

In The
Supreme Court of the United States

—◆—
PAULA PETRELLA,

Petitioner,

v.

METRO-GOLDWYN-MAYER, INC., et al.,

Respondents.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

—◆—
**BRIEF OF AMICUS CURIAE THE
CALIFORNIA SOCIETY OF ENTERTAINMENT
LAWYERS IN SUPPORT OF PETITIONER**

—◆—
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INTEREST OF AMICUS CURIAE¹

Amicus curiae the California Society of Entertainment Lawyers (CSEL) is a recently formed non-profit, non-partisan, professional organization of attorneys representing authors, screenwriters, songwriters, and other creators of intellectual property in the entertainment industry, including television, film, and music. CSEL seeks to balance the influence of the international conglomerates within the television, film, and music industries through education, public-policy advocacy, legislation, and litigation, in this case as an amicus curiae.

Due to their limited resources and relative ignorance of the law, individual creators in the entertainment industry are at a great disadvantage relative to corporate entities (such as studios) when attempting to protect or exploit their intellectual property. When creative professionals and studios face one another in court over alleged violations of intellectual property rights, these limitations most often result in decisive victories for studio and network

¹ Pursuant to Supreme Court Rule 37.6, counsel for amicus certify that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus made such a monetary contribution. The parties have been given at least ten days' notice of amicus' intention to file this brief. Letters of consent are being filed with the Clerk of this Court.

defendants.² CSEL seeks to level the playing field by providing informative counseling and advice to creator-litigants as to best practices for protecting and enforcing their rights, as well as advocating their interests to those in a position to correct perceived deficiencies in their legal protections.

In her petition for certiorari, Petitioner has demonstrated in detail the error of the Ninth Circuit's ruling and analyzed the conflicts of authority justifying this Court's intervention. CSEL agrees with Petitioner that the circuit split regarding the use of laches in the context of copyright infringement claims is ripe for resolution by the court, as it directly affects the uniform application of a federal body of law. The case below provides a clean vehicle for resolving the circuit split, as the issue of laches was dispositive of Petitioner's copyright claim.



² See Steven T. Lowe, *Death of Copyright*, L.A. LAWYER, Nov. 2010, at 32, 34-35, available at <http://www.loweandassociatespc.com/press/publications/death-of-copyright> (identifying 29 cases within the Ninth Circuit decided between 1991 and 2010 in which the studio or network defendants prevailed); Steven T. Lowe & Daniel Lifschitz, *Death of Copyright, the Sequel*, THE COMPUTER & INTERNET LAWYER, Sept. 2012, at 1, 7 nn.15, 18, available at <http://www.loweandassociatespc.com/press/publications/death-of-copyright-the-sequel> (identifying 5 more cases decided within the Ninth Circuit in 2010 and 2011 in which the studio or network defendants prevailed).

SUMMARY OF ARGUMENT

The case before the Court is symptomatic of the Ninth Circuit's broader hostility to copyright plaintiffs – specifically, creators filing suit against conglomerates within the entertainment industry for violation of their intellectual property rights. In the past decade alone, the Ninth Circuit has upended both the selection and arrangement test of copyrightability (a test specifically mandated by this Court in *Feist*) and the traditional standards for analyzing substantial similarity between works, confining each to circumstances that systemically frustrate plaintiffs' claims. In addition, findings of fact properly left to a jury are now routinely conducted by the judges overseeing cases within the Ninth Circuit, depriving litigants of their ability to present expert testimony on issues properly left to the triers of fact. As a result, the Ninth Circuit persistently dismisses such plaintiffs' claims, making it more adverse to copyright plaintiffs than other circuits are and tilting its case law strongly in favor of studio and network defendants.

These additional hurdles that the Ninth Circuit has erected to copyright infringement claims, like the laches doctrine at issue here, flout canonical tenets of copyright law and this Court's binding precedent, and are out of step with the approaches of sister circuits. Because individual authors lack the organization and resources of the major studios and networks, they

have little hope of reversing this trend within the Ninth Circuit, absent this Court's intervention.

◆

ARGUMENT

The Ninth Circuit Systematically Erects More Hurdles to Copyright Plaintiffs Than Do Many Other Circuits, All but Immunizing Motion Picture Studios and Television Networks From Infringement Claims.

In dissenting from the Ninth Circuit's 1993 decision in *White v. Samsung Electronics America*, now-Chief Judge Alex Kozinski famously remarked: "for better or worse, we are the Court of Appeals for the Hollywood Circuit."³ This oft-quoted observation neatly encapsulates the problem that creator-plaintiffs face in litigating within the Ninth Circuit: The case law governing copyright simply has become amorphous or markedly adverse to creators. As a result, the determination of each case now rests almost entirely in the unfettered discretion of trial judges, who have consistently dismissed plaintiffs' claims. The question before the Court in this case, concerning the Ninth Circuit's rogue application of laches in the context of copyright claims, is symptomatic

³ *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512, 1521 (9th Cir. 2003).

of the Circuit’s hostility to creator-side copyright plaintiffs in general, as Judge Fletcher recognized in his concurrence below.⁴

A. Defendant-Friendly Ninth Circuit Copyright Jurisprudence Has Subverted the Selection and Arrangement Test Mandated by This Court in *Feist*.

The Ninth Circuit’s unrestricted approval of the laches defense in this case is in keeping with its defendant-friendly test for substantial similarity, at odds with this Court’s holding in *Feist*.⁵ A basic notion of copyright law is that, although it does not generally protect characters, basic plot premises in literary works, or commonly used expressions that flow naturally from those premises (i.e., “scènes à faire”), the original selection and arrangement of these elements can constitute a protectable work in and of itself.⁶ Therefore, if the courts were to “screen out” all

⁴ “Our circuit is the most hostile to copyright owners of all the circuits.” Pet. App. 23a (Fletcher, J., concurring).

⁵ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991).

⁶ See *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970); *United States v. Hamilton*, 583 F.2d 448 (9th Cir. 1978); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991); *Shaw v. Lindheim*, 919 F.2d 1353, 1363 (9th Cir. 1990); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000); *Fleener v. Trinity Broad. Network*, 203 F. Supp. 2d 1142 (C.D. Cal. 2001); *Metcalf v. Bochco*, 294 F.3d 1069 (9th Cir. 2002); *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003); *Swirsky v. Carey*, 376 F.3d 841 (9th Cir. 2004).

unprotectable elements before comparing the two works, there would be virtually nothing left for courts to look for an original selection and arrangement. Such a screening process would thus violate the selection and arrangement test and improperly limit the scope of copyright protection in a work. The Ninth Circuit realized this, for instance, in the 1990 case of *Shaw v. Lindheim*, which held that “[e]ven if none of [the] plot elements [shared between the two works at issue] is remarkably unusual in and of itself, the fact that both scripts contain all of these similar events gives rise to a triable question of substantial similarity of protected expression.”⁷ This ruling in *Shaw* was substantially ratified by this Court one year later in *Feist*, when the Court held that in dealing with works largely (or even entirely) composed of unprotectable elements, “choices as to *selection and arrangement*, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original.”⁸

The Ninth Circuit has never seriously disputed the validity of the selection and arrangement test for copyright protection, invoking the test as recently as 2012.⁹ However, it has repeatedly undermined use of the test to drastically limit the circumstances in

⁷ *Shaw*, 919 F.2d at 1363.

⁸ *Feist*, 499 U.S. at 348 (emphasis added).

⁹ *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841 (9th Cir. 2012), amended by *L.A. Printex Indus. v. Aeropostale, Inc.*, 2012 U.S. App. LEXIS 12032 (9th Cir. 2012).

which the test can be applied. In 2002, the Ninth Circuit held in *Cavalier v. Random House* that when conducting a substantial similarity analysis, the Court “must take care to inquire only whether the protectable elements, standing alone, are substantially similar,” and in doing so, “must filter out and disregard the non-protectable elements in making its substantial similarity determination.”¹⁰ This standard is at odds with both *Shaw* and *Feist*, allowing courts to isolate individual similarities, quickly classify them as unprotected elements (such as individual character archetypes, plot points, and themes), and *remove them entirely* from analytical consideration, even though they may be part of a protectable selection and arrangement.¹¹ Furthermore, it goes *beyond* both the Second and Ninth Circuit case law it cites to justify the new standard, further distancing itself from the jurisprudence of other federal circuits.¹²

¹⁰ *Cavalier v. Random House, Inc.*, 297 F.3d 815, 823 (9th Cir. 2002) (internal citations omitted).

¹¹ See *Death of Copyright, the Sequel*, *supra* note 2, at 3.

¹² *Id.* at 2-3 (“The ‘protectable elements, standing alone’ standard comes from a 1995 Second Circuit decision and was adopted by the Ninth Circuit in the *Cavalier v. Random House* decision in 2002, under the claim that it comported with prior Ninth Circuit jurisprudence. *Cavalier* has been cited regularly since for the propositions that courts should not only look at ‘protectable elements, standing alone’ in assessing substantial similarity, but also ‘filter out and disregard the non-protectable elements.’ The problem is that the *Cavalier* court plucked that

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The Ninth Circuit acknowledged this problem in 2003's *Metcalf v. Bochco*, which held that “[t]he particular sequence in which an author strings a significant number of unprotectable elements can itself be a protectable element.”¹³ The Court’s solution to the apparent contradiction was to distinguish *Cavalier* as having dealt only with *random* similarities scattered throughout works, rather than concrete patterns.¹⁴ Because the *Cavalier* plaintiff “apparently did not make an argument based on the overall selection and sequencing of these similarities,” the Ninth Circuit found *Cavalier* was not applicable to a claim where that contention *was* made.¹⁵ Yet shortly thereafter, the Ninth Circuit twice distinguished *Metcalf*’s use of selection and arrangement as only applicable when there has been an admission by the defendant that he or she had access to the plaintiff’s work¹⁶ (as occurred in *Shaw*¹⁷). While a copyright

second part out of thin air; it is not in the Second Circuit standard, and goes beyond prior Ninth Circuit case law.”).

¹³ *Metcalf*, 294 F.3d at 1074. It should be noted that the court does not actually cite *Feist* for its proposition, but rather to *Shaw v. Lindheim*, which predates *Feist*.

¹⁴ *Id.* at 1074-75.

¹⁵ *Id.*

¹⁶ *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1179 (9th Cir. 2003) (“[O]ur decision in *Metcalf* was based on a form of inverse ratio rule analysis: the plaintiff’s case was “strengthened considerably by [defendants’] concession of access to their works”); *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*, 462 F.3d 1072, 1081, n.4 (9th Cir. 2006) (declining to apply *Metcalf* because “this is not a circumstance in which the defendant has

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plaintiff has always been required to prove the defendant (a) had access to the plaintiff's work and (b) in fact copied from the plaintiff's work, the idea that defendants can restrict how plaintiffs prove the latter merely by disavowing the former (their candor vis-à-vis the issue of access determining what tests are available to demonstrate substantial similarity) is, to the best of counsel's knowledge and research, uniquely a Ninth Circuit phenomenon.

The preceding line of Ninth Circuit cases appears to have effectively created a *condition precedent* (admitted access) to use of the selection and arrangement test where none has ever actually been found to be required before: if the Defendant does not *admit* access, the courts will not apply *Metcalf*; without *Metcalf*, *Cavalier* applies instead; if *Cavalier* applies, those unprotected elements are disregarded before an extrinsic analysis; and if unprotected elements are disregarded before an extrinsic analysis, plaintiffs always lose.

The Ninth Circuit has thus quietly skewed copyright's balance. The Supreme Court laid out a straightforward rule in *Feist*, which the Ninth Circuit seemed to follow both before (*Shaw*) and afterward

conceded access to the purportedly copied material"). *Funky Films*, 462 F.3d, 1078.

¹⁷ *Shaw*, 919 F.2d at 1362 ("[D]efendants' admission that they had access to Shaw's script is a factor to be considered in favor of [the plaintiff]").

(*Metcalfe*) with no mention at any time of any condition precedent to protecting patterns of individually unprotected elements. Yet over the last decade, the Ninth Circuit has ignored and constricted that test to a level that almost no plaintiff can overcome. This preoccupation with admitted access frustrates creators in Hollywood, who will almost never have knowledge of the inner machinations of the studios with whom they must deal to have their work produced. *Nimmer on Copyright*, the leading treatise in the field, recognizes this reality.¹⁸ Absent a confessional communiqué or surveillance tape of a studio hire poring over the plaintiff’s work, there will always be some measure of speculation or inference required to show “actual copying” – even the claim in *Feist* heavily relied upon probative similarities.¹⁹ Yet now plaintiffs are seemingly barred from properly demonstrating substantial similarity in the Ninth Circuit unless they can directly prove access first.

¹⁸ 4-13 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.02[A] (Matthew Bender, Rev. Ed. 2012) (“Just as it is virtually impossible to offer direct proof of copying, so it is often impossible for a plaintiff to offer direct evidence that defendant (or the person who composed defendant’s work) actually viewed or had knowledge of plaintiff’s work. Such viewing will ordinarily have occurred, if at all, in a private office or home outside of the presence of any witnesses available to the plaintiff.”).

¹⁹ *Feist*, 499 U.S. at 344 (“1,309 of the 46,878 listings in [the defendant’s] 1983 directory were identical to listings in [the plaintiff’s] 1982-1983 white pages . . . Four of these were fictitious listings that [the defendant] had inserted into its directory to detect copying.”).

This defendant-friendly skewing of the doctrine is of a piece with the Ninth Circuit’s unrestricted embrace of laches at issue in this case – yet another substantial obstacle to copyright infringement suits.

B. The Ninth Circuit Subverts Canonical Tenets of Copyright Law with Its Recent and Novel Standard of “Substantial Dissimilarity.”

Another example of the Ninth Circuit’s adversity to copyright plaintiffs is its recent adoption of a substantial-dissimilarity test for copyright infringement. Traditionally, the Ninth Circuit, like other circuits, approached infringement claims simply by analyzing the similarities between the works at issue.²⁰ A qualitatively important similarity, even if it did not quantitatively permeate the infringing work, could provide the basis for an infringement claim.²¹ Furthermore, the portions copied by defendant only needed to be qualitatively important to the *plaintiff’s* work, *not the defendant’s*.²²

²⁰ See, e.g., *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994).

²¹ See, e.g., *Baxter v. MCA, Inc.*, 812 F.2d 421, 425 (9th Cir. 1987) (“Even if a copied portion be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity.”).

²² See NIMMER § 13.03[B][1][a], at 13-53 (“Dissimilarity is only relevant when “points of dissimilarity not only exceed the points of similarity, but indicate that the remaining points of
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However, in the 2006 case of *Funky Films, Inc. v. Time Warner Entertainment Company, L.P.*, the Ninth Circuit subverted all of the above by creating a whole new defense for alleged infringers where none previously existed: The court justified its ruling for the studio defendant in *Funky Films* on the basis that a “reading of the two works reveal[ed] greater, more significant differences” than similarities.²³ In essence, the court constructed a new test of “substantial dissimilarity” in the context of copyright infringement, one that completely contravenes the well-established principle that dissimilarity is essentially irrelevant as long as the plaintiff makes a showing of similarity to a substantial element of the plaintiff’s work.²⁴

The impact of this new defense was seen in the 2010 case of *Benay v. Warner Bros.*: Despite compelling evidence that actual copying of the plaintiff’s screenplay occurred,²⁵ the court deemed such copying insufficient to overcome the overall lack of similarities between only the individually protectable elements

similarity are, within the context of plaintiff’s work, of minimal importance.”) (emphasis added).

²³ *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*, 462 F.3d 1072, 1078 (9th Cir. 2006).

²⁴ NIMMER § 13.03[B][1][a].

²⁵ *Benay v. Warner Bros. Entm’t*, 2008 WL U.S. 9th Cir. Briefs 55719 (9th Cir. June 9, 2009) (“Defendants copied plaintiffs’ work right down to the historical inaccuracy of cannons being new when in fact cannons date back to the fourteenth century.”).

of the works.”²⁶ The Ninth Circuit’s analysis once again ignored the selection-and-arrangement test (citing *Cavalier*, but not *Metcalf*), comfortably stripping all unprotected elements from the works and ultimately using the new *Funky Films* dissimilarity test as a basis to rule against the plaintiffs on their copyright claim.²⁷

In the wake of *Funky Films* and *Benay*, it appears that the old Learned Hand chestnut that “no plagiarist can excuse the wrong by showing how much of his work he did not pirate” may no longer be true within the Ninth Circuit.²⁸ The result of this shift in copyright law is that third parties now have the freedom to steal from screenplays with impunity, provided they cover their tracks by adding sufficient new material to what is, in reality, a “derivative work.”²⁹ As with the doctrine of laches in this case, the

²⁶ *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 629 (9th Cir. 2010).

²⁷ *Id.* at 625 (“We agree with the district court that “[w]hile on cursory review, these similarities may appear substantial, a closer examination of the protectable elements including plot, themes, dialogue, mood, setting, pace, characters, and sequence of events, exposes many more differences than similarities between Plaintiffs’ Screenplay and Defendants’ film.”).

²⁸ *Shaw*, 919 F.2d at 1362 (quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936)).

²⁹ A “derivative work,” as defined by 17 U.S.C. § 101, is “a work based upon one or more pre-existing works . . . including any form in which a work may be recast, transformed, or adapted.” 17 U.S.C. § 106 provides that, subject to other sections

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Ninth Circuit's invention of the substantial-dissimilarity requirement once again makes its courts more hostile to copyright plaintiffs than those of other circuits.

C. The Ninth Circuit's Case Law Allows Judges to Be Self-Appointed Fact-Finders, Phasing Out Experts and Juries.

Yet another area in which the Ninth Circuit's case law stretches to favor copyright infringement defendants is its summary judgment standards, which allow defendants to bypass expert witnesses and juries. The *ad hoc* consideration of dissimilarities and the refusal to acknowledge selection and arrangement has stripped creators of the doctrines that once protected them. If more juries were presented the facts of these cases, creators might hope to reverse the imbalance. The determination of appropriation has time and again been allocated to the presiding judge of each case instead.

While courts in the Ninth Circuit have repeatedly cited the proposition that "summary judgment is not highly favored on the substantial similarity issue

of the Copyright Act, a copyright owner "has the exclusive rights to do and to authorize . . . derivative works based upon the copyrighted work."

in copyright cases,”³⁰ the overwhelming majority of copyright cases are dismissed on exactly that issue. Admissible expert testimony can defeat summary judgment against the proffering party.³¹ When two expert witnesses reasonably contradict one another, this creates a material issue of fact that a jury is required to resolve.³² However, the Ninth Circuit has inexplicably carved out literary analysis as an exception to this rule, frequently dismissing expert witnesses to copyright infringement claims involving screenplays or novels and analyzing the works themselves.³³

³⁰ See *Funky Films*, 462 F.3d at 1076; *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985); *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984); *Shaw v. Lindheim*, 809 F. Supp. 1393, 1355 (C.D. Cal. 1992).

³¹ *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1116 (9th Cir. 1989) (citing *Bieghler v. Kleppe*, 633 F.2d 531, 534 (9th Cir. 1980) (“As a general rule, summary judgment is inappropriate where an expert’s testimony supports the nonmoving party’s case.”)).

³² *Wylar Summit P’ship v. Turner Broad. Sys., Inc.*, 235 F.3d 1184, 1192 (9th Cir. 2000) (“Weighing the credibility of conflicting expert witness testimony is the province of the jury.”).

³³ See *Rice*, 330 F.3d 1170 (holding that district court did not abuse its discretion in disregarding the testimony of plaintiff’s expert); *Bethea v. Burnett*, 2005 WL 1720631, at *12 (C.D. Cal. 2005) (ignoring plaintiff’s expert’s testimony, finding it unhelpful to the court’s own analytic dissection); *Shaw*, 809 F. Supp. 1393 (disregarding plaintiff’s expert’s testimony in overturning jury verdict in favor of plaintiff); *Funky Films*, 462 F.3d at 1076 (“[T]he district court conducted an independent analysis of [the works].”); *Gable v. National Broadcasting Co.*, 727 F. Supp. 2d 815, 836, n.18 (C.D. Cal. 2010) (“Expert testimony is

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In 2001, the U.S. District Court for the Central District of California stated in *Fleener v. Trinity Broadcasting Network* (a case that was not against a major studio): “There is abundant case-law establishing that expert testimony is particularly appropriate in summary judgment motions under the copyright ‘extrinsic test.’”³⁴ In spite of this fact, judges within the Ninth Circuit disregard such testimony³⁵ when they believe that they can do their own comparison, regardless of how the testimony comports with well-established legal standards.³⁶ In addition to denigrating the craft of such creator-plaintiffs, these judges essentially deprive them of their Seventh Amendment rights to jury trials.

In copyright infringement cases, judges are supposed to play the role of gatekeeper to the jury. Their task in analyzing substantial similarity is

far less critical in a case like this than it is in a case where specialized knowledge is required to dissect the objective components of the copyrighted work.”).

³⁴ *Fleener*, 203 F. Supp. 2d at 1147 (denying defendants’ requests for reconsideration and summary adjudication based on substantial similarities between the two works).

³⁵ *See supra* note 33.

³⁶ *But see Swirsky*, 376 F.3d at 846 (the district court’s dismissal of expert testimony and use of its own substantial similarity analysis to discount similarities between the two works as *scènes à faire* was erroneous) (quoting *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1472 (9th Cir. 1992)).

supposed to be extrinsic – that is, objective.³⁷ If a plaintiff can show objective similarity, a jury is brought in to determine whether the total concept and feel – the intrinsic test – of the plaintiff’s and defendant’s works are substantially similar. In practice, however, the extrinsic test has been devoured by an intrinsic test performed by the judge, who commands a body of case law so internally inconsistent that the standard of review is chosen rather than adhered to. Simply put, with judges able to substitute their opinions for those of experts and juries on issues of material fact, all other witnesses become effectively unnecessary.

D. As a Consequence of the Ninth Circuit’s Aberrant Rulings, Plaintiffs Have Been All but Forced to Abandon Copyright Claims.

The cumulative effect of defendant-friendly rulings such as the decision below has been a dramatic pro-defendant tilt in copyright litigation within the Ninth Circuit. Studios and networks have won every one of the dozens of copyright infringement cases litigated to final judgment in the Ninth Circuit

³⁷ *In re Apple Sec. Litig.*, 886 F.2d 1109, 1442 (9th Cir. 1989) (citing *Brown Bag Software*, 960 F.2d at 1475); *Shaw*, 919 F.2d at 1357 (“[T]he extrinsic test now objectively considers whether there are substantial similarities *in both ideas and expression*, whereas the intrinsic test continues to measure expression subjectively.”) (emphasis added).

since 1990, to the best of counsel’s knowledge and research, usually on summary judgment.³⁸ As a result,

³⁸ *Gregory v. Murphy*, 1991 U.S. App. LEXIS 4893 (9th Cir. 1991) (summary judgment for defendant affirmed) (“Coming to America”); *Shaw v. Lindheim*, 809 F. Supp. 1393 (C.D. Cal. 1992) (upon remand, judgment as a matter of law in favor of defendant studio) (“The Equalizer”); *Pelt v. CBS, Inc.*, 1993 U.S. Dist. LEXIS 20464 (C.D. Cal. 1993) (summary judgment for defendant) (“Listen Up! Young Voices for Change”); *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042 (9th Cir. 1994) (summary judgment for defendant affirmed) (“Honey, I Shrunk the Kids”); *Lane v. Universal City Studios*, 1994 U.S. App. LEXIS 23769 (9th Cir. 1994) (summary judgment for defendants affirmed) (“Kojak: Fatal Flaw”); *Ostrowski v. Creative Artists Agency*, 1994 U.S. App. LEXIS 23732 (9th Cir. 1994) (summary judgment for defendant affirmed) (“To Forget Palermo”); *Kodadek v. MTV Networks*, 1996 U.S. Dist. LEXIS 20776 (C.D. Cal. 1996) (summary judgment for defendant) (“Beavis & Butthead”); *Weygand v. CBS*, 1997 U.S. Dist. LEXIS 19613 (C.D. Cal. 1997) (summary judgment for defendant) (“Charlie”); *Laskay v. New Line Cinema*, 1998 U.S. App. LEXIS 23461 (C.D. Cal. 1998) (summary judgment for defendant) (“Don Juan DeMarco”); *Grosso v. Miramax Film Corporation*, 2001 U.S. Dist. LEXIS 26199 (C.D. Cal. 2001) (summary judgment for defendant) (“Rounders”); *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129 (C.D. Cal. 2001) (summary judgment for defendant) (“The Peacemaker”); *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170 (9th Cir. 2003) (summary judgment for defendant affirmed) (“The Mystery Magician”); *Metcalf v. Bochco*, 294 F.3d 1069 (9th Cir. 2002) (jury verdict in favor of defendant studio), *aff’d*, *Metcalf v. Bochco*, 200 Fed. Appx. 635 (9th Cir. 2006) (“City of Angels”); *Flynn v. Surnow*, 2003 U.S. Dist. LEXIS 26973 (C.D. Cal. 2003) (summary judgment for defendant) (“24”); *Bethea v. Burnett*, 2005 WL 1720631 (C.D. Cal. 2005) (summary judgment for defendant) (“The Apprentice”); *Merrill v. Paramount Pictures Corporation*, 2005 U.S. Dist. LEXIS 45401 (C.D. Cal. 2005) (summary judgment for defendant) (“Crossroads”); *Stewart v. Wachowski*, 574 F. Supp. 2d 1074 (C.D. Cal. 2005) (summary

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authors are now forced to contort and repackage their claims under other headings, such as implied-in-fact

judgment for defendant) (“The Matrix”); *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*, 462 F.3d 1072 (9th Cir. 2006) (summary judgment for defendant) (“Six Feet Under”); *Benjamin v. Walt Disney Company*, 2007 U.S. Dist. LEXIS 91710 (C.D. Cal. 2007) (summary judgment for defendant) (“Sweet Home Alabama”); *Lassiter v. Twentieth Century Fox Film Corporation*, 238 Fed. Appx. 194 (9th Cir. 2007) (summary judgment for defendant affirmed) (“Drumline”); *Zella v. E. W. Scripps Company*, 529 F. Supp. 2d 1124 (C.D. Cal. 2007) (defendant’s motion to dismiss granted) (“Rachael Ray”); *Mestre v. Vivendi Universal U.S. Holding Co.*, 273 Fed. Appx. 631 (9th Cir. 2008) (summary judgment for defendant affirmed) (“Billy Elliot”); *Milano v. NBC Universal, Inc.*, 584 F. Supp. 2d 1288 (C.D. Cal. 2008) (summary judgment for defendant) (“The Biggest Loser”); *Rosenfeld v. Twentieth Century Fox Film*, 2009 U.S. Dist. LEXIS 9305 (C.D. Cal. 2009) (summary judgment for defendant) (“Robots”); *Thomas v. Walt Disney Company*, 337 Fed. Appx. 694 (9th Cir. 2009) (defendant’s motion to dismiss affirmed) (“Finding Nemo”); *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620 (9th Cir. 2010) (summary judgment for defendant affirmed) (“The Last Samurai”); *Buggs v. Dreamworks, Inc.*, 2010 U.S. Dist. LEXIS 141515 (C.D. Cal. 2010) (summary judgment for defendant) (“Flushed Away”); *Clements v. Screen Gems, Inc.*, 2010 U.S. Dist. LEXIS 132186 (C.D. Cal. 2010) (summary judgment for defendant) (“Stomp the Yard”); *Gable v. National Broadcasting Co.*, 727 F. Supp. 2d 815 (C.D. Cal. 2010) (summary judgment for defendant) (“My Name Is Earl”); *Gilbert v. New Line Productions*, 2010 U.S. Dist. LEXIS 27134 (C.D. Cal. 2010) (summary judgment for defendant) (“Monster in Law”); *Novak v. Warner Bros. Pictures, LLC*, 387 Fed. Appx. 747 (9th Cir. 2010) (summary judgment for defendant affirmed) (“We Are Marshall”); *Walker v. Viacom International, Inc.*, 2010 U.S. App. LEXIS 1475 (9th Cir. 2010) (summary judgment for defendant) (“SpongeBob SquarePants”); *Wild v. NBC Universal, Inc.*, 2013 U.S. App. LEXIS 4169 (9th Cir. 2013) (summary judgment for defendant affirmed) (“Heroes”).

contracts, to avoid the Circuit's obvious hostility to copyright claims. This was seen in *Benay v. Warner Bros.*, in which the Ninth Circuit dismissed the plaintiffs' copyright infringement claim, but let them proceed on their state law claim for breach of implied contract.³⁹ The fact that copyright plaintiffs have been forced to effectively abandon copyright claims as a viable means of protecting their intellectual property speaks to the Ninth Circuit's tilt against plaintiffs. As a result, plaintiffs who have the choice will have to file elsewhere, breeding forum shopping. As that Circuit is apparently unwilling to correct its aberrant pro-defendant doctrines such as the laches ruling below, only this Court can hope to rectify the Ninth Circuit's subversion of copyright claims.

* * * * *

In the case before the Court, the Ninth Circuit's unrestricted embrace of the laches defense continues its modern adverse trend against copyright plaintiffs. The division among the circuits on this issue, coupled with the Ninth Circuit's narrow application of the laches defense, leaves creators uncertain about when and where the defense applies and could lead to forum shopping. Clear guidance for all parties on the laches defense is warranted.



³⁹ *Benay*, 607 F.3d at 629, 633.

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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