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# extrinsically valid or intrinsically flawed: two judges question ninth circuit's test for substantial similarity of copyrightable expression

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On January 2, 2026, the Ninth Circuit handed tattoo artist Kat Von D a victory over photographer Jeffrey Sedlik in his suit against her for alleged copyright infringement of his portrait of jazz icon Miles Davis. Sedlik sued Von D in early 2024 after discovering she used his photograph—which featured a dimly-lit Davis, posed against a black background, index finger pressed to his lips in a “shh” gesture—as the basis of a tattoo she gave a client. Sedlik alleged that multiple works were infringing, including the tattoo itself, a sketch of the tattoo, photographs of the tattoo posted on Instagram, and process images of Von D tattooing her client with the copyrighted photograph in the background.

The case proceeded to trial in the U.S. District Court for the Central District of California. Von D stipulated that the process images incorporated Sedlik’s photograph, leaving fair use as the dispositive issue. However, the jury ruled in her favor, finding these process images constituted fair use. As to the remainder of the allegedly infringing works, the jury found these works were not substantially similar to Sedlik’s photograph and thus non-infringing on these grounds. After the court denied Sedlik’s motion for judgment as a matter of law, he appealed.

In a short, unpublished memorandum, the appellate panel affirmed the jury’s finding that the process images were fair use. The panel found Sedlik’s Rule 50 (b) motion for judgment as a matter of law on fair use was procedurally improper, as Sedlik had failed to move on the issue under Rule 50(a) at trial. The panel further found that the jury’s verdict was supported by sufficient evidence including evidence that the process images had a different “purpose and character” than Sedlik’s photograph, that the process images were not “of a

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commercial nature," and were unlikely to affect the potential market for Sedlik's photograph.

More significantly, the Ninth Circuit also issued a published *per curiam* decision that affirmed the jury's verdict finding that the works at issue were not substantially similar. In so doing, the majority applied the Ninth Circuit's two-part extrinsic/intrinsic test. The extrinsic test is an objective assessment of similarities between the works, focusing only on protectable elements of the copyrighted work. The intrinsic test is a subjective assessment, from the perspective of the ordinary observer, of whether the works are similar in "total concept and feel."

While the extrinsic test can sometimes be decided by the court as a matter of law, the Court explained that under prior Circuit precedent the intrinsic test is "uniquely suited for determination by the trier of fact because of its focus on the layperson." The Court found that reversing the jury's verdict on substantial similarity "would be tantamount to supplanting the jury's subjective interpretation with [its] own, which [it] cannot do."

While the decision to affirm was unanimous, two judges issued concurrences loudly calling for an overhaul of the extrinsic/intrinsic test. Judge Wardlaw wrote that the intrinsic test's directive that the jury consider the "total concept and feel" of the works with no further guidance is at odds with the Copyright Act's clear statement that "[i]n no case does copyright protection . . . extend to any idea [or . . .] concept." Judge Wardlaw also suggested the test was at odds with the Supreme Court's analysis in *Feist*<sup>[1]</sup>, which focused on the original protectable elements of copyrighted works rather than "an ordinary observer's impression of the 'concept and feel' of the works[.]"

In the second concurring opinion, Judge Johnstone explained that foundational Ninth Circuit cases like *Roth* and *Krofft*<sup>[2]</sup>, where an intrinsic test based on "total concept and feel" was first developed, were concerned with assessing whether the arrangement or combination of various elements comprised a protectable expression and whether that expression had been appropriated. As the doctrine developed and elements like "arrangement," "theme," and "mood" were rolled into the extrinsic test, the intrinsic test was retooled to focus on a "subjective" comparison of the "total concept and feel" of works versus the extrinsic test's "objective" comparison of their protectable elements. Thus, "[w]hat began as a factual test for determining substantial similarity of an idea's overall expression has become a subjective test based on the jury's own impression[.]"

Both concurring judges felt bound by Ninth Circuit precedent to affirm the verdict of no substantial similarity, but suggested this was the wrong result, with Judge Johnstone lamenting that "a test that produces such a result cannot be right." Judges Wardlaw and Johnstone thus joined a number of academics and practitioners criticizing the intrinsic test as vacuous and untethered from copyright law, and courted *en banc* review in their concurrences.

Given the apparent invitation to do so, there is a meaningful possibility that the Ninth Circuit will consider the issue *en banc*.

[1] *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991).



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[2] *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970); *Sid &*

*Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977).