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Will the Ninth Circuit's Intrinsic Test Be Inked Out of Existence?

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by Cathy Dahl and Maia Songer



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- Cathy Dahl

For decades, the Ninth Circuit has applied its two-part intrinsic/extrinsic test to evaluate substantial similarity in copyright infringement claims. However, following the court's September 29, 2026, en banc review in *Sedlik v. Von Drachenberg*, that longstanding framework faces significant scrutiny and the possibility of abandonment altogether.

The relevant dispute revolves around a tattoo created by Katherine von Drachenberg (AKA "Kat Von D"), a well-known beauty mogul and tattoo artist that gained significant public recognition through popular reality TV shows like *Miami Ink* and *LA Ink*. While Kat Von D has now mostly stepped away from professional tattooing (having closed her shop High Voltage Tattoo in 2021), she may still occasionally tattoo people that she knows.

In 2017, one of Kat Von D's friends expressed to her how important jazz legend Miles Davis was to him, as he was a trumpet player much like the famous musician. Kat Von D therefore offered to gift him a tattoo of Miles Davis. Her friend selected and sent her an

iconic photograph of Miles Davis that he wanted to be used as a reference, created in 1989 by photographer Jeffrey Sedlik. The image features a quiet, pensive Miles Davis, with his right pointer finger raised to his lips making a “Shhh” gesture, and much of his body and clothing shadowed in black. Visible to the eye are the artist’s face, his right hand raised to his face, his hair, and some elements of the outline of his clothing.

Over two sessions, Kat Von D skillfully recreated the photograph on her friend’s shoulder. The tattoo process included sketching the contents of the photograph, tracing it out, creating a stencil from the tracing, all to use as a map for creating the tattoo, 99% of which consisted of freehand shading. Kat Von D featured the process and the inspirational photograph for the tattoo on her Instagram page, which caught the attention of Sedlik.

Sedlik reached out to Kat Von D’s agent to discuss the matter, and having received no response, filed an action for copyright infringement in the Central District of California. Kat Von D did not seek permission or a license to make use of the photograph, though Sedlik had licensed the image at no cost for a tattoo in at least one other instance.

Sedlik moved for summary judgment, which was denied. The district court found there were triable issues with respect to the tattoo itself under the extrinsic and intrinsic tests. The Ninth Circuit has long made use of the two-part test to determine whether a defendant’s work is substantially similar to a plaintiff’s copyrighted work. The first step, the extrinsic test, “assesses the objective similarities of the two works, focusing only on the protectable elements of the plaintiff’s expression.” *Rentmeester v. Nike, Inc.,* 883 F.3d 1111, 1118 (9th Cir. 2018). A court must focus on filtering out any unprotectable elements of the plaintiff’s work, such as the underlying ideas embodied in the work. The second step is the intrinsic test, which “test[s] for similarity of expression from the standpoint of the ordinary reasonable observer, with no expert witness.” *Jada Toys, Inc. v. Mattel, Inc.,* 518 F.3d 628, 637 (9th Cir. 2008). This test is reserved solely for the finder of fact, but the extrinsic test may be determined as a matter of law during an earlier litigation stage. Importantly, **both** tests must be satisfied in order for the works to be deemed substantially similar.

The case proceeded to trial in January 2024, where the jury had the opportunity to: 1) view the tattoo in person; 2) hear testimony from Sedlik; and 3) hear testimony from Kat Von D’s employee. Both parties moved for judgment as a matter of law before the case was submitted to the jury, but ultimately the jury was tasked with making use of the “intrinsic test” to determine if the tattoo created by Kat Von D was substantially similar to the Miles Davis photograph created by and owned by Sedlik. The jury, as the trier of fact, determined that the tattoo was not substantially similar to the photograph.

Sedlik appealed to the Ninth Circuit, which upheld the district court's ruling based on the case law in the circuit. But the three-panel judge decision was far from unanimous. Judges Kim McLane Wardlaw and Anthony Johnstone both authored concurring opinions suggesting that the intrinsic test has distorted copyright law and should be abandoned.

In her concurrence, Justice Wardlaw noted that the language of “total look and feel”

ingrained in the intrinsic test contradicts the Copyright Act itself because copyright protection does not extend to statutorily ineligible categories like ideas or concepts. Justice Wardlaw said, "[t]he intrinsic test is a creation of our court; the Supreme Court has never said that the ordinary observer's spontaneous impression of the 'total concept and feel of the works,' without any expert guidance, should be a dispositive factor in copyright infringement. Indeed, Supreme Court precedent suggests the opposite: that, to accord with the Copyright Act, a court should focus on carefully filtering out concepts and ideas." Wardlaw suggested that had the court been able to focus on the protectable and unprotectable elements in the works, "we would have concluded that Von Drachenberg's tattoo infringed Sedlik's copyright in his photograph of Miles Davis."

Justice Wardlaw and Johnstone's concurrences highlight an issue far beneath the skin. For Sedlik to have prevailed on appeal, he needed to show that the jury's determination was contrary to the only reasonable conclusion permitted by the evidence for both tests, because both tests are required for substantial similarity. But how can you successfully challenge a subjective test as to whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar? The intrinsic test is devoid of analysis, relying instead on a holistic comparison from the perspective of a lay observer. It is therefore unsurprising that the Ninth Circuit has never reversed a jury's no-infringement verdict under the intrinsic test before, nor did it stray from that trend in deciding Sedlik's appeal.

So, the question becomes, **is the intrinsic test the *right* test?**

In June 2026, the Ninth Circuit granted rehearing en banc to wrestle with that very question, effectively vacating the January opinion upholding Kat Von D's trial win. En banc hearings are notoriously rare, so this is a significant development in the world of copyright law. Held on September 29, 2026, the rehearing focused largely on what the alternative would be if the court were to dispose of the intrinsic test and the implications of that decision.

Sedlik's counsel, while urging for the abandonment of the intrinsic test, advocated to replace the intrinsic/extrinsic framework with a single objective test that compares the protectable elements in the two works. Under this approach the court would first make an initial assessment determining what aspects of a plaintiff's work are protectable and filter out any unprotectable elements. Then, if the claim survives summary judgment and is presented to a jury, the jury would be instructed as to which elements of the work the court found protectable, hear trial testimony, including from appropriate expert witnesses, and would then be asked to compare the remaining protectable expression as a whole.

While we still await the outcome of the rehearing, one thing is for certain – there is a very real possibility that the intrinsic test's place in the Ninth Circuit is no longer as permanent as it once was. Soon it will be made clear if the intrinsic test is here to stay or destined to fade. We will keep you apprised of the developments of this case.