in any event, as Petitioners themselves note, the Fourth and Eighth Circuits adopted their tests from the Ninth, which considers far more copyright cases. Pet. 21. Thus, if the Ninth Circuit alters its substantial similarity test, the Fourth and Eighth may well follow suit.

Accordingly, even if the Court believes that there is currently a conflict worthy of its review, any such conflict may be eliminated or altered after *Sedlik*, so there is no basis to grant certiorari now.

B. This Case Is An Unsuitable Vehicle For Considering The Question Presented

This case also does not present a suitable vehicle for resolving the question presented, for several reasons.

First, Petitioners contend that the purported circuit conflict is "outcome-determinative" because the result below was driven by "Ninth Circuit's dissection approach." Pet. 31. That argument fails, however, because even if there were distinctions between the Second and Ninth Circuits' tests, they made no difference here. Again, Petitioners' main attack on the Ninth Circuit's approach is its purported "dissection" of the works into their protected elements without considering the works' "total concept and feel." See

supra at 19-20. But here, the court below *did* consider the works’ “total concept and feel” in the sense the Second Circuit understands that standard—the analysis below included an in-depth analysis of whether the works are substantially similar in their selection and arrangement, which is what the Second Circuit means by “total concept and feel.” *See supra* at 16-17. Again, Petitioners may disagree with how the Ninth Circuit applied these shared legal principles to the particular facts of this case, but the fact that this dispute boils down to that sort of factbound disagreement is what makes this case a bad vehicle.

Second, this case includes an impediment to a finding of substantial similarity that most cases do not: Yonay’s article is a work of non-fiction, and thus is in large part a factual description of the Top Gun program. This was of “particular relevance” to the court below because “copyright law ... does not protect the facts set forth in a work, so a defendant is not liable for copying them.” Pet. App. 6a-7a. That is not to say that nothing in the Yonay article was protectable—as the Ninth Circuit recognized, “‘Top Guns’ contains much original, protected expression—most notably, its vivid phrasing and innovative structure.” Pet. App. 8a-9a. But the problem for Petitioners was that “none of that expression appears in *Maverick*.” Pet. App. 9a. And the similarities that Petitioners did rely on largely constituted non-protectable facts.

For example, many of the protectable elements that Petitioners argued that the works shared were really just unprotectable facts about the Top Gun program. *See, e.g.*, Pet. App. 10a-11a (alleged similarities in plot constitute unprotectable facts); Pet. App. 12a

(characters based on real people not protectable); Pet. App. 14a (description of topography and scenery of location of Top Gun program is unprotectable fact). That problem extended even to Petitioners' selection-and-arrangement argument—Petitioners relied on a combination of facts about the Top Gun program, but the court explained that “a copyright plaintiff cannot establish substantial similarity by reconstituting the copyrighted work as a combination of unprotectable elements and then claiming that those same elements also appear in the defendant’s work, in a different aesthetic context.” Pet. App. 17a (quotation omitted). Petitioners do not allege that the Second Circuit would disagree with that basic principle. *See Tufenkian*, 338 F.3d at 134 (in selection-and-arrangement, the Second Circuit has “taken care to identify *precisely the particular aesthetic decisions*—original to the plaintiff and copied by the defendant—that might be thought to make the [works] similar in the aggregate” (emphasis added)).

That the Yonay article is non-fiction—and Petitioners' resulting heavy reliance on factual similarities between the two works—renders this case a poor vehicle for two reasons. For one thing, the principle of “particular relevance” below (Pet. App. 7a) that facts are not protectable is well-established, *see, e.g., Feist*, 499 U.S. at 345, and does not implicate any alleged circuit conflict. And in any event, the fact that this case arises in the unique context of a narrative literary work of fiction that is alleged to have infringed the copyright of a non-fiction article renders it an unsuitable vehicle to resolve a generalized circuit conflict of the sort Petitioners allege.

Third, as Petitioners readily admit, Pet. 31, the Ninth Circuit did not apply its intrinsic test here, so to the extent the Ninth Circuit's use of the intrinsic test sets it apart from other circuits, this case does not implicate that alleged conflict.

**C. The Petition's Arguments Concerning The
Recurring Importance Of The Question
Presented Are Flawed**

1. The Petition contends that the question presented is important and recurring because of the many copyright cases filed annually throughout the United States. Pet. 26. But while the legal test for substantial similarity can certainly be important in copyright cases, the circuits' various formulations articulating that test do not differ materially, *see supra* Section A.1, and empirical analysis shows that the circuits process this high volume of copyright cases with remarkable intra-circuit consistency, *see supra* Section A.2. This case is, moreover, a poor vehicle through which to resolve any circuit conflict that does exist. *See supra* Section B. There is thus no basis for this Court's intervention.

What's more, Petitioners' contention that the question presented recurs often, Pet. 26, undermines their argument that the Court should grant certiorari in this case despite the Ninth Circuit's en banc reconsideration of its substantial similarity test. *See supra* Section A.3. If the question presented is oft-recurring, the Court will have plenty of opportunities to consider whether that question is certworthy in future cases once the Ninth Circuit clarifies the scope of its test.

2. The Petition also argues that the question presented is important because the Ninth Circuit’s test (allegedly in contrast with the Second Circuit’s) “burdens copyright holders’ Seventh Amendment rights.” Pet. 28. According to Petitioners, the Second Circuit treats “substantial similarity” as a “fact-intensive question” and thus “generally an issue reserved for a jury,” Pet. 27 (quotation omitted), whereas the Ninth Circuit’s approach purportedly undermines copyright holders’ Seventh Amendment rights because it applies its extrinsic test at summary judgment and “does not even *consider* an ordinary observer’s perspective” at that stage, Pet. 28.

Petitioners’ Seventh Amendment argument is meritless. The Second Circuit has expressly recognized that “the question of substantial similarity is by no means exclusively reserved for resolution by a jury;” indeed, that court has held that substantial similarity can often be determined even on a motion to dismiss, because “when a court is called upon to consider whether the works are substantially similar, no discovery or fact-finding is typically necessary” *Gaito Architecture*, 602 F.3d at 63-64. And again, as Petitioners’ own amicus has concluded, the Second and Ninth Circuits grant defendants summary judgment in substantial similarity cases at nearly identical rates (67% v. 66%), *see supra* at 24, so the suggestion that the Second Circuit is more protective of plaintiffs’ jury rights is demonstrably incorrect. Petitioners’ error is again focusing on the semantics of the circuits’ tests without recognizing that the tests are themselves materially identical, so neither test is more or less protective of Seventh Amendment rights.

3. Finally, the Petition contends that the Ninth Circuit unfairly favors copyright defendants procedurally and substantively. Pet. 29-30. That, too, is wrong.

a. Petitioners contend, citing the concurring opinions in *Sedlik*, that the Ninth Circuit test unfairly favors defendants because plaintiffs can never obtain summary judgment under the extrinsic test, and must satisfy both the extrinsic and intrinsic tests to prevail. Pet. 29. That is incorrect—the Ninth Circuit has recognized that a court *can* grant a plaintiff summary judgment on substantial similarity in cases where no reasonable juror could disagree. *See Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 985, 986-87 (9th Cir. 2017). To be sure, summary judgment in favor of plaintiffs is not the norm, *see id.* at 986-87, but Petitioners do not contend that it is common in the Second Circuit. Indeed, any such suggestion from Petitioners would be odd, as they believe (erroneously) that the Second Circuit is uniquely protective of the jury’s role in copyright cases.

Petitioners also argue that plaintiffs are disadvantaged in the Ninth Circuit because a jury’s finding under the intrinsic test is unreviewable on appeal, so plaintiffs cannot obtain appellate relief to reverse a jury’s rejection of intrinsic substantial similarity. Pet. 29. That is a strange complaint, though, because one page earlier the Petition contended that the Ninth Circuit improperly undervalued the jury’s role in substantial similarity analysis. Pet. 28. Now Petitioners appear to argue that the Ninth Circuit test is *overly* solicitous of juries. In truth, neither position is

right—again, empirical studies show remarkable consistency in results across circuits. *See supra* Section A.2.

In any event, Petitioners rely entirely on the *Sedlik* concurrences in lodging these procedural complaints against the Ninth Circuit test. Pet. 29. If these arguments really uncovered problems that might warrant this Court’s review, that is all the more reason for this Court to await the Ninth Circuit’s en banc decision in *Sedlik* before considering whether the question present is certworthy.

b. The Petition also reprises its argument that the Ninth Circuit’s approach disfavors plaintiffs because “dissecting the copyrighted work and then only comparing the ‘golden nuggets’ to the allegedly infringing work may sometimes result in courts finding no infringement when defendants have, in fact, copied a substantial portion of protectable material resulting from how an author put together otherwise unprotectable elements.” Pet. 29-30 (quotation omitted). But as explained at length above, the Ninth Circuit *does not* simply “dissect” works into their protectable elements; it also considers whether the works are substantially similar in their selection and arrangement of protectable *or* unprotectable elements, *see supra* at 20-21—and thus does consider “how an author put together otherwise unprotectable elements.” Pet. 30 (quotation omitted); *see also* Pet. App. 14a-18a.

D. The Decision Below Is Correct

As the foregoing discussion makes clear, the Petition’s contention that the decision below is incorrect (Pet. 32-33) is based on a mischaracterization of that

decision. It did not improperly engage in a “piecemeal analysis of the works’ component parts.” Pet. 32. It did not “br[eak] the [Petitioners’] story down into disparate fragments that would be unrecognizable to ordinary readers or the moviegoing public.” *Id.* It did not “strip[] those fragments of their expressive content.” *Id.* And it did not improperly “focus[] on *differences* between the [works’] components ... rather than look for *similarities*.” Pet. 33.

Rather, the court below did what every court does in substantial similarity analysis: it “identifie[d] similarities in its various degrees of generality (literal and non-literal similarity), separate[d] unprotected from protected material, and compare[d] the remaining protected expression for quantitatively and qualitatively meaningful similarity.” *Godoy-Dalmau, supra*, at 251; *see supra* at 7-11. It did so with particular emphasis on what this Court has labeled the “most fundamental axiom of copyright law”: that “[n]o author may copyright his ideas or the facts he narrates.” *Feist*, 499 U.S. at 344-45 (quotation omitted); *see supra* at 29-30. And it concluded that the works did not share the type of particular pattern in their selection and arrangement of elements sufficient to demonstrate substantial similarity of original expression. Pet. App. 16a-18a. There are of course similarities in the works—they are both about the Top Gun program. But the problem, as the court below concluded, is that “what is protected is not similar, and what is similar is not protected.” Pet. App. 9a.

The Ninth Circuit’s analysis is consistent with the analysis employed in other circuits, and its decision is correct. The Petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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