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# 9th Circ. Copyright Ruling Highlights Doubts On Intrinsic Test

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The U.S. Court of Appeals for the Ninth Circuit's Jan. 2 decision in *Sedlik v. Von Drachenberg* — the long-running copyright dispute arising from tattoo artist Katherine Von Drachenberg's rendering of a photograph of Miles Davis captured by photographer Jeffrey Sedlik — may mark an inflection point in the court's substantial-similarity jurisprudence.<sup>[1]</sup>

Although the panel affirmed a jury verdict of noninfringement, two concurring judges openly questioned the continued viability of the circuit's intrinsic test, suggesting it inappropriately constrains judicial review and may lead to unjust outcomes. This signals a potential doctrinal shift with significant implications for copyright litigants.

## Background on the Two-Part Test

For nearly five decades, the Ninth Circuit has evaluated copyright infringement under a two-step framework created by the circuit for analyzing substantial similarity in copyright cases derived from *Sid & Marty Krofft Television Products Inc. v. McDonald's Corp.* in 1977.

First, courts apply the extrinsic test, an objective comparison of protectable elements, often aided by expert testimony and analytic dissection. Second, if the extrinsic test is satisfied, the case proceeds to the intrinsic test, which asks whether an ordinary reasonable observer would perceive the works as substantially similar in their total concept and feel.<sup>[2]</sup>

Critically, the intrinsic test is deliberately subjective and reserved for the jury. When a jury finds no substantial similarity under this subjective standard, courts have traditionally deferred to that determination.

In *Sedlik*, the jury found no intrinsic similarity between the photographer's image of Miles Davis and Von Drachenberg's tattoo and sketch, ending the infringement inquiry without reaching the extrinsic test. The panel affirmed, emphasizing its reluctance to disturb a jury's intrinsic-test determination under existing precedent.

## The Judicial Critique

What makes *Sedlik* notable is not the outcome, but the concurrences. U.S. Circuit Judges Kim McLane Wardlaw

and Anthony Johnstone agreed that circuit precedent compelled affirmance, yet both expressed deep reservations about the intrinsic test itself.

Judge Wardlaw characterized the test as having fundamental flaws and suggested the court should consider dispensing with it altogether.<sup>[3]</sup>

Judge Johnstone traced the doctrine's evolution, arguing that the intrinsic test has lost meaningful legal content and now permits verdicts unconstrained by copyright law, untethered from statutory limits and Supreme Court guidance.<sup>[4]</sup>

Their concern is structural, as the test effectively handcuffs appellate courts to jury verdicts finding no infringement. Once a case reaches the intrinsic test, filtering of unprotectable elements effectively disappears, allowing juries to base infringement findings — or nonfindings — on holistic impressions rather than legally cognizable expression.

In *Sedlik*, the judges suggested, the dispositive role of the intrinsic test overshadowed complex legal questions about protectable photographic choices and cross-medium copying. Thus, appellate courts face significant barriers to reversal, even when the objective evidence suggests otherwise.

Further, this deference creates an asymmetry: While courts can more readily assess objective similarities through the extrinsic test, they must accept jury determinations about subjective impressions even when those determinations appear inconsistent with the objective evidence. The judges suggested this framework may allow clear cases of infringement to escape liability based solely on jury perceptions about total concept and feel.

## **Implications for Intellectual Property Practitioners**

While the intrinsic test remains binding law, *Sedlik* invites practitioners to reassess litigation strategy in the Ninth Circuit. If the Ninth Circuit moves away from the intrinsic test, copyright litigation strategy would fundamentally change. Currently, defendants benefit enormously from surviving summary judgment and reaching a jury on the intrinsic test question, knowing appellate courts rarely disturb unfavorable plaintiff verdicts.

Eliminating or substantially modifying this framework could shift leverage in settlement negotiations and case evaluation. Plaintiffs should anticipate increased judicial skepticism toward arguments relying heavily on total concept and feel, particularly where protectable expression is thin. Defendants, meanwhile, may find greater receptivity to challenges emphasizing doctrinal drift and the need for principled limits on jury discretion.

Practitioners should also consider how alternative approaches might function. Other circuits employ different frameworks, and the Ninth Circuit could adopt a more unified test that allows greater judicial scrutiny throughout. This might strengthen copyright protection by reducing the risk that objective copying escapes liability through subjective jury determinations.

## **Strategic Considerations**

Copyright litigants in the Ninth Circuit should monitor this issue closely. While two judges' concerns don't

constitute binding precedent, they signal potential doctrinal evolution. Plaintiffs might emphasize these critiques in briefing, arguing for enhanced judicial review of jury determinations. Defendants, conversely, should prepare arguments defending the intrinsic test's role in maintaining appropriate jury functions.

The critique also underscores the importance of robust extrinsic test presentations. If courts gain greater authority to review similarity questions holistically, comprehensive expert testimony and objective analysis become even more critical to case outcomes.

Practically, counsel should build records that foreground the extrinsic analysis and preserve arguments questioning the intrinsic test for potential en banc or U.S. Supreme Court review. Summary judgment motions may increasingly emphasize that disputes can — and should — be resolved through objective comparison of protectable elements alone.

More broadly, Sedlik suggests the Ninth Circuit may be poised to recalibrate its approach to substantial similarity, aligning it more closely with statutory text and Supreme Court precedent.

## Conclusion

The Ninth Circuit's willingness to question foundational aspects of its substantial similarity framework suggests copyright jurisprudence in the circuit may be at an inflection point. IP attorneys should prepare for potential doctrinal changes that could reshape litigation strategy and settlement dynamics throughout the region.

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[1] Sedlik v. Von Drachenberg , Case No. 24-3367 (9th Cir. 2026).

[2] Sedlik, No. 24-3367 (9th Cir. 2026) (citing Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000)).

[3] Sedlik, No. 24-3367 (9th Cir. 2026) (Wardlaw, J., concurring).

[4] *Id.*

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