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

REPLY FOR PETITIONERS

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REPLY FOR PETITIONERS

This case presents an open and entrenched conflict over the proper test for comparing an allegedly infringing work to the copyrighted original. Respondent acknowledges that courts and commentators distinguish between two approaches—the dissective, two-step "extrinsic-intrinsic" approach of the Ninth, Fourth, and Eighth Circuits, and the holistic "ordinary observer" test applied in the Second, Third, Fifth, Seventh, and D.C. Circuits.

The differences are hardly "semantic." Opp. 2. "[I]f one thing is clear," leading scholars agree, "it is that the two tests bear no resemblance to each other." 3 *Patry on Copyright* § 9:235; see also Volokh. Br. 13-14 (collecting authorities). The Ninth Circuit's two-step approach starts with the "extrinsic test," an abstract, point-by-point "comparison of *specific* expressive elements" in the copyrighted

and allegedly infringing works. *Cavalier* v. *Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002) (emphasis added). That first step is performed by the court, "regardless of the jury's views." *Gray* v. *Hudson*, 28 F.4th 87, 97 (9th Cir. 2022). If—and *only* if—the court finds the works' individual elements "substantially similar" will the case proceed to the "intrinsic test," under which factfinders assess the similarity between the two works' "'total concept and feel'" from the perspective of the "'ordinary, reasonable audience.'" *Cavalier*, 297 F.3d at 822.

The Second Circuit's "ordinary observer" test rejects starting—and often ending—with that dissective approach. Rather, the "infringement analysis" asks, at *every* stage of the litigation, whether a jury could find, from the standpoint of a lay observer, that the elements "original to the plaintiff and copied by the defendant" make the works "similar *in the aggregate*." *Tufenkian Imp./Exp. Ventures, Inc.* v. *Einstein Moomjy, Inc.*, 338 F.3d 127, 134 (2d Cir. 2003) (emphasis added).

That is not a "'pseudo-conflict,'" Opp. 3—a term describing a *different* issue.[1] Respondent admits that courts applying the Ninth Circuit's approach do not consider how an ordinary observer would perceive the works' "'total concept and feel,'" *unless* the court first determines the extrinsic test is satisfied. Opp. 21 n.3. At summary judgment, "*only* the extrinsic test is important." *Kouf* v. *Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994) (emphasis added). The Seventh Amendment consequences are profound. Courts in the

[1] Respondent plucks that term from a decision examining differences in how courts determine whether one work *in fact copies* another. See *Peters* v. *West*, 692 F.3d 629, 633 (7th Cir. 2012). *Peters* was *not* addressing the issue here—divergent tests of substantial similarity—which goes to whether factual copying is *actionable*. See Pet. 6.

Ninth, Fourth, and Eighth Circuits may preclude a jury from deciding whether two works are substantially similar—granting judgment to the defendant—without ever considering how an ordinary observer would perceive the works as a whole. See Opp. 21 n.3; Pet. i. Courts in the Second, Third, Fifth, Seventh, and D.C. Circuits may not.

Respondent's vehicle objections fare no better. That "Top Guns" is non-fiction, Opp. 29-30, is irrelevant; the same tests govern all copyrighted works. Had the works here been compared under the Second Circuit's holistic test, instead of the Ninth Circuit's dissective framework, the result would have been different. And respondent's reliance on the Ninth Circuit's pending *en banc* review in *Sedlik* is, at most, a reason to hold the petition, not deny it. Review is warranted.

I. THE CIRCUITS ARE DIVIDED

Respondent admits the circuits have adopted different tests for substantial similarity. The differences are profound.

A. The Ordinary-Observer and Extrinsic-Intrinsic Tests Are Fundamentally Different

The Second Circuit's ordinary-observer test looks to the asserted and accused "works' 'total concept and feel,'" asking "whether 'an average lay observer would [ ] recognize the alleged copy as having been appropriated from the copyrighted work.'" *Knitwaves, Inc.* v. *Lollytogs Ltd.*, 71 F.3d 996, 1002-1003 (2d Cir. 1995). By contrast, the Ninth Circuit's extrinsic-intrinsic approach starts by "'breaking the works down into their constituent elements, and comparing those elements'" for "'substantial similarity'" piece-by-piece. *Gray*, 28 F.4th at 96.

1. Respondent concedes the extrinsic-intrinsic approach considers how ordinary observers would perceive

the works' total concept and feel "*only if* the court finds substantial similarity under the extrinsic test." Opp. 21 n.3 (emphasis added). Until then, the analysis is limited to a "comparison of *specific* expressive elements." *Cavalier*, 297 F.3d at 822 (emphasis added). Respondent concedes that the Ninth, Fourth and Eighth Circuits follow that same two-part framework. Opp. 13 n.2.

Respondent asserts that the ordinary-observer test uses the same dissective framework. Opp. 14-15. Not so. True, the Second Circuit has said courts "'*begin* by dissecting the copyrighted work into its component parts.'" Opp. 15 (quoting *Tufenkian*, 338 F.3d at 134). But respondent omits the rest of the sentence: While dissection "clarif[ies] precisely what is not original," "the total-concept-and-feel locution functions as a reminder that * * * infringement analysis is *not* simply a matter of ascertaining similarity between components viewed in isolation." *Tufenkian*, 338 F.3d at 134 (emphasis altered). The Second Circuit has expressly "disavowed any notion that '[courts] are required to dissect [the works] into their separate components, and compare only those elements which are in themselves copyrightable.'" *Peter F. Gaito Architecture, LLC* v. *Simone Dev. Corp.*, 602 F.3d 57, 66 (2d Cir. 2010). By contrast, the extrinsic test requires precisely that.

Respondent protests that courts applying the ordinary-observer test also identify distinct similarities in literary works' plot, themes, and dialogue. Opp. 19. But such elements play fundamentally different roles under the two tests. Courts applying the extrinsic test must "*disregard* the non-protectible elements." *Cavalier*, 297 F.3d at 822 (emphasis added). By contrast, courts applying the ordinary-observer test identify an author's "particular aesthetic decisions" to determine whether they make the two works "similar *in the aggregate*." *Tufenkian*, 338 F.3d at

134 (emphasis added). Under the ordinary-observer test, a copyrighted work is treated as "the *sum* of" its "parts," or "the *combination*" of its "elements," reflecting the totality of the aesthetic decisions. *Silvertop Assocs. Inc.* v. *Kangaroo Mfg. Inc.*, 931 F.3d 215, 221 (3d Cir. 2019) (emphasis added).[2]

2. While insisting that the Second Circuit applies the same *dissective* framework as the Ninth, respondent argues that both courts ultimately apply a *holistic* analysis. According to respondent, the Ninth Circuit considers "what the Second Circuit describes as an analysis of 'total concept and overall feel'" at the "extrinsic" step when it assesses whether the works share an original "'selection and arrangement'" of otherwise unprotectable elements. Opp. 20-21 & n.3. Not so.

First, as respondent acknowledges, the Ninth Circuit expressly holds that it will *not* consider "'total concept and feel,'" *or* the ordinary observer's perspective, until the *intrinsic* step of its analysis. Opp. 21 n.3. Until a court finds the works substantially similar under the extrinsic test's piecemeal, dissective approach, an "'ordinary person's subjective impressions'" of the works' total concept and feel are irrelevant. *Corbello* v. *Valli*, 974 F.3d 965, 974 (9th Cir. 2020); see Opp. 21 n.3. By contrast, the ordinary-observer

[2] Respondent concedes the Third and D.C. Circuits "have expressly adopted the Second Circuit's formulation" of the substantial similarity inquiry. Opp. 12-13 n.1. Respondent calls the Seventh Circuit inconsistent, *ibid.*, but identifies no case where that court has applied the extrinsic-intrinsic approach. And, contrary to respondent's assertion, *ibid.*, the Fifth Circuit requires a "'side-by-side comparison'" of the works "'to determine whether a layman would view the two works as "substantially similar,"'" *Peel & Co.* v. *The Rug Mkt.*, 238 F.3d 391, 395 (5th Cir. 2001). That is the ordinary-observer test.

test considers the ordinary observer's view of the whole work at *every* stage. See *Gaito*, 602 F.3d at 66.

Second, the Ninth Circuit's approach to selection-and-arrangement claims is anything but holistic. Pet. 23-24. A copyright holder must convince a court that the works "share a 'pattern, synthesis, or design' that is both 'particular' and 'coherent.'" Pet. App. 16a. The court compares protectable *patterns* the same way it compares protectable *elements*—one-by-one, without regard to the work as a whole. Pet. App. 14a-18a. Respondent urges (at 22-23) that the Second Circuit likewise "'identif[ies] *precisely the particular* aesthetic decisions'" the works share. *Tufenkian*, 338 F.3d at 134. But, unlike the Ninth Circuit, the Second Circuit assesses whether those decisions "make the [works] similar *in the aggregate*." *Ibid.* (emphasis added).

Respondent argues that the Second and Ninth Circuits use the phrase "total concept and feel" to mean "completely different" things. Opp. 21 n.3. But that would *exacerbate* the conflict, not resolve it. Regardless, both courts use the phrase "total concept and feel" to express the same idea—that a work's "'over-all impact and effect'" may "'indicate substantial appropriation,' even if 'any one similarity taken by itself seems trivial.'" *Williams* v. *Gaye*, 895 F.3d 1106, 1120 (9th Cir. 2018); accord *Tufenkian*, 338 F.3d at 134 (infringement may be "apparent only when numerous aesthetic decisions embodied in the plaintiff's work" are "considered in relation to one another"). The difference is who may consider that perspective, and when. The Second Circuit considers it at *each* stage; the Ninth Circuit forbids addressing it until the plaintiff first convinces the court under the element-by-element, jot-by-jot, tittle-by-tittle extrinsic approach.

B. The Conflict Is Recognized by Courts and Commentators Alike

Courts and commentators have recognized that the two tests are different. Pet. 24-25 (collecting cases); Volokh. Br. 13-14 (collecting authorities). Respondent suggests the only meaningful difference is that the Ninth Circuit's approach "includes an intrinsic portion that the Second Circuit's test does not possess." Opp. 23. That is *one* difference. But the conflict here stems from the *extrinsic* portion, which permits courts to decide substantial similarity without ever considering the ordinary observer's perspective. *That* is the division commentators and courts have recognized. Respondent cites no commentator suggesting otherwise.

Respondent (at 24) invokes an article finding that the Second and Ninth Circuits grant defendants' dispositive pre-trial motions at similar rates. Daryl Lim, *Saving Substantial Similarity*, 73 Fla. L. Rev. 591, 629 (2021). But that article found plaintiff-side success rates of 5% under the ordinary-observer test, compared to just 2% under the extrinsic-intrinsic test. Lim, *supra*, at 621 n.218. A more-than-double success rate cannot be dismissed as a "semantic" difference. Opp. 2. Even the study respondent invokes for similar success rates across both tests, Opp. 25, found plaintiffs won in 32.8% of cases under the ordinary-observer test, but only 25% under the extrinsic-intrinsic test, 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, 546 (2013).

Those statistics show that "the ways in which courts frame the comparison between the two works exert a powerful effect on substantial similarity outcomes." Kevin J. Hickey, *Reframing Substantial Similarity Analysis in*

Copyright, 93 Wash. U. L. Rev. 681, 700 (2016). That is hardly "'inconsequential.'" Opp. 25. And the statistics understate the impact. As Professors Volokh and Lim explain, it is "[q]uite possibl[e]" that the extrinsic-intrinsic approach "favors some plaintiffs and some defendants, while the ordinary observer test favors other plaintiffs as well as other defendants." Volokh. Br. 14. Whatever the aggregate success rates, *who* wins and *who* loses changes in a substantial number of cases—because "the two tests are indeed different." *Ibid.*

Respondent invokes commentators for the notion that "'each test engages in substantially the same * * * analysis.'" Opp. 24. But some of the same commentators say the opposite: The ordinary-observer test, one author explains, "consider[s] the work as a whole when" assessing "a lay spectator's response." Gabriel Godoy-Dalmau, *Substantial Similarity:* Kohus *Got It Right*, 6 Mich. Bus. & Entrepreneurial L. Rev. 231, 256 (2017). But the extrinsic-intrinsic test considers the "lay spectator's subjective response" only under the intrinsic step. *Ibid.*

Respondent invokes Nimmer for the notion that the differences are "'more cosmetic than substantive, in terms of actual results.'" Opp. 26. But many see things differently—and invoke Nimmer to show why. Volokh. Br. 11-12. Indeed, the language respondent invokes rests on a *single* case evaluating the same claim under "multiple tests." 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13D.21[D] (2025). That is hardly conclusive—especially where the data say otherwise.[3]

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[3] While respondent invokes Nimmer's discussion of *Peters*, Opp. 26, *Peters* did not address substantial similarity, n. 1, *supra*.

II. THIS CASE IS AN EXCELLENT VEHICLE

This case cleanly presents the circuit split, the question presented was preserved and passed upon, and this case would be sent to a jury under the ordinary-observer test employed by other circuits. Pet. 31-32.

Respondent urges denial in light of the Ninth Circuit's grant of rehearing *en banc* in *Sedlik*. Opp. 26-28. But the panel decision there involved "solely" the "jury's application of the intrinsic test." Opp. 27. Re-evaluating the *intrinsic* test cannot solve the problem in *this* case: the *extrinsic* test's disregard of the ordinary observer's perspective. Indeed, one concurrence in *Sedlik* advocated an approach that would *exacerbate* the problem here: abandoning the intrinsic test's focus on "the ordinary observer's impression of the 'concept and feel' of the works" for a test "focus[ing] * * * on the filtration of protectable and unprotectable elements." *Sedlik* v. *Von Drachenberg*, 163 F.4th 667, 678-679 (9th Cir. 2026) (Wardlaw, J., concurring in the judgment); see also *Sedlik*, No. 24-3367, Dkt. 100.1 at 10, 13, 18 (9th Cir.) (urging *en banc* court to "discard" the intrinsic test's "'total concept and feel,'" for "an objective, one-step test that articulates the protectible elements to be compared"). Such a "reformula[tion]" could only exacerbate, not eliminate, the conflict. Opp. 27. And any decision in *Sedlik* will not undo the errors in this case. Nor can *Sedlik* change the law of the Fourth and Eighth Circuits.

At the very least, this Court should hold the petition pending decision in *Sedlik*. Respondent's argument that review is "premature" because the Ninth Circuit "may well reformulate" its test, Opp. 27-28, at most supports holding, not denying, the petition. *Sedlik* was argued in late September, and a decision will issue in due course. A hold preserves this fully briefed vehicle pending confir-

mation that *Sedlik* will not (because it cannot) resolve the conflict. A denial, by contrast, cannot be undone: Petitioners would lose their right to press a case that five circuits would have sent to a jury.

Respondent asserts that this case comes out the same way under both tests because the decision below analyzed "total concept and feel" when evaluating selection and arrangement. Opp. 28-29. But the decision below nowhere evaluates "total concept and feel," because the Ninth Circuit defers that consideration for the *intrinsic* test. Pet. App. 7a; Opp. 21 n.3; Resp. C. A. Br. 23; pp. 5-6, *supra*. And its selection-and-arrangement analysis was limited to the "*particular* pattern[s]" petitioners identified, Opp. 35 (emphasis added)—eschewing the Second Circuit's holistic analysis of elements "in the aggregate," *Tufenkian*, 338 F.3d at 134.

Respondent retreats to "Top Guns" being a non-fiction work. Opp. 29-30. But the Copyright Act's protections "appl[y] equally to works of fiction and nonfiction," *Harper & Row Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539, 546 (1985)—including the original "selection and arrangement" of otherwise unprotectable elements, *Feist Publ'ns, Inc.* v. *Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991). This case presents the same question arising in all substantial-similarity cases—whether the similarities between "Top Guns" and *Maverick* reflect copying of "original, protected expression," Pet. App. 8a-9a, or unprotectable facts and ideas. The circuits' divergence on *how* to answer such questions does not depend on whether "Top Guns" is fiction or non-fiction. And "Top Guns" was a creative non-fiction work, interlacing factual presentation with a distinctive style reflecting the author's creative choices. Indeed, respondent nowhere disputes that "the decision below raises doubts about whether works of

creative nonfiction can *ever* obtain meaningful protection." Pet. 30; see NSEAL. Br. 11-20; *id.* at 8 (discussing films based on "true stories" like *The Fast and the Furious*, *Hustlers*, and *Dallas Buyers Club*).

III. THE ISSUE IS IMPORTANT AND RECURRING

The issue arises in thousands of cases each year, subjecting litigants to different legal regimes in different circuits. The Ninth Circuit's approach guts plaintiffs' Seventh Amendment rights. Pet. 26-28. And it unfairly favors accused infringers over copyright holders. Pet. 29-30.

Respondent denies any impact on jury-trial rights because the Second Circuit, in *one* case, sustained a motion to dismiss on substantial similarity. Opp. 32. But that decision did not rest on the *court's* view of the works; it held that "'no reasonable *jury*, properly instructed, could find that the two works are substantially similar.'" *Gaito*, 602 F.3d at 63 (emphasis added); *id.* at 67. That respects the jury's role. The Ninth Circuit's extrinsic test, by contrast, licenses courts to rule against copyright holders "regardless of the jury's views." *Gray*, 28 F.4th at 97. Respondent's sole Ninth Circuit case directing judgment for a plaintiff, *Unicolors, Inc.* v. *Urban Outfitters, Inc.*, 853 F.3d 980 (9th Cir. 2017), hardly shows equal treatment. That case involved "the rare instance where two works were 'overwhelmingly identical' and in the same medium." *Sedlik*, 163 F.4th at 683 (Johnstone, J., concurring). In derivative-work cases like this one, the Ninth Circuit's test "[f]unctionally preclud[es] summary judgment for copyright plaintiffs" and thus "favors defendants." *Ibid.*

That is consistent with the Ninth Circuit's refusal to reverse jury determinations of non-infringement under the intrinsic component of its two-part test. Opp. 33-34. That, too, reflects the Ninth Circuit's differential treat-

ment of copyright plaintiffs and defendants: *De novo* review on the *extrinsic* test can allow defendants to escape liability; but plaintiffs do not get even substantial-evidence review of a ruling against them on the *intrinsic* prong. Pet. 29-30. Circuits applying the ordinary-observer test do not erect such an asymmetrical, double-level gauntlet.

IV. THE DECISION BELOW IS WRONG

The decision below is inconsistent with the Copyright Act's textual focus on "work[s]" as a whole. Pet. 32. And it disregarded how ordinary observers would understand the works. *Ibid.* Respondent asserts that the decision below did "what every court does in substantial similarity analysis." Opp. 35. Not true. The decision below never considered the works *as a whole* from an ordinary observer's perspective. It treated "Top Guns" and *Maverick* as "a series of isolated bits and pieces," when an ordinary observer would find *Maverick* appropriated original expression from "Top Guns" as a whole. Pet. 33.

CONCLUSION

The petition should be granted or, alternatively, held pending the Ninth Circuit's *en banc* decision in *Sedlik* v. *Von Drachenberg*, No. 24-3367 (9th Cir.).

Respectfully submitted.

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