

FRIDAY, JANUARY 9, 2026

9th Circuit's 'Top Gun' copyright ruling crashes and burns, costing heirs millions

Copyright law's reliance on judges to parse art yields predictably flawed results—evident in *Yonay v. Paramount*, where the court dismissed the original "Top Guns" article behind the Top Gun films.

By Timothy D. Reuben

Copyright law has long been a confusing and complex legal domain, which is continuously made more intricate by incomprehensible judicial opinions. Trusting bench officers to dissect artistic works and opine regarding what is protectable and what is not is simply folly—how can a legal career prepare one to competently decide what is highly debatable artistically? And yet, our current questionable legal construct for evaluating infringement relies heavily on the analysis of judges to determine incredibly valuable rights.

So, in *Shosh Yonay et al. v. Paramount Pictures Corporation*, 2026 DJDR 163 (2026), Judge Eric D. Miller of the 9th Circuit, joined by Judges Andrew D. Hurwitz and Jennifer Sung, penned another opinion purporting to analyze what in art is protectable. The case involves potentially a lot of money because it's about the Top Gun naval program and the Tom Cruise films that were hugely successful and filled with exciting special effects of naval aeronautics. But unlike the popular films, this case ends sadly, with an unfair result for the heirs of the writer of the original article "Top Guns." And the analysis of the court,



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to the benefit of Paramount, arguably contains several flaws that led to failure for the plaintiffs.

Ehud Yonay wrote an 11-page article entitled "Top Guns," published in 1983 in *California Magazine*, in which he used "extensive images and subjective expression" to de-

scribe the famous Top Gun program. Yonay even used apparently fictional names (Yogi and Possum) to describe the experiences of two trainees, their experiences flying F-14 aircraft and the dynamics between them, as well as within the program. Paramount promptly bought "all rights to the

article." The Paramount deal provided that Yonay would receive a credit in any movies "produced by [Paramount] hereunder and substantially based upon or adapted from" his article. In 1986, Paramount released *Top Gun*, which was the top-grossing film of the year. Im-

portantly, Yonay was given a credit that the film was “suggested by” his “Top Guns” article. Although the opinion does not recognize this, the credit “suggested by” means “a very loose adaptation of an original source material, departing massively from the original plot, characters, or themes.” Sometimes characterized as a “springboard,” an example of this credit is how *The Sound of Music* was “suggested by” the Von Trapp family’s real-life story—and of course you couldn’t have one without the other. Thus, Paramount essentially acknowledged that the 1986 film was, to some degree, both inspired by and based on much of the article, since the film relied on and detailed so much of the factual as well as romantic nature of the *Top Gun* program described by Yonay.

Ehud passed in 2012, and pursuant to their statutory rights as heirs, his widow and son terminated the copyright grant made by him to Paramount in their agreement. The opinion is silent on the details, but likely the Yonays received a very small financial payment under the original agreement, while the *Top Gun* movie made vast sums for Paramount and others. Expecting a sequel, this decision would appear to have been sound thinking by the Yonays, and ultimately in 2022, Paramount released the sequel: *Top Gun: Maverick*, another Tom Cruise film filled with amazing aerodynamics. But Paramount did not credit the Yonays or the article or pay them a penny, so they sued for copyright infringement and breach of contract in the Central District.

Initially, Judge Percy Anderson denied a motion to dismiss but later granted summary judgment, finding that “Top Guns” and *Maverick* are not “substantially similar” because, although the works have “some similarities,” those are “based on unprotected elements” like facts about the *Top Gun* program or “general plot ideas [and] familiar stock scenes and themes.” Again, importantly, the trial court held that failure to credit Yonay pursuant to the agreement was not a breach, finding (incredibly) that “*Maverick*

was not produced under the agreement.” Judge Anderson also excluded the testimony of the Yonays’ literary expert, while allowing in the testimony of Paramount’s expert. The Yonays appealed and hired former 9th Circuit Judge Alex Kozinski, an expert himself in copyright law, to argue their case. But they still lost, and the judgment was affirmed.

After the “cut and paste” language citing the historical case law and standards in copyright law—noting that plaintiff must pass both the extrinsic and intrinsic tests—the opinion then attempts to evaluate whether there was substantial similarity between the article and the 2022 sequel by using those judicially created tests. Briefly and without exploring nuances, the extrinsic test “assesses the objective similarities of the two works,” and expert testimony is admissible for this analysis; the intrinsic test is supposed to examine “similarity of expression from the standpoint of the ordinary reasonable observer, with no expert assistance.” Caselaw supports a trial court applying these two tests on a summary judgment motion, presumably since there is no issue of fact about what the two works in question are.

Of course, there is a pretty big difference between an 11-page article and a two-hour feature film, yet the court just brushes aside the Yonays’ arguments because they “identify similarities between the article and the film only by describing both works at such a high level of abstraction that the similarities do not involve protected expression.” But in fact, the opinion goes on to detail numerous examples pointed out by the Yonays of similarities and then dismisses them all as “too general to be protectable.” That’s the first flaw. There are so many similarities detailed in the opinion that this article would itself be far too long to describe them all—which illustrates that there had to be a question of fact. The Yonays describe similarities in plot, sequence, dialogue, characters, theme, mood, setting and pace, all of which was dismissed by the court. It would be interesting to learn from the

court what it thinks is actually protectable, but it does not say. In the end, each one of the similarities is deemed factual or otherwise unprotectable ideas. What this part of the opinion illustrates is that what is protectable expression is clearly in the eye of the beholder—which means it should be tried and not disposed of on summary judgment. And notably, there is no recognition that at least Paramount credited the article with spawning the original blockbuster. If a feature film can ever misappropriate from an article, it would appear just from the court’s analysis that this one did. There is also absolutely no discussion of the sequel being a derivative work of the 1986 film under 17 U.S.C. Section 101 (as it obviously is), which is another flaw in the opinion—obviously the sequel is a derivative work and there should at least be some analysis of whether that created rights for the Yonays.

The court did at least acknowledge that there can be copyright protection of non-protectable elements by the “selection-and-arrangement argument” (e.g. as in Dickens’ “A Tale of Two Cities”: “It was the best of time, it was the worst of times”—a unique phrase composed of simple words). But the moneyed interests again won out over the artist anyway, this time in an even more strained argument, a third flaw. The court states that the Yonays “identify no . . . shared pattern of expression” between the works, although they “attempt[ed] to articulate patterns the works share.” But the court concludes “the patterns they describe are not the original expression in [Yonay’s] article.” The court bent over backwards to try to avoid the multiplicity of artistic arguments—and judicial officers are not really trained to analyze those. Simply put, that these appellate judges opine in detail about so many arguable similarities illustrates that there was a clear issue of fact that should not have been decided on summary judgment.

The court also affirmed the decision to exclude the Yonays’ literary expert, another flaw. Often this type of testimony is helpful in the

analysis and would create an issue of fact. But the expert acknowledged his approach was not to exclude unprotectable elements in his evaluation, and the court did not like that. But of course, what is protectable is really quite hard to determine, especially for a bench officer, since arguably very little in art is new or original. As W. Jackson Bate wrote back in 1970 in his “Burden of the Past,” since the 17th century, artists have been challenged by “the difficulty of achieving anything new.” Christopher Booker, in his 2004 work “The Seven Basic Plots,” pointed out there are not many new plots, new dynamics in love or adventure or other stories. One can debate whether the stories of both exceptional *Top Gun* films are unique, but here, there is no question that the sequel and the original film were at least loosely adapted from the article, which explores an exciting naval program that had not been depicted before—i.e., that was fresh and new. And as admitted by Paramount itself in its original credit, *Top Gun* was adapted from the article. Yet that fact was lost in the court’s struggle to be a literary analyst and follow the somewhat confusing tests that the 9th Circuit laid out long ago.

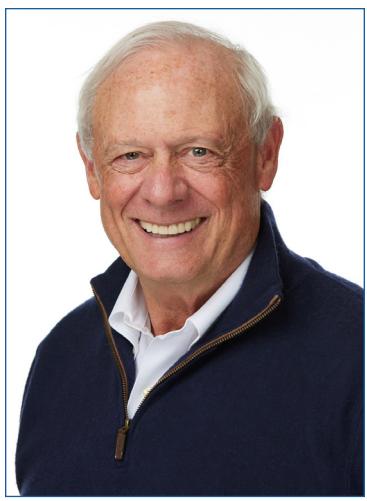
The final flaw came under the contract claim and the misinterpretation of its language. The court found that Paramount did not breach because the film was not “produced by [Paramount] *hereunder*” (emphasis added). Citing Black’s Law Dictionary, Judge Miller defined the word “hereunder” as “in accordance with the terms of this document.” The court then tautologically concluded that, because it found no copyright infringement, “it follows that Paramount did not use that same copyright, which it received through the agreement, to produce *Maverick*.” What?? What about rights other than copyrights? The court apparently forgot that, at least according to the opinion, the contract conveyed “all rights,” which are not just copyrights. For example, under California law, implied-in-fact contracts support idea submission claims, so especially in light of the credit

in the original film, since *Top Gun* was at least “suggested by” the article, that is arguably a right that Paramount used and was bound to credit in some way in the sequel. Even the name of the article was used for both films. Some discussion of other rights was necessary, even if to dismiss them.

Judges are not literary experts, nor are they artists by trade. Interpreting contracts or statutes or evaluating admissibility of evidence is a different skill. Perhaps the problem is the long-used extrinsic and

intrinsic tests devised by the courts, which have unfortunately put bench officers in a profoundly impossible task of being artistic experts. These tests ask too much of the bench and should be revisited. Here, there is little doubt that these wonderfully creative financial blockbusters owe something to Ehud and his family. But not according to the 9th Circuit, and that’s just wrong. Many clearly contributed talent to the success of *Maverick*, and many were well-compensated for it—but not the Yonays.

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