

## 17.19 Substantial Similarity—Extrinsic Test; Intrinsic Test

### Comment

As the Ninth Circuit confirmed in *Antonick v. Electronic Arts, Inc.*, 841 F.3d 1062 (9th Cir. 2016), the court employs a two-part test for determining whether one work is substantially similar to another:

[A plaintiff] must prove both substantial similarity under the “extrinsic test” and substantial similarity under the “intrinsic test.” The “extrinsic test” is an objective comparison of specific expressive elements. The “intrinsic test” is a subjective comparison that focuses on whether the ordinary, reasonable audience would find the works substantially similar in the total concept and feel of the works.

*Id.* at 1065-66; *see also Williams v. Gaye*, 885 F.3d 1150, 1163 (9th Cir. 2018) (approving instructions and explaining that extrinsic test requires “analytical dissection of a work and expert testimony”). The extrinsic test is a question of law for the court. *See Gray v. Hudson*, 28

F.4th 87, 97 (9th Cir. 2022). If the court determines that the plaintiff has failed to satisfy the extrinsic test, then the infringement claim fails and there is no need to proceed to the intrinsic test. *See Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (en banc); *Corbello v. Valli*, 974 F.3d 965, 974 (9th Cir. 2020); *Tangle, Inc. v. Aritzia, Inc.*, 125 F.4th 991, 997 (9th Cir. 2025) (“The extrinsic test thus serves to screen out objectively meritless claims, so courts can apply it as a matter of law.”).

If the court determines that “the idea underlying [a] copyrighted work can be expressed in only one way,” such that the idea and its expression merge (the “merger doctrine”), then “courts will not protect [the] copyrighted work from infringement.” *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1082 (9th Cir. 2000). And where “the expression is as a practical matter indispensable, or at least standard in the treatment of a given idea” (the “scenes a faire doctrine”), *Frybarger v. Int’l Bus. Machines Corp.*, 812 F.2d 525, 530 (9th Cir. 1987), “the expression is protected only against . . . virtually identical copying,” *Johnson Controls, Inc. v. Control Sys., Inc.*, 886 F.2d 1173, 1175 (9th Cir. 1989); *see also Data E. USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 209 (9th Cir. 1988) (applying the virtually identical test to a work whose original features “necessarily follow from the idea of a martial arts karate game, or are inseparable from, indispensable to, or even standard of the idea of the karate sport”).

If the extrinsic test is satisfied, the intrinsic test is a matter for the jury. *See Corbello*, 974 F.3d at 974; *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994). The court must instruct the jury as to: (1) the non-protectable elements of the plaintiff’s work, (2) the appropriate standard (virtually identical or substantially similar), and (3) that the jury may consider the work as a whole. *See Apple Comput.*, 35 F.3d at 1443, 1446; *Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 988-89 (9th Cir. 2009). The jury must determine if

the ordinary reasonable viewer would believe that the defendant's work appropriated the plaintiff's work as a subjective matter. *See Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004); *Apple Comput.*, 35 F.3d at 1442; *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986). Expert testimony is inappropriate to aid the jury in applying the intrinsic test. *Olson v. Nat'l Broad. Co., Inc.*, 855 F.2d 1446, 1449 (9th Cir. 1988); *Antonick*, 841 F.3d at 1066.

The Committee recommends that the court and counsel specifically craft instructions on substantial similarity based on the particular work(s) at issue, the copyright in question, and the evidence developed at trial. The following cases may provide guidance in formulating substantial similarity instructions in specific subject areas:

**Literary or Dramatic Works:** *Shaw v. Lindheim*, 919 F.2d 1353, 1357 (9th Cir. 1990); *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977) (holding that commercials infringed television production; applying specific criteria to assessment of substantial similarity); *see also Corbello v. Valli*, 974 F.3d 965, 975 (9th Cir. 2020) (applying extrinsic test for similarity to elements of challenged work that are undisputedly factual); *Metcalf v. Bochco*, 294 F.3d 1069, 1073-74 (9th Cir. 2002) (applying *Shaw* factors applied to screenplay for television show); *Pasillas v. McDonald's Corp.*, 927 F.2d 440, 442-43 (9th Cir. 1991) (noting that *Shaw* "is explicitly limited to literary works" and *Krofft* test is still applicable to other than dramatic or literary works).

**Musical Compositions:** *Gray*, 28 F.4th at 97 (applying extrinsic test and noting that protection for original expression does not extend to ideas, concepts, common or trite musical elements, or commonplace elements firmly rooted in genre's tradition) (citing *Skidmore*, 952 F.3d at 1069)); *Swirsky v. Carey*, 376 F.3d 841, 848-49 (9th Cir. 2004) (noting factors and constituent elements applicable to "analyzing musical compositions," while noting that Ninth Circuit has "never announced a uniform set of factors" because "each allegation of infringement will be unique"); *Newton*, 388 F.3d at 1196 (noting musical elements); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485-86 (9th Cir. 2000) (identifying "areas" of similarity of musical works); *Williams*, 885 F.3d at 1164 (noting that musical compositions are not "confined to a narrow range of expression"). In *Skidmore*, 952 F.3d at 1074, a case involving the alleged copyright infringement of a musical composition, the Ninth Circuit, reviewing for plain error, concluded that the district court did not err in omitting a "selection and arrangement" instruction. Such an instruction is appropriate only if the selection and arrangement of the unprotectable elements of a musical figure "is original in some way." *Gray*, 28 F.4th at 101 (quoting *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003)).

**Choreographic Works:** *Hanagami v. Epic Games, Inc.*, 85 F.4th 931, 942-45 (9th Cir. 2023) (explaining that choreography is composed of various elements that may be unprotectable when viewed in isolation, but what is protectable is the choreographer's selection and arrangement of the work's elements; and stating that although it is not "necessary to specify a discrete universe of elements from which a choreographic copyright infringement claim can be built," the district court erred in granting a motion to dismiss without considering

“the movement of the limbs, movement of the hands and fingers, head and shoulder movement, and tempo”).

**Moveable and Manipulable Sculptural Works:** *Tangle, Inc. v. Aritzia, Inc.*, 125 F.4th 991, 996 (9th Cir. 2025) (explaining that a toy manufacturer’s kinetic and manipulable sculptural works were sufficiently “‘fixed’ in a tangible medium” of expression to be entitled to copyright protection, “even when its pose changes,” analogizing the moveable sculptures to dance, movies, and music).

**Computer Programs and Similar Technologies:** *Apple Comput.*, 35 F.3d at 1445 (involving audiovisual and literary component of computer program); *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1477 (9th Cir. 1992) (“[C]omputer programs are subject to a *Shawtype analytic dissection of various standard components*, e.g., screens, menus, and keystrokes”); *Data*, 862 F.2d at 210 (9th Cir. 1988) (involving home-computer karate game); *Frybarger*, 812 F.2d at 529-30 (involving video game).

**Motion Picture, Television Production, or Copyrighted Script:** *Benay v. Warner Bros. Ent., Inc.*, 607 F.3d 620, 624-29 (2010) (involving movie and screenplay); *Funky Films, Inc. v. Time Warner Ent. Co., L.P.*, 462 F.3d 1072, 1076-77 (9th Cir. 2006) (involving screenplay and television series); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1177-78 (9th Cir. 2003) (involving video and television specials); *Metcalf v. Bochco*, 294 F.3d 1069 (9th Cir. 2002) (involving screenplay and television series); *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985) (involving novel and motion picture); *Litchfield v. Spielberg*, 736 F.2d 1352, 1356-57 (9th Cir. 1984) (involving musical play and movie).

**“Other Than Dramatic or Literary Works”:** *Malibu Textiles, Inc., v. Label Lane Int’l, Inc.*,

922 F.3d 946 (9th Cir. 2019) (involving original selection, coordination, and arrangement of

floral-pattern-printed fabric); *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 848-52 (9th Cir. 2012) (same); *Mattel, Inc. v. MGA Ent., Inc.*, 616 F.3d 904, 913-14 (9th Cir. 2010) (involving toy dolls); *Cavalier v. Random House, Inc.*, 297 F.3d 815, 826 (9th Cir. 2002) (involving works of visual art); *Sid & Marty Krofft Television Prods.*, 562 F.2d at 1164 (providing dicta concerning application of specific criteria to plaster recreation of nude human figure); *Pasillas*, 927 F.2d at 442-43 (noting *Krofft* test applicable to other than dramatic or literary works; using test to assess similarity of Halloween mask and mask used in television commercial).

**“Ordinary Observer” Test:** *Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1112 (9th Cir. 1998) (applying ordinary reasonable person standard); *see also L.A. Printex Indus., Inc.*, 676 F.3d at 852 (involving fabric designs); *Johnson Controls*, 886 F.2d at 1176 n.4 (involving

computer software), *implied overruling on other grounds recognized by Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 979 (9th Cir. 2011); *Data*, 862 F.2d at 209-10 (discussing intended audience); *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 902 (9th Cir. 1987) (involving perception of children); *Berkic*, 761 F.2d at 1293 (discussing reasonable reader or moviegoer); *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1121-22 (9th Cir. 2018) (involving photograph), *overruled on other grounds by Skidmore*, 952 F3d at 1069.

*Revised September 2025*