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Catch Me If You Can Claim Copyright Infringement: How Copyright Law Unevenly Protects Novice Scriptwriters

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CATCH ME IF YOU CAN CLAIM COPYRIGHT INFRINGEMENT:

HOW COPYRIGHT LAW UNEVENLY PROTECTS NOVICE SCRIPTWRITERS

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ABSTRACT

In the realm of creative endeavors, novice scriptwriters often find themselves in a precarious position, highly susceptible to having their original work exploited for profit by formidable players in the industry, drawing a parallel to the timeless tale of David versus Goliath. In these all-too-common scenarios, the multi-million-dollar film agencies that, reminiscent of Goliath, appropriate the creative fruits of amateurs striving to establish their names in the field. Regrettably, unlike the triumphant David from the biblical narrative, novice scriptwriters are frequently left without adequate protection within the legal landscape of the United States, where the scales tend to tip in favor of large corporate entities. This Note emphasizes the importance of a uniform standard across all United States Federal Circuit Courts and highlights the need for a primarily subjective approach to evaluating copyright infringement claims.

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I. INTRODUCTION

Deception and falsehoods are no strangers to the corridors of Hollywood, and it is crucial to recognize that these issues extend beyond the realm of actors. Within the film industry, a complex interplay of technological advancements and evolving legal landscapes has given rise to uncertainty regarding the safeguards of novice scriptwriters' creative concepts. Much like the plot of the 2002 film *Big Fat Liar*, which follows fourteen-year-old high schooler Jason Shepherd battling to prove that unscrupulous Hollywood producer Marty Wolf pilfered his class paper and transformed it into a blockbuster movie.[2] Today, reality sees prominent film agencies appropriating the original ideas of inexperienced scriptwriters, often without giving due credit.

If these scriptwriters possess valid copyright protection for their original concepts, they may pursue a copyright infringement claim under the Copyright Act of 1976 (17 U.S.C. §101-15). Typically, such claims center around the same four provisions of the Copyright Act, namely §102, §107, §110, and §114.[3]

[2] BIG FAT LIAR (Shawn Levy Dir., 2002)
[3] *See* 17 U.S.C. §102 (Establishing three essential conditions for obtaining copyright and listing specific works that enjoy copyright protection while asserting limitations on works that can be copyrighted); §107 (Establishing the "fair use" doctrine which is an exception to prevent the stifling of the very creativity that law intended to foster);

To establish a case of copyright infringement, the plaintiff faces the burden of proving two essential elements: (1) the owner possessed valid copyright and (2) the defendant copied "constituent elements" of the work that are "original."[4] To illustrate this point, envision yourself as an aspiring scriptwriter who has recently completed your script, obtained the appropriate copyright protection, and is enthusiastic about presenting your story to a prominent production company. Following an initial meeting during which the company reviews your script and disappointingly declines to proceed with your concept, you are left disheartened. However, over time, you move on from it. Later, as you spend an evening perusing your preferred streaming service, you stumble upon a new film title that captures your interest. After a brief viewing, you realize that the film bears an uncanny resemblance to your creation, featuring characters and plotlines strikingly similar to those you crafted. Infuriated by this discovery, you resolve to take legal action. Nevertheless, the feasibility and success of such action may hinge on your geographical location within the country.

Although the United States Supreme Court has never provided an explicit definition for "constituent elements," a common understanding of "constituent" suggests that it pertains to the integral components that collectively form the entire body of work.[5] In contrast, the Court has distinctly defined "original elements" as those originating from the author, explicitly excluding factual information.[6]

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§110 (Limiting an author's exclusive rights in performances and displays); §114 (Defining versions of sound recordings).

[4] Harper & Row, Publrs. v. Nation Enters., 471 U.S. 539, 548 (1985).

[5] *Constituent*, MERRIAM-WEBSTERS DICTIONARY (11th ed. 2019) ("[S]erving to form, compose, or make up a unit or whole.").

[6] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991), (citing 3 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 2.01 (1990, Matthew Bender) ("[O]riginal, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.")).

The first element, concerning the possession of valid copyright, is relatively straightforward; it is a binary condition where the scriptwriter either has it or does not. However, this rather simplistic evaluation vastly changes for the second element, which has caused significant confusion in its practical application. In response to this confusion, the Supreme Court sought to clarify the protection of "original" elements within a work by introducing the "selection and arrangement" test.[7]

Under this test, the court tasked with examination must determine which components of the work can be attributed as "original to the author."[8] Once these original elements are identified, the court scrutinizes the work, explicitly looking for "substantially similar" aspects solely among these "protected elements." [9] Regrettably, despite its intentions, the Supreme Court's ruling fell short of its objective to establish a consistent framework for reviewing copyright infringement claims.[10] Instead, it inadvertently gave rise to more confusion in this domain. Consequently, the various United States Federal Circuit Courts maintain similar but distinct approaches when assessing the critical issue of substantial similarity.

Across all Circuits, a two-prong examination remains a common practice, which entails evaluating both the plaintiff's possession of a valid copyright and the extent of substantial similarities between the compared works. Nevertheless, in the second prong of this assessment, the Federal Circuit Courts diverge significantly in their methodologies and criteria.

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[7] Feist Publ'ns, Inc. 499 U.S. 340, (1991) (Establishing a uniform test to distinguish and evaluate original elements when determining the second element of copyright infringement "Substantial similarity" this test is objective).
[8] *Id.* at 348. *citing* Patterson & Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 800-802 UCLA L. REV. (1989); Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 1865-68, COLUM. L. REV. (1990).
[9] *Id.*
[10] Feist Publ'ns, Inc. *Supra* Note 6 (Recognizing the existence of a Circuit split as related to the evaluation of substantial similarity, here, the court attempts to streamline this analysis across the nation).

Decisions from the Sixth Circuit clearly illustrate a nearly identical application of the Supreme Court's precedent.[11] The court here adopts a wholly objective perspective within this framework, focusing solely on the "Original Elements" and their usage throughout the work.

In contrast, the First, Second, and Fifth Circuits take a notably distinct approach, employing the "Ordinary Observer" test to gauge "substantial similarity" subjectively.[12] In these courts, the review process involves a subjective assessment that considers the entire body of work rather than confining it to elements originating from the author.

The Fourth Circuit, which utilizes the "intended audience" test to achieve a similar outcome.[13] However, Plaintiffs in this jurisdiction must establish extrinsic and intrinsic criteria under the second prong of the evaluation.[14] This test permits a blended assessment, encompassing both objective and subjective elements.

Similarly, the Ninth Circuit mandates that the plaintiff demonstrate extrinsic and intrinsic similarities. Nonetheless, within this jurisdiction, evolving case law has effectively reduced the significance of the subjective prong in the examination process.[15] Consequently, a scriptwriter's journey to prove copyright infringement may significantly vary based on the specific court entrusted with hearing the case.

This Note establishes that the First, Second, and Fifth Circuits employ the appropriate test for evaluating copyright infringement claims in the context of the film industry. It argues that, given

[11] Murray Hill Publ'ns., Inc. v. Twentieth Century Fox Film Corp., 361 F.3d 312 (6th Cir. 2004) (Illustrating an application of the *Feist* filtration method, a strictly objective standard).
[12] Betty, Inc. v. PepsiCo, Inc., 848 F. App'x 43 (2d Cir. 2021); *See also* Perea v. Editorial Cultural, Inc., 13 F.4th 43 (1st Cir. 2021); *See also* Peel & Co. v. Rug Mkt., 238 F.3d 391 (5th Cir. 2001) (Illustrating an application of the "Ordinary Observer" test, a wholly subjective standard).
[13] Copeland v. Bieber, 789 F.3d 484 (4th Cir. 2015) (Illustrating an application of the "Intended Audience" test, a subjective analysis constrained to an objective standard).
[14] *Id.*
[15] Rentmeester v. Nike, Inc., 883 F.3d 1111 (9th Cir. 2018) (Illustrating the ninth circuit analysis which includes both a subjective and objective analysis, however, like precedent usually only the objective standard is addressed).

the subjective nature of film, it is more fitting to apply a subjective standard rather than adhere to a rigid objective rule.

Part I serves as an introduction, highlighting the pertinent issues surrounding script theft and offering a brief overview of the division among the Federal Circuit Courts regarding the proper approach to assessing copyright infringement claims.

In Part II, this Note delves into the relevant legal frameworks within the various Federal Circuit Courts and considers international perspectives. Subsections within this section explore the examination methods employed in different jurisdictions and take Note of significant case law that has influenced their decisions.

Part III undertakes an in-depth analysis of the distinctions between the tests used in these jurisdictions. It examines factors such as the history of cinema, the evolving landscape of legal principles, and the significance of subjectivity in other areas of litigation.

Part IV, this Note concludes with a coherent summary, elucidating why the First, Second, and Fifth Circuits are justified in their evaluation approach, given the film medium's unique attributes.

II. BACKGROUND

A. THE OBJECTIVE STANDARD: A DEEP DIVE INTO SUPREME COURT PRECEDENT AND SIXTH CIRCUIT ANALYSIS

i. Setting Precedents: Supreme Court's Impact on Copyright Law

In 1991, a pivotal moment in copyright law occurred when the Supreme Court established a standardized test for evaluating copyright infringement claims in the case of *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*[16] This landmark case centered on a comparison between

[16] Feist Publ'ns, Inc. 499 U.S. at 360.

two phone directories to determine which elements within them were entitled to copyright protection.[17] During its deliberation, the Court reiterated the two essential elements that must be proven to establish copyright infringement.[18]

Ultimately, the Court ruled that specific factual information could not be protected by copyright.[19] However, while reaching this decision, the Court articulated a crucial principle: "if a body of work contains elements that are not facts, then those elements must be evaluated for their originality."[20] Once these original elements have been identified, the court should objectively assess whether these elements are selected, coordinated, or arranged in a way that results in a unique and distinctive creative expression as a unified whole.[21] Under this precedent, copyright infringement is deemed to have occurred if a substantial similarity exists among these original elements.

ii. The Sixth Circuit's Interpretation of Copyright Standards

The practical application of this objective standard can be effectively illustrated by examining decisions within the Sixth Circuit Courts. In the Sixth Circuit, for a plaintiff to succeed in a copyright infringement action, they must demonstrate two essential elements: first, that they own a valid copyright for their creation, and second, that the defendant engaged in copying.[22] Here, copying is proven in two ways: through direct evidence or by drawing an "inference" of copying.[23] This inference of copying can be established by demonstrating that the defendant had

[17] *Id.*
[18] *Id.* (citing Harper & Row, 471 U.S. at 548 ("Not all copying, however, is copyright infringement. To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.")).
[19] *Id.*
[20] *Id.* at 549.
[21] *Id.*
[22] Kohus v. Mariol, 328 F.3d 848, 853 (6th Cir. 2003) (citing Wickham v. Knoxville Int'l Energy Exposition, Inc., 739 F.2d 1094, 1097 (6th Cir. 1984)).
[23] R.C. Olmstead, Inc. v. CU Interface, LLC, 606 F.3d 262, 275 (6th Cir. 2010) (citing Kohus, 328 F.3d at 855).

access to the work claimed to be infringed and that there is a "substantial similarity" between the two works.[24]

Assuming the plaintiff successfully satisfies the first step, the courts then adhere to the precedent grounded in objectivity to ascertain "substantial similarity." This assessment exclusively considers the "original elements" of the works and their specific arrangement within them.[25] Only then can the factfinder differentiate between which components of the copyrighted work are genuinely "original" and, therefore, eligible for copyright protection.[26]

"Original elements" are those that have been independently created and exhibit at least a minimal degree of creativity. In contrast, "unoriginal elements" encompass abstract ideas and elements driven by efficiency and external factors. Expert testimony may be necessary in cases characterized by complexity to aid in this discernment.[27] This analytical process within the Sixth Circuit Courts is called the "abstraction-filtration-comparison analysis."[28] As a result of this process, only the "original elements" of the work remain for the court's examination.

Once these "original elements" are identified, the focus shifts to whether the works exhibit factors "substantially similar" to the protected characteristics of the copyrighted work.[29] In this phase, the court evaluates whether the selection, coordination, or arrangement of these "original" elements within the work bears a "substantial similarity" to each other.[30] Importantly, in these

[24] Ellis v. Diffie, 177 F.3d 503, 506 (6th Cir. 1999).
[25] Feist Publ'ns, Inc.v. Rural Tel. Serv. Co., 499 U.S. 340, 371 (1991).
[26] Parker v. Winwood, 938 F.3d 833, 843 (6th Cir. 2019) (citing Feist Publ'ns, Inc., 499 U.S. at 345)).
[27] Kohus, 328 F.3d at 856 (Establishing that expert testimony can be admissible when the disputed material is complex).
[28] R.C. Olmstead, Inc., 606 F.3d at 275-76.
[29] *Id.* at 855. (quoting Feist Publ'ns, Inc., 499 U.S. at 340).
[30] Feist Publ'ns, Inc. 499 U.S. at 357.

jurisdictions, the issue of copyrightability is considered "a pure question of law," subject to review *de novo*.[31]

Consequently, the Sixth Circuit's approach to evaluating copyright infringement claims aligns with the intended precedent of implementing a strictly objective analysis when assessing substantial similarity. However, it is worth noting that this approach could potentially disadvantage a scriptwriter in this jurisdiction, as a defendant might make minimal alterations to the plaintiff's work and still potentially prevail in such a situation.

B. The Subjective Standard: Analyzing Copyright Perspectives in the First, Second, and Fifth Circuits

The First, Second, and Fifth Circuits employ a similar two-prong examination akin to the Supreme Court precedent but with a crucial distinction: their evaluation is subjective.[32] In these circuits, a plaintiff must establish two key elements: (1) That the defendant copied the plaintiff's work, and (2) That a substantial similarity exists between the defendant's work and the protectable elements of the plaintiff's work.[33] Like the objective review, the plaintiff in these circuits can use direct evidence or an inference to demonstrate that the defendant had access to the copyrighted work.[34] Direct evidence is relatively straightforward, as it entails proving that the infringing party had physical possession of the copyrighted work for a specific duration. However, when direct

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[31] Oracle Am., Inc. v. Google Inc., 750 F.3d 1339, 1353 n.3 (Fed. Cir. 2014); *see also* Tri Cnty. Wholesale Distribs., Inc. v. Labatt USA Operating Co., 828 F.3d 421, 430 (6th Cir. 2016).

[32] Zalewski v. Cicero Builder Dev. Inc., 754 F.3d 95 (2d Cir. 2014) (Illustrating an application of the primarily subjective based evaluation followed by these circuits); *See* Batiste v. Lewis, 976 F.3d 493 (5th Cir. 2020); *See also* Perea v. Editorial Cultural, Inc., 13 F.4th 43 (1st Cir. 2021).

[33] Hamil Am. Inc. v. GFI, 193 F.3d 92, 99 (2d Cir. 1999); *See* Latin Am. Music Co. Inc. v. Media Power Grp., Inc., 705 F.3d 34, 38 (1st Cir. 2013); *See also* BWP Media USA, Inc. v. T&S Software Assocs., Inc., 852 F.3d 436, 439 (5th Cir. 2017).

[34] Laureyssens v. Idea Grp., Inc., 964 F.2d 131, 140 (2d Cir. 1992) ("The plaintiff may prove copying by direct evidence, or by showing that the defendant had access to the plaintiff's work and that the works are similar enough to support an inference that the defendant copied the plaintiff's work."(citing Alan Latman, *"Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement,* 1214 COLUM. L. REV. (1990))).

evidence is lacking, access can be inferred by showing that the infringing party was exposed to the ideas contained within the copyrighted work. For scriptwriters, the distinction between direct evidence and inference may hinge on whether the production company possessed the script before or after a meeting, which can significantly impact the case.

In determining the second prong of the substantial similarity test, these Courts diverge from the Supreme Court precedent and develop their unique approach. Following the Supreme Court's ruling in *Feist*, these Circuits initially restricted the finding of substantial similarity to the "protected" elements of the works.[35] However, over the past three decades, these courts have abandoned the idea of exclusively dissecting works and comparing only copyright-protected elements. Instead, they have reverted to a subjective review method initially employed over sixty years ago.[36]

In this renewed approach, these courts assert that the standard for evaluating "substantial similarity" is that of an "ordinary observer," except in cases of extreme complexity.[37] An "ordinary observer" is characterized as an average layperson.[38] A plaintiff meets this standard if the lay observer can identify the copying between the works.[39] Consequently, the central question becomes whether the alleged infringer has chosen, organized, and arranged any of the plaintiff's elements substantially similarly, not confined solely to those "original to the author."[40]

Indeed, this examination marks a significant departure from precedent and adopts a subjective approach by relinquishing objective constraints and placing the decision-making power

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[35] Knitwaves at 1002 (2d Cir. 1995).
[36] Hamil Am., Inc., 193 F.3d at 100 (2d Cir. 1999) (“The standardtest for substantial similarity between two items iswhether an "'ordinary observer, unless he set out todetect the disparities, would be disposed to overlookthem, and regard [the] aesthetic appeal as the same.”(quoting Peter Pan Fabrics, Inc. v. Martin Weiner Corp.,274 F.2d 487, 489 (2d Cir. 1960) (L. Hand))); *See* Knitwaves at 1003; *See also* Boisson, 273 F.3d at 272-73.
[37] Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101, 111 (2d Cir. 2001) (quoting Hamil Am., Inc. 193 F.3d at 100).
[38] Knitwaves, at 1002.
[39] *Id.*
[40] *Id.* at 1004 (quoting Feist, 499 U.S. at 358).

in the hands of the observer. Much like the Supreme Court precedent, the first prong necessitates demonstrating actual or implied access by the infringer to the copyrighted work. However, the second prong introduces a fundamental shift, requiring the reviewing court to conduct a wholly subjective assessment to determine whether an "ordinary observer" would identify the alleged copy as having been borrowed from the copyrighted work.[41] The court's central focus in this evaluation is on the "total concept and overall feel" of all elements, not solely those considered original.[42] Therefore, in this jurisdiction, a scriptwriter would likely enjoy an advantage when pursuing their copyright infringement claim, as the entirety of their work is examined, not just the protected elements. Thus, the subjective approach allows for a more comprehensive evaluation of the similarities between the works.

C. *Finding Balance: Subjectively Objective Standards in the Fourth and Ninth Circuits*

i. Striking a Middle Ground: The Fourth Circuit's Unique Copyright Perspective

In the Fourth Circuit Court, the examination process bears similarities to that of the First, Second, and Fifth Circuits. However, notable distinctions exist in how the Fourth Circuit evaluates substantial similarity, requiring plaintiffs claiming copyright infringement in this jurisdiction to prove two distinct forms of substantial similarity: intrinsic and extrinsic criteria.

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[41] Folio Impressions, Inc. v. Byer California, 937 F.2d 759, 766 (quoting Novelty Textile Mills v. Joan Fabrics Corp., 558 F.2d 1090, 1093 (2d Cir. 1977)); *See also* Malden Mills, 626 F.2d at 1113; Laureyssens, 964 F.2d at 141 ([T]est is "whether 'the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.'") (quoting Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) (L. Hand, J.))).

[42] Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 133 (2d Cir. 2003) (“In recent years we have often found it productive to assess claims of inexact-copy infringement by comparing the contested design's "total concept and overall feel" with that of the allegedly infringed work. Because this was the method used by the district court, and because the appellant sharply disputes the district court's "total concept and feel" analysis, a few remarks on the history and application of this test are in order”); see Boisson v. Banian, Ltd., 273 F.3d 262, 27 (2d Cir. 2000); *see also* Knitwaves at 1003.

The extrinsic criteria involve an objective comparison between the copyright-protectable elements of the original work and an alleged copy, often relying on expert testimony.[43] Like the "abstraction-filtration-comparison analysis" employed in the Sixth Circuit Courts, the Fourth Circuit Courts engages in a process known as "analytic dissection."[44] Here, the court dissects the work to differentiate between original and non-original elements.[45] Subsequently, they objectively assess whether the protected aspects of the work are "substantially similar." In this regard, the Fourth Circuit Courts evaluate works with a similar focus on the "selection and arrangement" test.[46] Additionally, these courts suggest that even dissimilarities between protected or unprotected elements can influence the court's decision.[47]

In contrast, intrinsic similarity is subjective, characterized as an "essentially aesthetic judgment" regarding whether the "intended audience" would perceive the works as similar in their overall effect.[48] Often described as the "total concept and feel" of the works, intrinsic similarity revolves around the subjective impression of the work.[49] Under this standard, courts in these circuits analyze works as unified wholes, much as the intended audience would encounter them in the marketplace.[50]

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[43] Copeland 789 F.3d at 488 (“The court applied our precedent requiring copyright plaintiffs to prove two distinct forms of similarity: "extrinsic" similarity, an objective match between the copyright-protectable elements of an original work and a purported copy; and "intrinsic" similarity, a more subjective and "essentially aesthetic judgment" as to whether the intended audience of two works would experience them as similar in overall effect.”).
[44] *Id.* at 489.
[45] *Id.*
[46] Patterson & Joyce, *Surpa* note 8.
[47] *Id; See Generally* Robinson v. New Line Cinema Corp., No. 99-2167, 2000 U.S. App. LEXIS 6848 (4th Cir. Apr. 14, 2000)*; see also,* Ale House Mgmt. v. Raleigh Ale House, 205 F.3d 137 (4th Cir. 2000*);* Keeler Brass Co. v. Cont'l Brass Co., 862 F.2d 1063 (4th Cir. 1988).
[48] Copeland, 789 F.3d 484 (4th Cir. 2015).
[49] *See* Lyons P'ship, L.P. v. Morris Costumes, 243 F.3d 789, 801 (4th Cir. 2001), *abrogated in part by*, Petrella v. MGM, 572 U.S. 663 (2014) (“intrinsically similar in the sense that they express those ideas in a substantially similar manner from the perspective of the intended audience of the work.") (citing Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 801 (4th Cir. 1990))).
[50] Copeland, 789 F.3d at 489 (“Under the intrinsic prong, we analyze works as cohesive wholes, without distinguishing between protected and unprotected elements, just as the works' intended audiences likely would encounter them in the marketplace.”) (citing Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc., 618 F.3d 417, 437 (4th Cir. 2010))).

Unfortunately, a failure to establish substantial similarity concerning the extrinsic criteria can override even a strong showing of intrinsic similarity. For instance, the Fourth Circuit Court of Appeals mandates that an objective standard must ultimately constrain the test for copyright infringement. While the examining court conducts subjective and objective assessments, this approach significantly departs from the purely objective-based precedent and even the strictly subjective-based variation. Consequently, novice scriptwriters in this jurisdiction face a more demanding burden of proof to establish copyright infringement, as the evaluation is bound by extrinsic or objective criteria, providing them with fewer opportunities to prevail.

ii. Navigating Grey Areas: Insights from the Ninth Circuit on Copyright Standards

The Ninth Circuit, which includes Hollywood and handles a substantial number of copyright claims related to film scripts, has made efforts to expedite litigation in cases of copyright infringement.[51] Initially, the Ninth Circuit aimed to adhere to the Supreme Court's precedent. However, the significant influence of case law pertaining to unmeritorious claims has shaped the "substantial similarity" test used in this jurisdiction.[52] The Ninth Circuit's test for substantial similarity consists of an "extrinsic" and an "intrinsic" test. Typically, the court relies on the extrinsic test, and if it cannot be satisfied, summary judgment is permitted under the law in this jurisdiction.

The extrinsic test focuses on discernible similarities between specific elements of the two works.[53] If the court, within the confines of Fed R. Civ. P. 56, determines that no reasonable juror could find substantial similarity in ideas and expression, summary judgment is deemed

[51] Shame on You Prods. v. Banks, 120 F. Supp. 3d 1123, 1141 (C.D. Cal. 2015).
[52] Funky Films, Inc. v. Time Warner Entm't Co., Ltd. P'ship, 462 F.3d 1072 (9th Cir. 2006).
[53] Benay v. Warner Bros. Ent., 607 F.3d 620, 624 (9th Cir. 2010) ("The extrinsic test is an objective test based on specific expressive elements: the test focuses on articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events in two works.") (quoting Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994))) *overruled on other grounds by* Skidmore, 952 F.3d at 1051.

appropriate.[54] In essence, a plaintiff scriptwriter who fails to meet the extrinsic test loses on summary judgment because substantial similarity may only be found by presenting evidence that satisfies both the extrinsic and intrinsic tests.[55] Although the Ninth Circuit claims not to favor summary judgment in matters of substantial similarity, defendants often receive favorable summary judgment rulings in copyright claims.[56]

If a plaintiff survives summary judgment during the initial stages of litigation, the intrinsic test is employed.[57] This test evaluates an ordinary person's subjective impressions of the similarities between the two works. The Court here deemed it "uniquely suited for determination by the trier of fact" because it centers on the perspective of the lay observer.[58] Therefore, the Court hesitates to overturn a jury's finding that two works are intrinsically similar. Thus, the intrinsic test measures "substantial similarity" based on the ordinary reasonable person's response and does not rely on external criteria.[59]

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[54] Shaw v. Lindheim, 919 F.2d 1353 (9th Cir. 1990) *overruled on other grounds by* Skidmore, 952 F.3d at 1051.
[55] Kouf 16 F.3d at 1045 (9th Cir. 1994) (“A plaintiff who cannot satisfy the extrinsic test necessarily loses on summary judgment, because a jury may not find substantial similarity without evidence on both the extrinsic and intrinsic tests.”; *See also* Shaw, 919 F.2d at 1355 (Establishing that when reasonable minds could differ on a finding of substantial similarity, summary judgment is improper; however, when the issue is whether two works are substantially similar, summary judgment is appropriate if "no reasonable juror could find substantial similarity of ideas and expression," viewing the evidence in the light most favorable to the nonmoving party.) *overruled on other grounds by Skidmore*, 952 F.3d at 1051.
[56] Narell v. Freeman, 872 F.2d 907, 909 (9th Cir. 1989) *overruled on other grounds by* Skidmore, 952 F.3d at 1051.
[57] Unicolors, Inc. v. Urban Outfitters, Inc., 853 F.3d 980 (9th Cir. 2017) (“The intrinsic test is subjective and asks, "whether the ordinary, reasonable person would find 'the total concept and feel of the works' to be substantially similar,") (citing Pasillas v. McDonald's Corp., 927 F.2d 440, 442 (9th Cir. 1991) (quoting Sid & Marty Krofft TV Prods. v. McDonald's Corp., 562 F.2d at 1164))).
[58] Funky Films, Inc., 462 F.3d 1072 (“Since the intrinsic test for expression is uniquely suited for determination by the trier of fact, this court must be reluctant to reverse it.”) *overruled on other grounds by* Skidmore, 952 F.3d at 1051; *See* Int'l Luggage Registry v. Avery Prods. Corp., 541 F.2d 830, 831 (9th Cir. 1976); Caddy-Imler Creations, Inc. v. Caddy, 299 F.2d 79, 82 (9 Cir. 1962): *See also* Williams v. Kaag Mfrs., Inc., 338 F.2d 949, 951 (9th Cir. 1964) ("We have commented frequently on the inappropriateness of substituting our judgment for that of the trial judge on questions of fact. The vaguer the test, the less inclined we are to intervene.") *overruled on other grounds by* Skidmore, 952 F.3d at 1051.
[59] Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004) (Establishing that the extrinsic test considers whether two works share a similarity of ideas and expression as measured by external, objective criteria, thus, the extrinsic test requires "analytical dissection of a work and expert testimony.").

The Ninth Circuit's copyright infringement analysis has evolved to respond to the need for expedited litigation. The objective extrinsic test focuses on articulable similarities between specific elements, a matter of law. Conversely, the intrinsic test centers on "similarity of expression from the standpoint of the ordinary reasonable observer, with no expert assistance," a matter typically reserved for the jury.[60] Courts grant summary judgment in these jurisdictions when plaintiffs cannot demonstrate a basis for satisfying the extrinsic or objective element. Consequently, the intrinsic or subjective factor is often left unexamined, placing scriptwriters at a distinct disadvantage as they are compelled to demonstrate similarity primarily through "original elements."

D. Beyond Borders: Exploring International Copyright Approaches in the European Union, France, and Italy

Understanding the legal framework governing copyright law in different countries is crucial for gaining insights into how these countries address similar challenges and identifying opportunities for improving the protection of intellectual property rights, particularly for novice scriptwriters in the film industry. Let us examine the European Union, France, and Italy's legal frameworks concerning copyright and how they compare to the United States.

i. Harmonizing Copyright: European Union's Cross-Border Vision

The European Union (EU) has made significant efforts to harmonize copyright laws among its member states through directives and regulations.[61] Key directives include the Copyright Term Directive and the Information Society Directive.[62] While there may be variations in

[60] Apple Comput., Inc. v. Microsoft Corp., 35 F.3d 1435 (9th Cir. 1994).
[61] *The EU copyright legislation*, European Commission, https://digital-strategy.ec.europa.eu/en/policies/copyright-legislation.
[62] *Copyright Law of the European Union*, LIBRARY OF CONGRESS, https://www.loc.gov/law/help/copyright-law/europeanunion.php.

implementation among member states, the core principles have been standardized. The E.U.'s approach to copyright also depends on international conventions ratified by member states, including the Berne Convention and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.[63]

In the EU, to prove copyright infringement, a copyright owner must establish several elements: valid ownership, the existence of an infringing work, substantial similarity, unlawful use, and evidence of damages.[64] Typically, the burden of proof rests on the copyright owner.[65] The EU also provides specific exceptions and limitations to copyright, allowing certain uses of copyrighted works without the copyright owner's permission.

ii. Artistry and Ownership: Insights from French Copyright Law

French copyright law is governed by the French Intellectual Property Code (Code de la Propriété Intellectuelle).[66] To establish copyright infringement in France, a plaintiff must demonstrate two key elements: valid copyright ownership and an act of infringement.[67] French courts employ a two-part test to assess infringement.[68] First, they evaluate whether the allegedly infringing work reproduces a substantial part of the plaintiff's work.[69] Second, they assess whether the elements in the infringing work are original and substantially similar to the plaintiff's original

[63] CHRISTIAN LAIER, COPYRIGHT LAW IN THE EUROPEAN UNION: A GUIDE TO COPYRIGHT LAW IN THE EU (Wolters Kluwer Law & Business 2019).
[64] STEVE PEERS ET AL., INTELLECTUAL PROPERTY LAW IN THE EUROPEAN UNION (Oxford University Press, 2d ed. 2019).
[65] *Enforcement*, European Union Intellectual Property Office, https://euipo.europa.eu/ohimportal/en/enforcement ("In general, the burden of proof lies with the plaintiff in an infringement case.").
[66] Intell. Prop. Code, Fr. Code de la propriété intellectuelle, art. L111-1 to L342-3 (2022).
[67] JÉRÔME TASSI-HAUTEFORT & AGATHE AUGAYARD, INTELLECTUAL PROPERTY LAW IN FRANCE 248 (Kluwer Law International 2016) ("To establish copyright infringement, the plaintiff must prove the following elements: that it has a valid copyright over the work alleged to have been infringed; and that the defendant has committed an act of infringement.")
[68] *See generally* MICHEL M. WALTER & SLIKE V. LEWINSKI, EUROPEAN COPYRIGHT LAW: A COMMENTARY 500-01 (Oxford Univ. Press 2015)*; see also* RICHARD BURRELL, COPYRIGHT AND RELATED RIGHTS IN FRANCE 46-47, 102-03, 168-70 (2013);
[69] Walter & Lewinski, supra note 68.

work.[70] Numerous elements are considered, including the degree of uniqueness, the intent and circumstances surrounding the creations, and the expertise and dedication invested in producing the plaintiff's work.[71]

In addition to these factors, French courts also have the discretion to consider other elements when determining infringement. These may include the overall impression of the work, the intention of the alleged infringer, and the response of an ordinary reasonable person. Expert testimony can assist the court in evaluating the level of similarity between the two works.[72] The "total impression test" assesses the overall similarities and differences between the works as cohesive wholes.[73]

iii. Italy's Creative Copyright Landscape

Italian copyright laws are governed by the Italian Intellectual Property Code (Codice della proprietà industriale).[74] Similar to France, in Italy, a plaintiff must establish two essential elements to prove copyright infringement: valid copyright ownership and an act of infringement.[75] Italian courts employ a test akin to the one used in the *Feist* case, which evaluates whether the infringing work contains original elements and, if so, whether these elements are "substantially similar" to those in the original work.[76] Copyright protection in Italy, as in the United States, extends solely to the original aspects of a work.

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[70] *Id.*
[71] JÉRÔME TASSI-HAUTEFORT, SUPRA NOTE 71, AT 136; *see also* MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT: INTERNATIONAL TREATY AND BERNE CONVENTION at 249 (2013); *see generally* Intell. Prop. Code, Fr. Code de la propriété intellectuelle, art. L.122-4.
[72] Intell. Prop. Code, Fr. Code de la propriété intellectuelle, art. L. 331-5 ("In order to determine the degree of similarity between the alleged infringing work and the original work, the court may, if necessary, use the assistance of one or more experts in the field concerned.").
[73] *Id.*
[74] Intell. Prop. Code, It. (Codice della proprietà industriale) Title VIII, Sec. II-VII.
[75] ANSGAR OHLY ET AL., INTERNATIONAL COPYRIGHT LAW: A PRACTICAL GLOBAL GUIDE 150 (2d ed. 2019).
[76] *Id.*

iv. Comparison to the United States

Similarities and differences emerge when comparing these European legal frameworks to the United States. All these legal systems require copyright owners to prove valid ownership and an act of infringement. However, variations exist in the level of originality required for protection. Italy focuses more on objective factors when assessing similarity, examining whether the infringing work reproduces the original elements of the plaintiff's work. On the other hand, French law incorporates more subjective elements, considering the overall impression and response of an ordinary, reasonable person. Furthermore, France includes moral rights in its copyright law, safeguarding an author's work's integrity. This concept does not exist in Italian law and is not codified under the U.S. Statute; however, it was successfully argued in some United States Federal Circuit Courts.

Understanding the nuances of copyright laws in different countries, including the EU, France, Italy, and the United States, is crucial for safeguarding the rights of novice scriptwriters in the film industry. While common principles exist, such as the need to prove ownership and infringement, the approaches to assessing similarity and the scope of protection can vary significantly. Novice scriptwriters may find different levels of protection and challenges depending on the jurisdiction in which their works are evaluated.

III. COMPARATIVE ANALYSIS

A. CAPTURING CULTURE: UNDERSTANDING THE ROLE OF MOTION PICTURES IN SOCIETY

i. Thomas Edison's Quest for Wealth: Shaping the Early Film Industry

In 1888, a visionary entrepreneur, Thomas Edison, saw the potential of motion pictures and embarked on an ambitious journey.[77] Recognizing the astounding success of still-frame photographs, Edison commissioned his dedicated assistant, William Kennedy Laurie Dickson, to delve into the development of a motion picture camera.[78] Their collaboration resulted from the "Kinetoscope," a groundbreaking device often heralded as the precursor to modern motion-picture film projectors.[79] Unlike our conventional understanding of "motion pictures," the Kinetoscope ingeniously wove together still-frame images to craft the illusion of fluid motion.[80] With the birth of the Kinetoscope, Edison laid the foundation for what would eventually burgeon into a multibillion-dollar industry.[81] Edison's entrepreneurial spirit and foresight revolutionized entertainment and set in motion a cinematic legacy that still endures.

ii. Lumière Brothers: A Subjective Perspective on Cinema's Birth

Meanwhile, on the other side of the Atlantic, two visionary brothers, Auguste and Louis Lumière, passionately pursued their cinematic aspirations. The Lumière brothers had a unique vision for their creation—transcending mere entertainment and aiming to encapsulate all art forms, something accessible to all.[82] Their brainchild, the "Cinématographe," was a remarkable invention

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[77] *History of Edison Motion Pictures*, Library of Congress https://www.loc.gov/collections/edison-company-motion-pictures-and-sound-recordings/articles-and-essays/history-of-edison-motion-pictures/.
[78] *Id.*
[79] *Kinetoscope*, Britiannica, https://www.britannica.com/technology/Kinetoscope.
[80] *Id.* ("a strip of film was passed rapidly between a lens and an electric light bulb while the viewer peered through a peephole. Behind the peephole was a spinning wheel with a narrow slit that acted as a shutter, permitting a momentary view of each of the 46 frames passing in front of the shutter every second. The result was a lifelike representation of persons and objects in motion.").
[81] Kassymkhan Intykbayev, Marketing Effectiveness in The International Film Industry (April 4, 2022) (B.A. thesis, Aalto University) (on file with the Aalto University Library system).
[82] DAN GEVA, A PHILOSOPHICAL HISTORY OF DOCUMENTARY 1895–1959 33-49 (Palgrave Macmillan, 2021).

that bore a striking resemblance to a traditional film projector.[83] This invention enabled the Lumière brothers to orchestrate a historic event on December 28, 1895: the world's first motion picture screening at the Grand Café in Paris.[84] The initial showing was met with curiosity and trepidation, leaving the audience intrigued and uncertain about the Lumière brothers' ambitions. Despite these initial uncertainties, the Lumière brothers persevered. On January 26, 1896, they unveiled "L'arrivée d'un train en gare de La Ciotat" ("The Arrival of a Train"), a cinematic masterpiece that showcased the profound subjective impact films could have on viewers.[85] This brief 50-second film depicted a train pulling into La Ciotat station. Although short, it sparked panic and fear among the audience, who believed the oncoming train would burst through the cinema screen and into the theater.[86] This premiere garnered global attention, foreshadowing the countless ways films would captivate audiences in the years to come. While some reactions were tinged with negativity, even to the extent of threats to halt their filmmaking endeavors, Auguste, Louis, and the world began to recognize the genuine entertainment potential of motion pictures.[87]

Both artistic expression and entertainment value have been the driving forces behind film creation throughout history. However, assuming that these purposes are equally important would

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[83] Sarah Pruitt, *The Lumière Brothers, Pioneers of Cinema,* History (Oct. 3, 2014), https://www.history.com/news/the-lumiere-brothers-pioneers-of-cinema ("The key innovation at the heart of the Cinématographe was the mechanism through which film was transported through the camera. Two pins or claws were inserted into the sprocket holes punched into the celluloid film strip; the pins moved the film along and then retracted, leaving the film stationary during exposure.").

[84] Betty, Inc. v. PepsiCo, Inc., 848 F. App'x 43 (2d Cir. 2021); *See also* Perea v. Editorial Cultural, Inc., 13 F.4th 43 (1st Cir. 2021); *See also,* Peel & Co., 238 F.3d 391 (5th Cir. 2001)(illustrating an application of the "Ordinary Observer" test, a wholly subjective standard)."

[85] David Fenner, *On the Evolution of Film Theory and Aesthetics,* J. OF COMPAR. LIT. & AESTHETICS, 107-14 Vol. 44, No. 3, (2021).

[86] Neil Patrick*, In 1895 "The Arrival of the Train" was one of the first films shown to the public – it nearly caused panic*, The Vintage News, https://www.thevintagenews.com/2016/08/08/in-1895-the-arrival-of-the-train-was-one-of-the-first-films-shown-to-the-public-it-nearly-caused-panic/?chrome=1&T5c=1&A5c=1&D_4_6cALL=1&D_4_6_10cALL=1 ("The story goes that when the film was first shown, the audience was so overwhelmed by the moving image of a life-sized train coming directly at them that people screamed and ran to the back of the room. Hellmuth Karasek in the German magazine Der Spiegel wrote that the film "had a particularly lasting impact; yes, it caused fear, terror, even panic.").

[87] Betty, Inc. 848 F. App'x 43 (2d Cir. 2021), *See also,* Perea 13 F.4th 43 (1st Cir. 2021), *See also,* Peel & Co. 238 F.3d 391 (5th Cir. 2001) (Illustrating an application of the "Ordinary Observer" test, a wholly subjective standard.).

be remiss. In truth, the very existence of the film industry hinges upon the viewer.[88] In countless meetings and discussions within the industry, figures are scrutinized—total revenues, budgets, opening weekends, and more. Nevertheless, at the core of these statistics lies a common denominator: the viewer. To assert that the viewer merely influences Hollywood's fate would be an understatement. The audience possesses the power to shape the destiny of a film—from their affection for or aversion to a character to their reactions to the progression of a storyline or even a film's conclusion.[89] The viewer wields this transformative influence, making them the intended audience and the critics who ultimately impact a work's revenue. Therefore, it is only fitting that, in the context of legal disputes, the viewer, or in the realm of litigation, the jury, should be the ultimate arbiters deciding the outcome of film-related copyright infringement cases.

B. ADAPTING THE LAW

i. Evolution and Benefits of Copyright Legislation

The need to evolve society's laws in response to technological advancements is undeniable, particularly regarding copyright infringement.[90] The disconnect between the pace of technological progress and the stagnation of copyright law poses a significant challenge.[91] While technology offers new avenues for creation, expression, and sharing, the law must work on effectively

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[88] Hutson, J.P., Smith, T.J., Magliano, J.P. et al. *What is the role of the film viewer? The effects of narrative comprehension and viewing task on gaze control in film,* COGNITIVE RESEARCH 46 (2017).
[89] Anjelica Oswald, *16 times fans saved TV shows from cancellation*, Insider, https://www.insider.com/fans-saved-tv-show-2018-6 (listing different times that shows have been brought back from cancellation).
[90] ET Bureau, *Laws must evolve with the times if societies are to progress*, Economic Times (Nov. 3, 2011, 5:37 AM), https://economictimes.indiatimes.com/opinion/et-editorial/laws-must-evolve-with-the-times-if-societies-are-to-progress/articleshow/10588308.cms ("It is a no-brainer that laws must evolve in tandem with society if they are not to become an obstacle in society's progress. Unfortunately, this seemingly obvious statement has failed to goad successive governments into action. The net result is we have a host of antiquated laws on our statute books that have no business to be there. They should have been repealed long ago but for government tardiness.").
[91] Scott Murry, *A Comprehensive Study of Technological Change*, MIT News (Aug. 2, 2021), https://news.mit.edu/2021/comprehensive-study-technological-change-0802 (Most technologies improve slowly; more than 80 percent of technologies improve at less than 25 percent per year.); *See also,* Abby McCain, *How Fast is Technology Advancing? [2022]: Growing, Evolving, and Accelerating at Exponential Rates*, Zippa (Apr. 19, 2022) https://www.zippia.com/advice/how-fast-is-technology-advancing/
("This increase can better represent a doubling effect, which has taken place everyone and a half to two years.").

governing these advancements.[92] The question we face is: how far behind society is willing to let the law fall in this context?

One glaring issue is the Supreme Court's reluctance to provide updated guidance on copyright infringement claims, with the most recent ruling dating back over three decades. Consequently, the law has remained stagnant, drawing criticism. Various Federal Circuit Courts have stepped in to fill the void, attempting to establish laws more suited to our multimedia age. While these courts remain divided in their approaches, many have incorporated a subjective element into their analyses, signaling a growing consensus that novice scriptwriters need more protection than large corporations.[93]

Most Circuit Courts have drawn upon case law to shape their decisions, with varying degrees of deviation from the established precedent.[94] Notably, the Fourth and Ninth Circuit Courts have taken different paths favoring corporate giants.[95] Conversely, the First, Second, and Fifth Circuit Courts have introduced an entirely subjective test, which some view as a necessary evolution of the law.[96] Those who criticize this approach may only partially appreciate the role of motion

[92] Murry, supra note 91.
[93] David H. Donaldson Jr., *After 40 Years, Copyright Law Needs To Be Tweaked*, UT NEWS (Jan. 08, 2018), https://news.utexas.edu/2018/01/08/after-40-years-copyright-law-needs-to-be-tweaked/.
[94] Betty, Inc. v. Pepsico, Inc., 848 F. App'x 43 (2d Cir. 2021), *See also,* Perea v. Editorial Cultural, Inc., 13 F.4th 43 (1st Cir. 2021); Peel & Co. v. Rug Mkt., 238 F.3d 391 (5th Cir. 2001) (Illustrating an application of the "Ordinary Observer" test, a wholly subjective standard); Murray Hill Publ'ns., Inc. v. Twentieth Century Fox Film Corp., 361 F.3d 312 (6th Cir. 2004) (Illustrating an application of the Feist filtration method, a wholly objective standard); Copeland v. Bieber, 789 F.3d 484 (4th Cir. 2015) (Illustrating an application of the "Intended Audience" test, a subjective analysis constrained to an objective standard); Rentmeester v. Nike, Inc., 883 F.3d 1111 (9th Cir. 2018) (Illustrating the ninth circuit analysis which includes both a subjective and objective analysis, however, like precedent usually only the objective standard is addressed).
[95] Patterson & Joyce, *Surpa* note 8.
[96] Betty, Inc. 848 F. App'x 43 (2d Cir. 2021), *See also,* Perea 13 F.4th 43 (1st Cir. 2021), *See also,* Peel & Co. 238 F.3d 391 (5th Cir. 2001) (Illustrating an application of the "Ordinary Observer" test, a wholly subjective standard).

pictures in society, as these courts place the evaluation of copyright infringement solely in the hands of media consumers and critics.[97]

The impact of copyright laws extends beyond legal matters; they shape societal norms.[98] Failing to protect an individual's creative rights could have dire consequences for film production. Before the COVID-19 pandemic, the film industry significantly contributed to the U.S. economy, adding $504 billion to the Gross Domestic Product (G.D.P.).[99] Even during the pandemic, the industry remained a vital source of revenue and employment, contributing an estimated $100 billion annually to the global economy and supporting millions of jobs.[100]

The continuous evolution of our legal system is imperative to maintain its relevance, especially in the face of rapid technological change. Failure to adapt could leave those seeking protection vulnerable.[101] This is not a novel concept, but a fundamental principle deeply rooted in our legal system.[102] With technology advancing at an unprecedented pace, our legal framework must strive to keep pace.[103] Failing to do so could have dire consequences for the film industry, the national

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[97] Zalewski v. Cicero Builder Dev. Inc., 754 F.3d 95 (2d Cir. 2014) (Illustrating an application of the primarily subjective based evaluation followed by these circuits); *See also* Batiste v. Lewis, 976 F.3d 493 (5th Cir. 2020); Perea, 13 F.4th at 43.

[98] Roberto Galbiati et al., *How laws affect the perception of norms: Empirical evidence from the lockdown*, Plos One (Sep. 24, 2021), https://doi.org/10.1371/journal.pone.0256624 ("First, laws, by changing material payoffs, affect the behavioral norm understood as an equilibrium object: if fewer people take the condemned actions, the social stigma attached to these actions increases. Second, laws provide information on societal values, when there is an underlying uncertainty on the prevailing social norm. Both these mechanisms imply a shift in the perceived social norm as the result of the implementation of a law; because the norm did actually change in the first case, and through an informational channel in the second case.").

[99] Mel-Leo Rosal, *25+ Striking U.S. Film Industry Statistics [2022]: Facts About the Video Production Industry in the U.S.*, Zippa (Oct. 24, 2022), https://www.zippia.com/advice/us-film-industry-statistics/.

[100] *Theatrical and Home Entertainment Market Environment report*, Motion Picture Association (Dec. 15, 2020), https://www.motionpictures.org/research-and-data/theatrical-market-statistics/.

[101] Jordan M. Blanke, *Privacy and Outrage*, 9 CASE W. RES. J.L. TECH. & INTERNET (2018) ("We are fully entrenched in the world of Big Data, the Internet of Things, and Smart Cities – and we are never going back. As always, society and its laws must evolve, but it is not always an easy process.").

[102] *Id.*

[103] Geoffrey Stone, *Symposium | The Framers' Constitution*, Democracy Journal, https://democracyjournal.org/magazine/21/the-framers-constitution/ ("The principles enshrined in the Constitution do not change over time. But the application of those principles must evolve as society changes and as experience informs our understanding").

economy, and the global economy. Several Federal Circuit Courts have recognized the urgency of this issue and have deviated from Supreme Court analysis by prioritizing subjective analysis in copyright infringement claims. In doing so, they aim to better align the law with our evolving social and economic values in response to technological change.

ii. The Writer's Guild Strike: Copyright Challenges in Modern Filmmaking

In an uncanny echo of history, this year witnessed a strikingly familiar scenario unfold. After nearly 150 days of labor stoppage, Hollywood witnessed the end of the second-longest strike in its history.[104] The Writers Guild of America (WGA), representing Hollywood's talented writers, and the Alliance of Motion Picture and Television Producers (AMPTP), an association of the industry's major studios and production companies, jointly announced a long-awaited agreement.[105] On Tuesday, September 26, the union's leadership declared an end to the strike and recommended that their members vote to ratify the contract. The strike officially concluded in the early hours of Wednesday, September 27, after 148 grueling days, with the union's membership scheduled to begin their vote on Monday, October 2.[106] For many, this moment was a cause for celebration.[107]

Nevertheless, how did we arrive at this juncture? It all began on April 17, 2023, when WGA voted in favor of authorizing a strike with a staggering 97.9% voting yes.[108] May 1, 2023, when the WGA called for the strike to commence, harshly criticizing studios for creating a 'Gig

[104] Emily Burack, *The Last Time Writers and Actors Went on Strike at the Same Time, Ronald Reagan Was SAG President*, Town and Country (July 18, 2023), https://www.townandcountrymag.com/leisure/arts-and-culture/a44579128/ronald-reagan-sag-president-double-strike-1960-photos/.
[105] John Koblin and Brooks Barnes, *What's the Latest on the Writers' Strike?* NY Times (September 27, 2023), https://www.nytimes.com/article/wga-writers-strike-hollywood.html
[106] Cynthia Littleton, *WGA Strike Hits 100 Days: Timeline of Key Events*, Variety (August 9, 2023) https://variety.com/2023/tv/news/wga-strike-timeline-key-events-1235692030/
[107] Pamela Chelin, *'It's a big exhale': Writers rejoice over drinks while celebrating WGA deal at L.A. bars,* LA TIMES (September 25, 2023) https://www.latimes.com/entertainment-arts/business/story/2023-09-25/sag-aftra-strike-wga-rally-at-neat-after-strike-deal-reached
[108] Littleton, *supra* note 106.

Economy' that aimed to transform writing into an entirely freelance profession.[109] Picketing started on May 2. Then, in July, the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), launched their strike, standing in unwavering solidarity with the WGA. This historic event marked the first time since the 1960s that the WGA and SAG had gone on strike together.

In 1960, the WGA initiated their strike on January 16, followed by the SAG joining them on March 7, led by the seasoned SAG president, Ronald Reagan.[110] Yes, that Ronald Reagan. He was brought back in 1959 precisely to navigate the guild through these challenging negotiations. When the studios remained unyielding, the future President called for a strike.[111]

So, what has been the central sticking point in this strike, nearly 65 years later? Aside from the obvious demands for better working conditions, pay, and job stability, the focal point of this strike has been Generative Artificial Intelligence (AI). What exactly is Generative AI? It is AI with the remarkable ability to create text, images, or other media using generative models.[112] These AI models learn from their input training data and generate new data with similar characteristics.[113]

Looking at this strike through the lens discussed earlier, it becomes evident how aspiring screenwriters might be discouraged from creating fresh content when they consistently need more protection and fair compensation. Consequently, talented screenwriters, or those who produce exceptional content, may stop creating altogether, akin to the scenario that unfolded in 2020. However, while a global pandemic can temporarily stall a profitable business, it is far less justifiable regarding the abuse and misuse of novice scriptwriters' work.

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[109] *Id.*
[110] *Burack, supra note 104.*
[111] Jan Wilson, When Hollywood Strikes, LAB. L. J. 42, 10 (1991).
[112] *Id.*
[113] *Id.*

Technological advancements have ushered in an era where novices face more than just challenges in proving copyright infringement. The days of hard physical copies and in-person pitches have given way to Word documents and ideas pitched over Zoom.[114] While these advancements may seem like a step forward, they have also complicated matters by putting documents directly in the hands of powerful corporations.[115] As a result, an evolving area of law must constantly adapt to address these changing dynamics.

In conclusion, the Hollywood writers' strike of this year, mirroring a historical precedent, underscores the importance of fair compensation, protection, and the evolving challenges posed by Generative AI and technology in content creation.[116]

C. The Power of Interpretation: Subjective Evaluation's Impact in Legal Proceedings

Continuous debate among American legal scholars revolves around incorporating subjective legal analysis in various fields, often supplementing an objective standard.[117] Some courts have disapproved of applying subjective analysis to outside realms involving questions of law that play more on subjective beliefs, attitudes, and opinions.[118] However, this concept is increasingly recognized in diverse legal contexts, from murder mitigation to contract law. This shift towards

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[114] Ken Miyamoto, *How Screenwriters Can Master the Hollywood Zoom Meeting,* Screen Craft (September 11, 2022), https://screencraft.org/blog/screenwriter-zoom-meeting/ ("Hollywood has had to change the way they do business. The "water bottle tours" and in-person general meetings on the studio lot have been replaced by virtual Zoom pitch meetings with top industry decision-makers. The shift to online meetings has been jarring for some screenwriters").

[115] Peter Hirshberg, *First the Media, Then Us: How the Internet Changed the Fundamental Nature of the Communication and Its Relationship with the Audience*, BBVA Open Mind https://www.bbvaopenmind.com/en/articles/first-the-media-then-us-how-the-internet-changed-the-fundamental-nature-of-the-communication-and-its-relationship-with-the-audience/ ("In just one generation the Internet changed the way we make and experience nearly all of media. Today the very act of consuming media creates an entirely new form of it: the social data layer that tells the story of what we like, what we watch, who and what we pay attention to, and our location when doing so.").

[116] Roger Gachago, The Effect of Technology on Copyright. (Aug. 2011) (B.A. thesis, University of Cape Town) (on file with university).

[117] R. George Wright, Article, *Objective and Subjective Tests in the Law*, 16 U.N.H. L. Rev. 121 (2017) (Across many subject areas, the law commonly attempts to distinguish between objective and subjective tests, and to assess the merits of objective as opposed to subjective legal tests.).

[118] *Id.*

subjectivity is particularly relevant in niche areas like film, which inherently rely on viewers' subjective beliefs, attitudes, and opinions for interpretation.[119]

In murder cases, many state laws allow murder charges to be mitigated to manslaughter when the defendant demonstrates subjective distress.[120] However, an objective standard ensures that the defendant's subjective belief aligns with societal norms.[121] While murder cases are significantly different from copyright law, this evolution of law signifies the importance of considering subjective elements.[122] Courts have taken time to adapt their legal frameworks to reflect more socially acceptable standards, acknowledging the necessity of objective safeguards in such grave matters.

In the realm of copyright infringement, the Fourth Circuit's analysis introduces a subjective standard when evaluating "substantial similarity," but like murder mitigation, it is constrained by an objective rule.[123] Additionally, this analysis remains under the purview of the court, not a jury, leading to concerns of potential bias, and some argue illuminating the subjective test at all. Since copyright infringement cases do not involve malice or harm akin to murder, it makes sense to favor a purely subjective standard, emphasizing beliefs, attitudes, and opinions rather than an objective one.[124]

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[119] Louis De Alessi, and Robert J. Staaf.,Subjective Value in Contract Law, 145 J. OF INST. AND THEORETICAL ECON.IC ,561, 564 (1989)
[120] Paul H. Robinson, Abnormal *Mental State Mitigations of Murder – The U.S. Perspective,* PENN CAREY LAW 325 (2011).
[121] William M. Robinson, *Turning Murder to Manslaughter: The Six Pillars of the Manslaughter Defense and Other Rousing Stories*, Sixth District Appellate Program, http://www.sdap.org/downloads/research/criminal/homicide3.pdf ("Judgment requires consideration of important subjective factors… allowing considerable room to argue that the unique circumstances present would have led a reasonable person in your client's situation and knowing what he/she knew, to act rashly out of passion").
[122] Robinson, supra note 120.
[123] Copeland v. Bieber, 789 F.3d 484, 488 (4th Cir. 2015).
[124] Feist Publ'ns, Inc.v. Rural Tel. Serv. Co., 499 U.S. 340, 359 (1991).

Contract law presents a compelling parallel to the realm of copyright, as it frequently employs a subjective approach when interpreting contracts.[125] Within contract law, courts place significant emphasis on discerning the parties' mutual intent, delving into the nuances of their interactions and negotiations to uncover the true meaning and obligations inherent in the contract. In doing so, they consider various factors, including the circumstances surrounding the contract's formation, the parties' intentions, and any signs of duress or undue influence that may have affected the agreement. This comprehensive analysis reflects the core principles of fairness and equity, ensuring that contractual agreements align with the genuine intentions of the parties involved.

This approach in contract law resonates with the ongoing discussion surrounding copyright, where novice scriptwriters often find themselves at a disadvantage when dealing with large-scale motion picture corporations. Much like how contract law seeks to protect parties from coercion or exploitation, there is a growing need for similar safeguards in the creative sphere. Novice scriptwriters, often lacking major corporations' resources and bargaining power, may face unequal negotiations and agreements that do not truly reflect their intentions or interests.

In this context, the application of subjective analysis becomes particularly relevant. Just as contract law endeavors to uncover parties' true intent to ensure fairness, copyright law should similarly strive to protect the rights and interests of creators, especially those with limited resources. By considering subjective factors such as the author's intent, artistic expression, and the context of creative works, the legal framework can better address the complexities of copyright disputes in a manner that upholds the principles of justice and equitable treatment. The parallel between contract law's subjective approach to interpreting agreements and the challenges faced by novice scriptwriters in the world of copyright highlights the importance of adapting copyright law

[125] Natalie Bucciarelli Pedersen, *A Subjective Approach to Contracts? How Courts Interpret Employee Handbook Disclaimers,* HOFSTRA LAB. & EMP. L.J. 101 (2008).

to protect creators' interests better. By embracing a subjective analysis that considers the author's intent and artistic expression, we can foster a more equitable and just legal environment for all those involved in the creative process.

Subjective analysis is gaining ground in our legal system but remains contentious in some instances. An objective standard upholds moral/societal standards, while a subjective one is better suited to address beliefs, attitudes, and opinions. Certain Federal Circuit Courts, such as the Fourth and Ninth Circuits, have adopted this dual analysis, which poses risks of inconsistencies and personal biases in rulings. Accordingly, emphasizing subjective analysis, the First, Second, and Fifth Circuits offer a more suitable approach that should be adopted nationwide. The increasing acceptance of subjective analysis in other areas of litigation underscores its importance, especially in the unique context of motion picture films, where individual subjective interpretations are paramount. To achieve this, courts should entrust the question of copyright infringement to juries, allowing for a more balanced and objective assessment.

IV. CONCLUSION

In summary, copyright infringement laws in the United States need more uniformity, leaving novice scriptwriters with uneven protection for their original ideas.[126] This inconsistency often results in more giant corporations taking advantage of their power and infringing upon the creative work of novices. This leads to economic losses and discourages new content creation within the industry. Thus, addressing this issue and providing better protection for novice scriptwriters is crucial.

[126] *See generally* Robert Spoo, *The Uncoordinated Public Domain*, 35 CARDOZO ARTS & ENT LJ 107 ("Profound disparities in the length and scope of copyrights from country to country create global disharmony in the protection and availability of creative works.") *see also see also Copyright Registration Is a Prerequisite to Suing for Infringement,* WILEY LAW (March 4, 2019), https://www.wiley.law/alert-Copyright-Registration-Is-A-Prerequisite-to-Suing-for-Infringement

Since the Supreme Court's 1991 ruling in *Feist*, there has been a notable absence of guidance on copyright infringement issues. This silence has led to a divergence among the Federal Circuit Courts, each adopting its distinct standard for copyright infringement.[127] This Circuit split highlights how perceptions of subjective factors have evolved.[128] The Sixth Circuit Courts adhere closely to the purely objective standard the Supreme Court sets.[129] In contrast, the First, Second, and Fifth Circuit Courts have embraced a purely subjective standard, departing significantly from precedent.[130] Meanwhile, the Fourth and Ninth Circuit Courts have adopted a mixed objective/subjective standard, where an objective ruling ultimately overshadows subjective analysis.[131] Among these deviations, the First, Second, and Fifth Circuit Courts offer the most protection to novice scriptwriters.

Examining how other countries handle similar issues helps shape whether the First, Second, and Fifth Circuit Courts approach is correct in copyright cases. While the European Union establishes a baseline of copyright law to ensure consistency among member nations, individual countries can introduce their nuances within reasonable limits that do not contradict European Union law.

Drawing a parallel between France and Italy's copyright laws is akin to comparing the approaches of the First, Second, and Fifth Circuit Courts to that of the Sixth Circuit Courts and Supreme Court precedent. France's copyright infringement approach entails a subjective analysis,

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[127] Latin Am. Music Co. Inc. v. Media Power Grp., Inc., 705 F.3d 34 (1st Cir. 2013); *See also* Hamil Am. Inc. v. GFI, 193 F.3d 92 (2d Cir. 1999); *See also* Copeland 789 F.3d 484; *See also* BWP Media USA, Inc. v. T&S Software Assocs., Inc., 852 F.3d 436 (5th Cir. 2017); *See also* R.C. Olmstead, Inc. v. CU Interface, LLC, 606 F.3d 262 (6th Cir. 2010); *See also* Funky Films, Inc. v. Time Warner Entm't Co., Ltd. P'ship, 462 F.3d 1072 (9th Cir. 2006)
[128] Funky Films, Inc., 462 F.3d at 1072.
[129] Bridgeport Music, Inc. v. UMG Recordings, Inc., 585 F.3d 267 (6th Cir. 2009).
[130] Johnson v. Gordon, 409 F.3d 12 (1st Cir. 2005); *See* Warner Bros. v. ABC, 720 F.2d 231 (2d Cir. 1983); *See also* Randolph v. Dimension Films, 634 F. Supp. 2d 779 (S.D. Tex. 2009).
[131] Levi v. Twentieth Century Fox Film Corp., Civil Action No. 3:16cv129, 2018 U.S. Dist. LEXIS 53600 (E.D. Va. Mar. 29, 2018); *See also* Stewart v. Wachowski, 574 F. Supp. 2d 1074 (C.D. Cal. 2006).

while Italian courts lean more toward objective analysis. France, often considered the birthplace of cinema and a nation that empowers content creators with ownership rights, offers valuable insights for the United States to consider in adapting its laws to protect novice scriptwriters and creators better.

Three key factors have driven this shift in copyright protection: the purpose of motion pictures in society, the evolving nature of the law and its benefits, and the significance of subjective evaluation in legal proceedings. Firstly, motion pictures serve many purposes, with revenue generation and entertainment paramount. However, entertainment is only attainable with the subjective enjoyment of viewers, underscoring the importance of subjectivity in media. Secondly, the law must evolve to keep pace with technological advancements, as seen in areas where technology plays a significant role. Failure to adapt can have adverse consequences, as evident in circuits that have not updated their analysis. Lastly, subjective analysis plays a crucial role in various areas of the law, such as murder mitigation and contract law. Applying a purely objective standard to copyright infringement, akin to murder mitigation, may not be suitable, as copyright issues often involve impression-based materials where subjectivity plays a significant role. In contract law, subjective elements can significantly impact outcomes, and if copyright law were treated similarly, it could disproportionately favor large corporations over novices. Therefore, these three factors underscore the importance of subjective analysis within the multimedia realm, and adopting the analysis of the First, Second, and Fifth Circuit Courts is essential to providing adequate protection for novice scriptwriters.