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Comment

Combatting Cyberstalking with Copyright Law: An Alternate Route for Redress

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This Comment explores the growing phenomenon of "copycat cyberstalking," a form of stalking in which individuals obsessively mimic another's social media content—including posts, poses, outfits, captions, and digital aesthetics—to the point of emotional distress and reputational harm. Given the limitations and inconsistencies of existing cyberstalking laws, which often fail to address nuanced and non-physical forms of digital harassment, this Comment proposes an innovative legal remedy: the application of copyright law. Through a detailed analysis of the first-of-its-kind case based in copyright, Gifford v. Sheil, this Comment argues that content creators can frame instances of cyberstalking as copyright infringement by utilizing doctrines such as the substantial similarity test. By applying copyright standards to curated digital expression, victims can pursue legal recourse even when cyberstalking statutes fall short. Ultimately, this Comment advocates for the recognition of user-generated content as protectable creative work and highlights the potential for copyright law to fill critical enforcement gaps in the digital age.

COMMENT CONTENTS

Combatting Cyberstalking with Copyright Law: An Alternate Route for Redress

JAYLEIN PIEKARSKI*

INTRODUCTION

Imagine you are lying in bed when you receive a text from a friend asking if you would like to have dinner at a recently opened restaurant in your city. After Googling the restaurant's menu and parking situation, you agree and plan to meet your friend that night. Impressed with the décor, food options, and service, you post a photo of your plate to Instagram with the caption "Loving this new restaurant!" The next day, you receive an Amazon package containing multiple outfits and matching accessories. You try each outfit on, style it with its accompanying accessories, and take a few photos in your bedroom mirror, changing your pose and angles for each outfit. The following weekend, you go out to a local nightclub wearing one of these new outfits and post a video of you singing your favorite song, switching the camera view halfway through the video to showcase your environment.

A few days later, you receive an account suggestion on Instagram. Thinking that the person looks vaguely familiar, you click on the account and begin scrolling. Suddenly, you realize that not only does this person look familiar, but their *entire account* looks familiar because their posts are *exactly like yours*. You see a post at the same restaurant you visited a few days ago; you know the photo was not the one you took, despite it being at the same place, of the same meal, and taken at the same angle as yours. You continue scrolling and see photos in the same outfits as yours, again with the same poses and angles, and even with the same filter placed over the photo. Finally, you see a video taken in the same nightclub you visited, with the subject wearing the same outfit and switching the camera halfway through while singing a song by the same artist. Each post was made within days of yours, and you realize this has been going on for at least two months.

What do you do about this? Should you go to the police? Would the police even take the situation seriously or just tell you to call them back if any "real" harm occurs? You are trying to build an online persona, and you know that brands will not want to partner with you if all your posts are the same as somebody else's, despite who made the post first. You have put a lot of work into creating your content—choosing the location, lighting, angle, filter, pose, caption, etc.—and it is both frustrating and quite unsettling to see another person steal your ideas and sell them as their own.

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Although this situation may seem far-fetched, similar behavior has been documented online many times. There is not a broadly recognized term for this phenomenon, but it is occasionally referred to as "copycat stalking."[1] While this behavior may appear inconsequential, the fear, distress, and, in some cases, financial loss[2] resulting from these situations are very real.

One creator, Vi Luong, posted a series of TikTok videos in September 2024, accusing her former friend and fellow content creator, Yuyi Chua, of being a "serial content stealer."[3] Vi Luong discussed several instances over four years in which Chua had recreated her videos without permission or credit, including clothing and product reviews, confidence tips, cosplays, and general follower advice.[4] Chua's videos copied Luong's videos "word for word, movement for movement, and mannerism for mannerism,"[5] even making the same spelling mistakes that Luong had made in her videos and captions.[6] Looking back at the situation, Luong expressed the feeling that Chua was trying to "deskin" her and "wear [Luong's] skin as her own."[7] Chua, meanwhile, was rewarded with an increased follower count, brand deals, gifted products, and a front row seat at New York Fashion Week.[8]

Another viral incident occurred in 2018 when Chloe Cowan, a student at the University of Dundee, discovered a fellow student had been mirroring her Instagram posts for nearly two years.[9] The copycat had "not only worn the same clothes, but she had also posed in the same way, and often used near identical captions."[10] The account had copied hundreds of Cowan's pictures and even went as far as to reenact videos of a photo album that Cowan had posted of her father, who passed away.[11] According to Cowan's sister, this behavior was reported to both the University and local police; the University launched a cyberstalking investigation into this behavior, but it

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[1] *Infra* Part I.

[2] *See* discussion *infra* Part III (discussing Gifford v. Sheil, No 1:24-cv-00423 (W. Dist. Tex. Apr. 22, 2024)).

[3] Vi Luong (@ViLuong), TIKTOK (Sept. 20, 2024), https://www.tiktok.com/t/ZP8jojr3X (discussing Chua's history of serial content stealing).

[4] Vi Luong (@ViLuong), TIKTOK (Sept. 21, 2024), https://www.tiktok.com/t/ZP8jojC6e (providing side-by-side comparisons between her content and Chua's content).

[5] Vi Luong (@ViLuong), TIKTOK (Sept. 22, 2024), https://www.tiktok.com/t/ZP8johHm3.

[6] *Id.*

[7] Vi Luong (@ViLuong), TIKTOK (Sept. 21, 2024), https://www.tiktok.com/t/ZP8joSGjv.

[8] Vi Luong (@ViLuong), TIKTOK (Sept. 22, 2024), https://www.tiktok.com/t/ZP8johHm3. While not always the primary motive, these opportunities highlight the possible financial incentives behind such behavior.

[9] Zoe Drewett, *Instagram Copycat 'Took Same Pictures as Another Student for Two Years'*, METRO UK (Nov. 21, 2018, 8:10 AM), https://metro.co.uk/2018/11/21/instagram-copycat-took-same-pictures-as-another-student-for-two-years-8161591.

[10] *Id.*

[11] Joel Adams, *Woman Claims a Mystery Lookalike is Stalking Her Sister 'to the Extreme' by Bizarrely Copying All of Her Instagram Posts*, DAILY MAIL (Nov. 20, 2018), https://www.dailymail.co.uk/news/article-6406277/Student-discovers-mystery-lookalike-stalking-extreme-copying-Instagram-posts.html ("This girls stalking behaviour is to the extreme of reenacting videos of a photo album that Chloe posted of my dad who past [sic] away.").

is unclear whether any legal repercussions resulted from the incident.[12]

Copycat stalking is not limited to large creators—many stories can be found online of individuals discussing their own experiences with copycats. Writing to The Guardian for advice, one woman said of an acquaintance: "[S]he has always been where I've been, thought what I've thought. . . . I thought I was imagining it[, b]ut the list is huge and includes the classes I go to, and the clothes, colours, phrases and home decor I choose."[13] Although the victim felt that this constituted stalking, she believed she could not do anything unless her life was in danger.[14]

Similar allegations came from influencer Sydney Nicole Gifford, who filed a lawsuit against fellow creator Alyssa Sheil in April 2024, for replicating various elements of Gifford's posts, captions, and branding for over a year.[15] As discussed in greater detail later in this Comment, Gifford and Sheil's social media accounts became virtually identical—some followers even mistaking Sheil for Gifford.[16] Although Gifford's claims sounded primarily in intellectual property law, a deeper look into the situation revealed accusations of unsettling behavior somewhere between relentless plagiarism and outright harassment. While the case was eventually dismissed by Gifford for personal reasons,[17] it seems inevitable that similar situations will continue to occur as social media usage evolves; existing laws do not adequately address such behaviors in a way that balances artistic expression with protection from intimidation or escalation.

Generally, there is a difference in how both victims and onlookers view these instances, with some viewing copycat behavior as a form of stalking and harassment, while others see it as content theft, imitation, and copying.[18] These competing views are consistent with the legal uncertainties faced by victims when addressing such behavior. Given the nature of this behavior and its effects on victims, the actions taken by perpetrators in these scenarios *should* constitute cyberstalking. However, victims of cyberstalking are often reluctant to report these incidents to law enforcement due to the way

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[12] *See id.*

[13] Annalisa Barbieri, *My Friend Copies Things I Say, Wear, and Do, and Watches My House. Is This Stalking?*, THE GUARDIAN (Mar. 22, 2024, 10:30 AM), https://www.theguardian.com/lifeandstyle/2024/mar/22/my-friend-copies-things-i-say-wear-and-do-and-watches-my-house-is-this-stalking.

[14] *See id.*

[15] *See generally* Gifford v. Sheil, No 1:24-cv-00423 (W.D. Tex. Apr. 22, 2024).

[16] *Id.* at 21 ("Defendants' mimicry of Plaintiffs' appearance and the overall image associated with Plaintiffs' brand . . . causes the two to be so similar that followers will be and are unable to differentiate between the two. On information and belief, actual instances of consumer confusion have occurred.").

[17] *See* discussion *infra* Part III.

[18] Specifically, occurrences between those with larger platforms, such as celebrities and influencers, are often viewed as mere copying, while situations between individuals without a large following are typically interpreted as cyberstalking. *See, e.g.*, u/epicaac, REDDIT (Nov. 21, 2018, 1:58 AM), https://www.reddit.com/r/blogsnark/comments/9yt66a/woman_claims_a_mystery_lookalike_is_stalking_her (noting that "it certainly makes it take on more of a harassing, stalker-vibe" that Cowan was not a social media influencer).

cyberstalking cases are commonly handled throughout the legal system.[19] As a result, the unique dynamics at play in these situations often fall into a legal gray area that may serve as a barrier to justice, and as cyberstalking behaviors evolve to include obsessive surveillance and mimicry—acts that are not sufficiently addressed by existing cyberstalking legislation—victims are left without adequate legal remedies.

Copyright law has the potential to provide a viable alternative. By framing the repeated recreation of posts, outfits, locations, and poses as infringement of original expression, victims should be able to use copyright doctrine to protect their creative output while also forcing perpetrators to face legal repercussions for their actions. This Comment argues that while copyright law is not designed to address harassment, its lower threshold and enforcement mechanisms may serve to offer relief for victims in situations where cyberstalking laws fall short, specifically in the context of online influencers, artists, and content creators. Part I of this Comment will discuss the limitations of cyberstalking laws in instances of copycat cyberstalking. Part II will provide an overview of copyright law and introduce the elements that are most likely to be at odds in situations of copycat cyberstalking. Part III will apply a substantial similarity analysis to the recently ended case *Gifford v. Sheil* to illustrate how similar claims may fall within the scope of copyright infringement. This Comment will conclude by addressing possible counterarguments to this approach, ultimately arguing for the use of copyright law as an alternate remedy to copycat cyberstalking when current cyberstalking laws fall short.

I. PROBLEMS WITH EXISTING CYBERSTALKING LEGISLATION

Generally, cyberstalking refers to "the use of any form of technology to conduct acts of surveillance, make threats, express intent to injure or harass, or intimidate a victim to the point of them reasonably fearing for their safety or feeling significant emotional distress."[20] Cyberstalking thus includes behaviors that fall under the traditional definition of stalking with the added use of technology, as well as behaviors that require technology, such as hacking, account spoofing, unsolicited messaging, information sourcing, excessive posting, and more.[21] Given this, it appears that copycat stalking

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[19] *See* discussion *infra* Part I.

[20] DAVID M ADAMSON, ANNIE BROTHERS, SASHA ROMANOSKY, MARJORY S. BLUMENTHAL, DOUGLAS C. LIGOR, KARLYN D. STANLEY, PETER SCHIRMER & JULIA VIDAL VERÁSTEGUI, RAND CORPORATION, CYBERSTALKING: A GROWING CHALLENGE FOR THE U.S. LEGAL SYSTEM 2 (2023) available at https://www.rand.org/pubs/research_reports/RRA2637-1.html [hereinafter CYBERSTALKING: A GROWING CHALLENGE].

[21] Sameer Hinduja, *Cyberstalking*, CYBERBULLYING RSCH. CTR. https://cyberbullying.org/cyberstalking (last visited Apr. 28, 2025). *See also* Congressman Brian Fitzpatrick, *Protecting Americans from Cyberstalking,* https://fitzpatrick.house.gov/protecting-americans-from-cyberstalking (last visited Apr. 28, 2025) (explaining that cyberstalking extends traditional stalking into digital spaces).

through the use of technology should *also* be considered a form of cyberstalking. However, victims may struggle to make such claims for various reasons. While legislation to criminalize cyberstalking has been adopted on both the federal and state level,[22] technology has developed faster than the law's ability to adequately address the realities of the issue.[23] As a result, "[l]aws, law enforcement, and public response systems are not readily equipped to meet every demand . . . ."[24]

The problem with applying cyberstalking legislation to copycat stalking is twofold: (1) law enforcement officers lack the ability to properly assist victims of cyberstalking, and victims are aware of this; and (2) cyberstalking statutes, while seemingly broad, have been construed so narrowly that only the most serious of cases are prosecuted.

A. *Law Enforcement's Inability to Address the Realities of Cyberstalking*

While a glance at the federal cyberstalking conviction rate of 90% may lead one to assume that the United States justice system has been successful in curtailing cyberstalking, the reality is that this success rate is only possible because the majority of victims' cases never make it this far. Although an estimated 2.7 million U.S. citizens reported experiencing cyberstalking behaviors in 2019 alone,[25] only 412 federal cyberstalking cases were filed in the ten-year period between 2010 and 2020.[26] Further, in 2019, just 29% of all stalking victims reported their experience to police, with that number decreasing to 23% for victims of solely cyberstalking (as opposed to those who experienced both traditional and technological stalking).[27]

These figures highlight a significant issue: victims of cyberstalking do not want to report these incidents to law enforcement. There are multiple reasons why. One survey found that about one in three victims did not report their experiences because they did not believe the police would do anything, and one in three did not believe the police would be helpful.[28] The idea that law enforcement struggles to address instances of cyberstalking appears to be a commonly-held belief for various reasons.

First, many stalking victims share stories in which they reported the

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[22] *See, e.g.*, FLA. STAT. § 784.048(1)(d) (2018), LA. STAT. ANN. § 14:40.3 (2020), 720 ILL. COMP. STAT. ANN. 5/12-7.5, MISS. CODE ANN. § 97-45-15 (2024), 11 R.I. GEN. LAWS § 11-52-4.2 (2024).

[23] *See* CYBERSTALKING: A GROWING CHALLENGE, *supra* note 20, at 2 ("The growth of cyberstalking is consistent with the general trend that technology typically develops faster than the capacity of 'existing regulatory agencies [that] lack the legal authority, expertise, and resources to regulate any of the emerging technologies comprehensively, even if they wanted to.").

[24] *See* CYBERSTALKING: A GROWING CHALLENGE, *supra* note 20, at 2.

[25] Erica R. Fissel, *Is It a Crime? Cyberstalking Victims' Reasons for Not Reporting to Law Enforcement*, 12 SOC. SCI. 1 (2023) ("A recent estimate . . . suggests that 3.4 million people experienced stalking in 2019, with 2.7 million of these victims experiencing cyberstalking behaviors.'").

[26] CYBERSTALKING: A GROWING CHALLENGE, *supra* note 20, at 4.

[27] RACHEL E. MORGAN & JENNIFER L. TRUMAN, BUREAU OF JUST. STAT., NCJ 301735, STALKING VICTIMIZATION 2019, at 4 (2022).

[28] *Fissel*, *supra* note 25, at 8.

perpetrator's behavior to law enforcement but received no help or were not taken seriously—this experience is heightened in situations of cyberstalking consisting primarily of electronic communications.[29] Take, for example, the story of Holly Jacobs, a graduate student living in Florida who became a victim of cyberstalking and revenge porn following a break up.[30] After receiving an anonymous email with a link to a website she had never heard of, she discovered that the nude photographs and videos she had sent to her ex-boyfriend appeared on hundreds of websites and included her full name, email address, screenshots of her Facebook page, and her work address.[31] The harassment escalated as she had fake Facebook profiles made in her name, anonymous calls made to her school accusing her of sexual harassment, and nude photos sent to her work colleagues from someone spoofing her email address.[32] Jacobs went to two police stations in Miami, as well as the FBI, and was turned away by all of them:

> One officer said that the online posts were technically legal because she was older than eighteen. Another explained that because she had sent some of the pictures to her ex-boyfriend, he owned them and could do what he wanted with his "property." Still another officer said his department lacked jurisdiction over the attacks because they occurred on the Internet. . . . [T]he FBI told her the "dispute" belonged in civil court and urged her to get a lawyer to sue her harassers and to buy a gun for protection.[33]

In another instance, a woman named Hannah described how her cyberstalker "mimicked [her] life, dressing like her, taking similar photos, similar hairstyles, and even going as far as dating her ex-husband."[34] Hannah noted instances where her stalker had gotten the same haircut and dyed their hair the same color, recreated the filters, fonts, outfits, poses, and editing of Hannah's Instagram posts, and had even driven to Illinois to get the same

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[29] *See, e.g.*, Danielle Citron, *Cops Don't Take Harassment of Women Seriously—Especially Online*, TIME (Oct. 17, 2014, 12:41 PM), https://time.com/3513763/anita-sarkeesian-hate-crimes ("Law enforcement routinely disregards online threats of violence and other modes of cyber-stalking. At times, officers resist dealing with online threats for the same reasons that laypeople refuse to take online harassment seriously. Police laugh off reports of online threats. They dismiss threats as 'online talk' and tell victims that no one is going to come get them."); Katia Beech, *I Had a Cyberstalker, and the Police Wouldn't Help Me*, NYLON (June 14, 2016), https://www.nylon.com/articles/cyberstalker-police **(**discussing her struggles with getting police to file an incident report and enforce her temporary restraining order); Danielle Keats Citron, *From Bad to Worse: Stalking, Threats, and Chilling Effects*, 2024 SUP. CT. REV. 175, 204 ("It is a truism that when victims report cyberstalking, law enforcers do nothing, even though criminal laws ban cyberstalking, harassment, and threats.").

[30] DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 45–50 (2014).

[31] *Id.*

[32] *Id.*

[33] *Id.* at 47.

[34] Strictly Stalking, *194. Copycat Obsession: Stalking Hannah*, at 01:12 (Oct. 3, 2023) (downloaded using Apple Podcasts).

cheek piercing that Hannah had gotten from the same piercer.[35] Hannah went to the authorities after the behavior escalated to threats of violence and harassing posts, but she was told that they could not do anything because much of the stalker's behavior was difficult to prove or prevent.[36] Over time, Hannah became reluctant to report new occurrences to the police, stating: "[E]very time I make a report, [they] are telling me to just get off social media. Just shut down your accounts and leave the internet."[37] Eventually, Hannah contacted a lawyer who told her that although she had grounds for a restraining order, there was nothing she could do about the copycat posts despite the fact that the behavior proved she was being stalked.[38] Even after a restraining order, Hannah's cyberstalking continued; her stalker found a way to evade the restraining order by using their social media following to harass and bully Hannah.[39] These experiences discourage stalking victims, resulting in a lack of trust in law enforcement's ability to assist them.[40]

Another issue, as cyberstalking experts have noted, is that "law enforcement's capacity to investigate these crimes varies widely; small-city and rural police departments often lack the training and resources to respond."[41] This issue extends to federal law enforcement departments as well, given that there is typically no specific training on cyberstalking and law enforcement rarely prioritizes or provides sufficient resources to cyberstalking cases.[42] Technological advancements that allow perpetrators to remain anonymous and untraceable exacerbate this issue. Further, the increasing prevalence of AI and deep fakes has already allowed cyberstalkers to engage in more advanced forms of harassment as law enforcement struggles to differentiate between real and fake.[43]

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[35] *Id.* at 12:15–13:45.

[36] *See id.* at 27:20–27:40 ("It's been six months. I don't know what to do anymore. I've tried to do everything. Can you make this person stop? And they were just like, we can call them and tell them to stop, but there's really nothing we can do. It's online.").

[37] *Id.* at 43:45–44:07. Following this, Hannah explained that she did not want to stop posting because she had become a content creator at this point and relied on this as part of her income. This issue will likely become increasingly common as content creation continues to become a source of income for the general public.

[38] *Id.* at 37:20–37:55.

[39] *Id.* at 41:02–41:20 ("So I, of course, talked to the police again. And I was like, like, this is about me. I don't, I don't know what to do. People are commenting on it and calling me ugly and calling me derogatory terms and supporting my stalker. And the police were like, they found a gray area of the restraining order where it's not a violation and there's nothing we can do about it.").

[40] *See* CYBERSTALKING: A GROWING CHALLENGE, *supra* note 20, at 10 ("Many experts lamented, however, that the justice system at times falls short in trust-building, commenting that this is a critical area for improvement. Some experts reported that when victims decide to report cyberstalking crimes, their claims might be dismissed by law enforcement, reflecting a lack of understanding or empathy.").

[41] *Id.*

[42] *Id.* (discussing causes of cyberstalking being underreported).

[43] *See, e.g.*, Melissa Krull, *Artificial Intelligence is Increasingly Use to Fabricate Claims, Police Say*, (Mar. 20, 2026, 5:12 PM), https://spectrumlocalnews.com/nys/central-ny/news/2026/03/20/law-enforcement-working-to-detect-artificial-intelligence-in-claims ("[P]olice agencies hav[e] to equip themselves for detecting when AI is used for illegal purposes.").

Researcher Nina Jankowicz experienced law enforcement's limited ability to handle these advancements firsthand when the Biden Administration asked her to lead a new Department of Homeland Security group called the Disinformation Governance Board; shortly after this announcement, Jankowicz became the subject of a cyber harassment campaign that centered on the idea that she was the "enemy of free speech."[44] Jankowicz was subsequently "flooded with emails, texts, and voicemails from speakers threatening to kill her[,]"[45] and soon after discovered that at least three artificially generated videos, which showed her engaging in sexual acts, had been uploaded to deepfake porn websites.[46] A month later, the Biden Administration decided to close the board, and Jankowicz resigned.[47] She and her family were "left to face the abuse by themselves—she received no support from her former employer."[48] Because federal laws criminalizing deepfakes were nonexistent, Jankowicz decided to go offline and hired a private security consultant who advised her to avoid coffee shops, not get gas alone, and to stay somewhere else despite being nine months pregnant.[49] The fact that Jankowicz was such a prominent figure who held a substantial position in the federal government and was still unable to receive proper assistance for cyberstalking certainly sends a message to ordinary victims that discourages them from coming forward.

B. *Narrow Application of Federal Cyberstalking Statutes*

In 1996, Congress enacted 18 U.S.C. § 2261A(2)—the federal stalking statute—as part of the Violence Against Women Act.[50] It was amended in 2006 to include cyberstalking,[51] and again in 2013 to broaden the *scope* of cyberstalking; specifically, it included the use of "the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce" to carry out cyberstalking.[52] Prior to this, various federal statutes existed that could be applied to cyberstalking cases (e.g., computer hacking, interstate extortion, committing intimate partner

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[44] Danielle Keats Citron, *The Continued (In)visibility of Cyber Gender Abuse*, YALE L.J. FORUM, 333, 334 (2023).

[45] *Id*.

[46] Nina Jankowicz, *I Shouldn't Have to Accept Being in Deepfake Porn*, THE ATL. (June 25, 2023), https://www.theatlantic.com/ideas/archive/2023/06/deepfake-porn-ai-misinformation/674475.

[47] Citron, *The Continued (In)visibility of Cyber Gender Abuse*, *supra* note 44, at 335.

[48] *Id.*

[49] *Id.* at 334.

[50] CYBERSTALKING: A GROWING CHALLENGE, *supra* note 20, at 3.

[51] Kara Powell, *Cyberstalking: Holding Perpetrators Accountable and Providing Relief for Victims*, 25 RICH. J.L. & TECH., no. 3, 2019, at 1, 9.

[52] 18 U.S.C. § 2261A(2).

violence, coercing a minor to engage in sexual activity[53]), but none directly criminalized the act of cyberstalking. Section 2261A(2) does not provide a private right of action, meaning that a victim must rely on law enforcement and prosecutors to hold their perpetrator accountable.

While the amendment of Section 2261A(2) was instrumental in providing victims with an avenue to obtain justice, it also required prosecutors to prove various elements, such as "the intent of the perpetrator to kill, injure, harass, intimidate, or surveil for those purposes such that the victim has a reasonable fear of death or serious bodily injury or suffers substantial emotional distress."[54] As a result, prosecutors and courts struggled to understand the level of scrutiny that should be applied in these cases to avoid violating a defendant's First Amendment rights.[55] This is a highly contentious issue that has produced a "messy, sometimes incoherent, and deeply unsatisfying body of law . . . [which has] led courts to distort the basic facts of the cases they adjudicate in order to make sense of them."[56]

Over time, courts have narrowed their interpretation of stalking statutes to quell First Amendment challenges relating to online speech. For example, in *United States v. Sayer*, the First Circuit "suggested, in other words, that criminal harassment meant *physical* harassment that puts someone in fear of physical harm, and it was only speech motivated by an intent to engage in *this* kind of harassment that could be considered 'integral to criminal conduct.'"[57] Such narrow interpretations are problematic as they fail to address intent that falls outside of causing physical fear, such as an intent to psychologically dominate or control.[58]

This battle culminated in June 2023 when the United States Supreme Court held in *Counterman v. Colorado* that speech is only a true threat if the speaker is reckless towards the risk that their "communications would be

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[53] For examples of such statutes, see CYBERSTALKING: A GROWING CHALLENGE, *supra* note 20, at 3 ("These statutes were all enacted between 1934 and 1998, with subsequent amendments, and none of them as amended define or specifically punish cyberstalking.").

[54] *See* CYBERSTALKING: A GROWING CHALLENGE, *supra* note 20, at 4.

[55] *See generally* Genevieve Lakier & Evelyn Douek, *The First Amendment Problem of Stalking:* Counterman*,* Stevens*, and the Limits of History and Tradition*, 113 CAL. L. REV. 143 (2025) (discussing recent First Amendment jurisprudence).

[56] *Id.* at 149. *See also id.* at 175 ("To avoid approving statutes that could be used to punish speech that in fact *was* intended to communicate ideas and information—even if also achieving other aims—courts sometimes interpreted the harassment and stalking laws restrictively, to require proof that the speaker was *solely* motivated by an intent to harass or frighten, rather than by other more legitimate desires. In other cases, they interpreted the harm requirement narrowly, to avoid an interpretation of the laws that could potentially implicate the sometimes annoying but often important communicative activity that life in a vigorous democratic society entails.").

[57] *Id*. at 183 (emphasis in original). *See also* United States v. Sayer, 748 F.3d 425, 434 (2014) (stating that a defendant who posted fake online sex ads which invited men to his ex-girlfriend's house put her at risk of physical harm and was, therefore, unprotected speech).

[58] *See* Lakier & Douek, *supra* note 55, at 183. Imposing psychological fear is a common goal for many perpetrators, especially in cases of domestic violence. *Id.*

viewed as threatening violence."[59] In *Counterman*, the Court vacated a stalking conviction by framing this case as one about true threats and making its ruling based on the content of Counterman's speech, rather than the fact that he had been convicted of stalking.[60] Counterman's initial conviction was based on the constant and endless barrage of Facebook messages which caused his victim, a local musician, severe anxiety and distress; his victim had actually not read most of the messages in an effort to avoid more stress.[61] This ruling, once again, places a narrow focus on physical harm and ignores the realities of stalking behaviors and incidents. As a result, victims of cyberstalking are now further discouraged from coming forward when their perpetrator's actions have not been physical or violent.

It is undeniable that victims of cyberstalking face a multitude of challenges when reporting their perpetrators. Stalking victims should be able to hold perpetrators accountable and be able to function without being in constant fear. While some cyberstalking victims attempt to find justice by suing perpetrators for torts such as intentional infliction of emotional distress, defamation, or public disclosure of a private fact, this approach may be impractical in instances of copycat cyberstalking.[62] As with cyberstalking statutes, these claims often rely on proving that the perpetrator intended to harm the victim, which can be difficult to do when a perpetrator's behavior appears innocuous or can be attributed to other motivators such as popularity or financial gain. One underexplored alternative which has the potential to yield better results is the use of copyright law to address copycat cyberstalking.

II. COPYRIGHT LAW AS A POTENTIAL ALTERNATIVE

While copyright law also struggles to keep up with the ever-changing technological landscape,[63] it is slightly more evolved in the social media realm given laws such as the Digital Millenium Copyright Act, which allows

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[59] Myron Minn-Thu-Aye, *True Threats of Coercive Control: Stalking Communications*, Counterman v. Colorado*, and the First Amendment*, 55 SETON HALL L. REV. 1379, 1382 (2025); Counterman v. Colorado, 143 S. Ct. 2106, 2111–12 (2023).

[60] *See* Lakier & Douek, *supra* note 55, at 187–295 ("By the time *Counterman* reached the Supreme Court, it was almost universally understood as a case about threats . . . . The fact that Counterman was convicted of stalking, not threats, did not appear to matter to how courts analyzed the constitutionality of his conviction, however.").

[61] *Id.* at 192.

[62] *See* Citron, *The Continued (In)visibility of Cyber Gender Abuse*, *supra* note 44, at 357–58.

[63] *See generally* Fatin Hamamah, Munaji, Erna, Sukama, & Marhendi, *The Impact of Social Media on Intellectual Property Law* 9 JURNAL PENELITIAN HUKUM EKONOMI SYARIAH 123 (2024) ("Platforms such as Facebook, Twitter, Instagram, and TikTok, have blurred the lines between private and public spaces, creating new challenges in implementing and enforcing IP laws."). *See also* Whitney N. Alston, *The Power of Social Media as an Evolving Force and Its Impact on Intellectual Property*, 11 CYBARIS 1, 6 ("[G]iven that [intellectual property] laws were made so long ago, they may not fully capture all aspects of the needed protections because this type of social media influx was likely not foreseeable when these regulations were enacted.").

creators to request the removal of infringing content online.[64]

Copyright protection extends to original works of authorship that are fixed in a tangible medium of expression.[65] While copyright is vested in the author immediately upon creation of a work, the work must be registered with the U.S. Copyright Office to file a lawsuit for copyright infringement.[66] To establish a prima facie case of copyright infringement, a plaintiff must show: (1) ownership of a valid copyright; and (2) a violation by the alleged infringer of at least one of the exclusive rights granted to copyright owners by the Copyright Act.[67] When evaluating a claim of copyright infringement, courts first determine whether the work is actually eligible for copyright protection, and if so, to what extent the work is protectable.[68]

A. *Establishing Protectability*

Copyright law is premised on two ideas that go hand-in-hand: the originality requirement and the idea-expression dichotomy. As established in the landmark case *Feist Publ'ns Inc. v. Rural Tel. Serv. Co*., "the *sine qua non* of copyright is originality." [69] Under existing copyright law, a finding of originality requires only that a work was independently created by the author and that it possesses at least a minimal degree of creativity.[70] The minimal aspect of this requirement cannot be understated—even a slight amount of creativity will suffice.[71] Further, "originality does not signify novelty; a work may be original even if it closely resembles other works as long as the similarity is *not the result of copying*."[72]

To illustrate the creativity requirement of copyright, consider the holding in *Feist* that even factual compilations could possess the requisite originality when the author chooses "which facts to include, in what order

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[64] 17 U.S.C. § 512.

[65] 17 U.S.C. § 102(a).

[66] U.S. COPYRIGHT OFF., COPYRIGHT BASICS 4 (Sept. 2021), https://www.copyright.gov/circs/circ01.pdf ("Although registering a work is not mandatory, for U.S. works, registration (or refusal) is necessary to enforce the exclusive rights of copyright through litigation.").

[67] Section 106 of the Copyright Act provides owners with exclusive rights to reproduce the work, create derivatives based on the original work, distribute copies of the copyrighted work, perform works in public, display works in public, and perform the work for sound recordings. 17 U.S.C. § 106.

[68] *See* Eric Osterberg, *Copyright Litigation: Analyzing Substantial Similarity*, WESTLAW (5-524-1501) (updated 2020) ("Copyright law prohibits only copying of copyrightable expression. Material that is not copyrightable expression is not considered in the substantial similarity analysis.").

[69] Feist v. Rural, 499 U.S. 340, 345 (1991).

[70] *Id.* Authorship can be established through: (1) literary works; (2) musical works (including any accompanying words); (3) dramatic works (including any accompanying music); (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. 17 U.S.C. § 102.

[71] *Feist Publ'ns Inc.*, 499 U.S. at 345.

[72] *Id.* at 345 (emphasis added). The Court further notes: "[A]ssume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable." *Id.* at 346 (citing Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936)).

to place them, and how to arrange the collected data."[73] In this scenario, a telephone directory book did not meet the originality requirement because it had organized names alphabetically, which was both predictable and commonplace.[74] However, if the work had been copyrightable, a competing telephone company would not have infringed if they had formatted the information differently, such as by rearranging the order of phone numbers.[75] This limited protection is due to the idea-expression dichotomy. While the bar for originality is low, the less original a work is the less protectable it is. Works such as factual compilations are subject to thin copyright protection because they contain very few original elements.

Under the idea-expression dichotomy, an infringement claim is limited to the elements of the work *themselves* that are eligible for copyright protection.[76] In turn, no matter how much originality is displayed in a work, "the facts and ideas it exposes are free for the taking. . . . The very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas."[77] The idea-expression dichotomy serves as a limitation on the scope of copyright protection. Section 102 of the Act excludes copyright protection for any "idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[78] This exclusion balances the Copyright Act with the First Amendment by "permitting free communication of facts while still protecting an author's expression."[79] Thus, copyright law protects only the *way* that an author expresses a general idea.

For example, suppose that an author decides to write a book about a boy who discovers he has superpowers and attends a school that specializes in training children with superpowers. Under the idea-expression dichotomy, the author could not stop others from creating stories that explore the same concept, but she could exercise her rights if someone else were to create a story that copies the protected expressive elements of her story, such as the characters, setting, dynamics, and plot points. Critically, one similar character trait or plot line is insufficient to warrant a finding of copyright

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[73] *Feist Publ'ns Inc.*, 499 U.S. 340 at 348 (1991).

[74] *Id.* at 363.

[75] *See id.* at 362. ("The selection, coordination, and arrangement of Rural's white pages do not satisfy the minimum constitutional standards for copyright protection. As mentioned at the outset, Rural's white pages are entirely typical. . . . The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity.").

[76] For example, if a compilation author adds an original statement explaining a fact, the author may be able to claim copyright protection for this written expression. However, if an author adds no written expression, the only protectable expression is the selection and arrangement of facts. *See id.* at 348. *See also* Harper & Row Publishers v. Nation Enter., 471 U.S. 539, 556–57 (1985).

[77] *Feist Publ'ns Inc.*, 499 U.S. at 349.

[78] 17 U.S.C. § 102(b).

[79] *Harper & Row Publishers*, 471 U.S. at 556.

infringement. Instead, these situations require a court to determine whether there is a 'substantial similarity' between the two works.

B. *Substantial Similarity of the Works*

When an author claims that expressive elements of their work have been copied by the infringer, courts will apply a substantial similarity analysis to determine whether the infringement is actionable.[80] This manner of infringement does not require exact duplication; a plaintiff can prove that the defendant copied their work by showing that (1) the defendant had access to the plaintiff's copyrighted work, *and* (2) that there are substantial similarities between the defendant's work and original elements of the plaintiff's work.[81]

A substantial similarity analysis will depend on the nature of the alleged infringement, the court's substantial similarity test, the amount and importance of material copied from the plaintiff's work, and whether the defendant copied protectable or unprotectable content.[82] The two primary substantial similarity tests are the Second Circuit's 'ordinary observer' test and the Ninth Circuit's 'extrinsic/intrinsic' test.

1. *Ninth Circuit's Extrinsic/Intrinsic Test*

The Ninth Circuit evaluates reproduction infringement claims under a two-part substantial similarity test known as the extrinsic/intrinsic test. The extrinsic part of the test examines "whether two works share a similarity of ideas and expression based on objective, external criteria."[83] The copyright holder must first identify specific elements that are similar between the works to be analyzed by the trier of fact.[84] Generally, these involve a comparison of the materials used, subject matter, setting, or other expressive choices deliberately made by the author.[85] Next, the court must determine whether those similar elements qualify for copyright protection. If they do, the court then decides whether a copyrighted work is entitled to "broad" or "thin" protection after filtering out the unprotectable elements, where the level of protection afforded is dependent on the range of creative choices

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[80] *See generally* Osterberg, *supra* note 68 (describing how nature of the alleged infringement affects how a court evaluates substantial similarity).

[81] Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977) ("There must be ownership of the copyright and access to the copyrighted work. But there also must be substantial similarity not only of the general ideas but of the expressions of those ideas as well.")

[82] *See* Osterberg, *supra* note 68 (discussing how the substantial similarity analysis is litigated throughout circuit courts).

[83] Express, LLC v. Fetish Group, Inc. 424 F. Supp. 2d 1211, 1228 (E.D. Cal. 2005); *See also* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977) ("It is extrinsic because it depends not on the responses of the trier of fact, but on specific criteria which can be listed and analyzed.").

[84] *Sid & Mary Krofft Television Prods., Inc.*, 562 F.2d at 1164.

[85] *Id.*

available in producing it.[86] If the idea behind a work can only be expressed in so many ways, then a work will only receive thin protection; by contrast, ideas that allow for unlimited expression receive broader protection because they require the author to take more creative liberties.[87]

If the extrinsic test reveals similarities in ideas and is found to be protectable, then the court proceeds to the intrinsic part of the test.[88] There, the factfinder must decide "whether the ordinary, reasonable person would find the total concept and feel" of the derivative works similar enough to the original.[89] When the original work is entitled to broad protection, challenged derivatives are evaluated for whether they are 'substantially similar' to the original, while originals that lack expression will have protection "against nothing other than identical copying of the work."[90] While expert testimony is permitted during the extrinsic test due to its analytical nature, the intrinsic test is solely based on how the factfinder views the works as a whole.[91]

Applying the first extrinsic test to photographs (i.e., social media posts in instances of copycat cyberstalking) can be challenging because copyright law views the subject matter of photographs as ideas, which are not protectable.[92] Therefore, only the photographer's creative decisions involved in producing a photograph are eligible for copyright protection.[93] While individual elements may be incapable of receiving protection, the photographer's selection and arrangement of the photograph's otherwise unprotected elements are protected.[94] Furthermore, if sufficiently original, "the combination of subject matter, pose, camera angle, etc." are protected.[95] Courts have also granted protection if a photograph contains a "carefully delineated selection of subject, posture, background, lighting, and perhaps even perspective alone."[96] While works created for the purpose of

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[86] Rentmeester v. Nike, Inc., 883 F.3d 1111, 1120 (9th Cir. 2018) ("A copyright work is entitled to thin protection when the range of creative choices that can be made in producing the work is narrow. . . . [A] work [is] entitled to 'broad' protection given [a] much wider range of creative choices available in producing it."); *see also* Mattel, Inc. v. MGA Ent., Inc., 616 F.3d 904, 913–14 (9th Cir. 2010) ("If there's a wide range of expressions (for example, there are gazillions of ways to make an aliens-attack movie), then copyright protection is 'broad.'").

[87] *Mattel, Inc.*, 616 F.3d at 913–14.

[88] *See Sid & Marty Krofft Television Prods., Inc.*, 562 F.2d at 1164 ("If there is substantial similarity in ideas, then the trier of fact must decide whether there is substantial similarity in the expressions of the ideas so as to constitute infringement.").

[89] Express, LLC v. Fetish Group, Inc. 424 F. Supp. 2d 1211, 1228 (E.D. Cal. 2005). *See also Mattel, Inc.*, 616 F.3d at 914.

[90] *Sid & Marty Krofft Television Prods., Inc*., 562 F.2d at 1168 (concluding that "the scope of copyright protection increases with the extent expression differs from the idea").

[91] *See id.* at 1166 (expressing reluctance to reverse the lower court's ruling because the intrinsic test is subjectively determined by the trier of fact).

[92] *See generally* MELVILLE B. NIMMER, DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 2A.08[E][1].

[93] Los Angeles News Serv. v. Tullo, 973 F.2d 791, 794 (9th Cir. 1992)

[94] MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 2A.08[E][3][c]; *see also* Rentmeester v. Nike, Inc., 883 F.3d 1111, 1119 (9th Cir. 2018) ("What *is* protected by copyright is the photographer's selection and arrangement of the photo's otherwise unprotected elements.").

[95] *Rentmeester*, 833 F.3d at 1119.

[96] *Los Angeles News Serv.*, 973 F.2d at 794.

advertisement are sufficiently expressive to warrant protection,[97] photographs taken for the purpose of product advertisement have been granted thin protection due to limited expressive capability. [98]

2. *Second Circuit's Ordinary Observer Test*

The Second Circuit has developed the ordinary observer test for substantial similarity analyses, requiring the fact finder to decide whether an ordinary observer would recognize the alleged copy as having been appropriated from the copyrighted work unless he set out to detect the discrepancies.[99] When the works have both protectable and unprotectable elements, then the court will undertake a more discerning analysis.[100] In this, the court attempts to separate the unprotectable elements from consideration and asks whether the protectable elements alone are substantially similar.[101] However, the factfinder in the heightened test must still consider the overall look and feel of both works rather than comparing their individual elements.[102] Even if the works share substantial similarities, infringement cannot be found unless protectable elements were copied.[103]

The Second Circuit developed a framework for applying the ordinary observer test to photographic works in *Mannion v. Coors Brewing Co.*[104] In *Mannion,* an infringement claim was brought by a photographer whose work was recreated after he denied a request for licensing.[105] Mannion was commissioned to photograph basketball player Kevin Garnett, and Mannion said, "I want you to wear all the jewelry you have in this moment."[106] He then gave Garnett specific instructions on how to pose and angled the camera to look upwards at him from below; two years later, Coors Brewing used Mannion's photograph on a mockup for outdoor advertising and later contacted him to see if he would produce an image for the campaign.[107] After

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[97] *See generally* Bleinstein v. Donaldson Lithographing Co. 188 U.S. 239 (1903) (holding that circus posters designed for advertising were protectable because they contained artistic merit and value).

[98] *See* Ets-Hokin v. Skyy Spirits, Inc. 323 F.3d 763, 765 (9th Cir. 2003) (finding that commercial product shots for a blue vodka bottle must be virtually identical to be infringing due to the inevitable similarity of the shared concept).

[99] *See* Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101, 111 (2d Cir. 2001) (finding infringement when defendant created jewelry that was substantially similar to plaintiff's work); Knitwaves, Inc. v. Lollytogs Inc., 71 F.3d 996, 1002 (2d Cir. 1995) (finding infringement when a design executive intentionally produced garments with the "same feel" as the plaintiff's work).

[100] *See* Fisher-Price, Inc. v. Well-Made Toy Mfg. Corp., 25 F.3d 119, 123 (2d Cir. 1994) (finding infringement for one product due to nearly indistinguishable features but denying protection for another because the protected elements were "substantially dissimilar.").

[101] *Knitwaves, Inc*., 71 F.3d at 1002.

[102] Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 66 (2d Cir. 2010) (determining infringement when the defendant redesigned plaintiff's architectural plans and constructed buildings based on these designs).

[103] Bill Diodato Photography, LLC v. Kate Spade, LLC, 388 F. Supp. 2d 382, 391 (S.D.N.Y. 2005).

[104] Mannion v. Coors, 377 F. Supp. 2d 444 (S.D.N.Y. 2005).

[105] *Id.* at 447–48.

[106] Peter Walsh, *Who Shot Ya?: Johnathan Mannion*, SLAM ONLINE (June 25, 2013), https://www.slamonline.com/news/nba/jonathan-mannion-basketball-photography.

[107] *Id.* (discussing *Mannion*, 377 F. Supp. 2d 444).

this, Coors used an image so similar to Mannion's that he believed they had used the image without his permission; although they had not, "[t]hey copied it so identically down to the placement of the watch, and it wasn't KG's Rolex, it was a Folex with a different color band or whatever."[108]

In *Mannion*, the court announced three distinct aspects of a photograph that can be used to identify expressive elements in a work:

1. The rendition of the subject (including technical elements like lighting, angle, and exposure);
2. The timing of the shot (capturing a unique moment); and
3. The creation of the subject (posing, arrangement, or stylization that contributes to the originality of the image).[109]

When a photographer has made a significant number of stylistic choices in these categories, then a court is more likely to grant copyright protection and find that a substantially similar work has infringed.[110] Generally, this analysis is done on a case-by-case basis. In the case of copycat cyberstalking, the likelihood of success for a victim will be dependent on the type of content that is being recreated and the extent that the copier has gone through when recreating posts.

III. CASE STUDY: *GIFFORD V. SHEIL*

In April 2024, an influencer by the name of Sydney Nicole Gifford filed the lawsuit based on copyright against another influencer, Alyssa Sheil, accusing her of "replicating [Gifford's] social media content, mimicking her 'neutral, beige, and cream aesthetic,' and even copying apparel designs."[111] Gifford's original Complaint brought claims against Sheil for federal copyright infringement, vicarious copyright infringement, Digital Millennium Copyright Act violation, trade dress infringement, misappropriation, unfair trade practices and unfair competition, and unjust enrichment.[112] Unsurprisingly, Gifford's lawsuit was quite divisive online—many classified Gifford as boring, unoriginal, egotistical, dramatic, and embarrassing, while others viewed Sheil as unhinged, obsessive, a copycat,

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[108] Walsh, *supra* note 1066.

[109] *Mannion*, 377 F. Supp. 2d at 452–54.

[110] *Id.* at 454 ("[T]he nature and extent of protection conferred by the copyright in a photograph will vary depending on the nature of its originality. Insofar as a photograph is original in the rendition or timing, copyright protects the image but does not prevent others from photographing the same object or scene.").

[111] *See generally* Amended Complaint, Gifford v. Sheil, No 1:24-cv-00423 (W.D. Tex. Dec. 11, 2024) [hereinafter Gifford Amended Complaint]; Hannah Taylor & Molly Rothschild, *What the "Sad Beige Lawsuit" Can Teach Us About IP in the Influencer Space*, IP and Media Law (Dec. 17, 2024), https://ipandmedialaw.fkks.com/post/102jrmb/what-the-sad-beige-lawsuit-can-teach-us-about-ip-in-the-influencer-space#page=1.

[112] Complaint at ¶¶ 37–94, Gifford v. Sheil, No 1:24-cv-00423 (W. Dist. Tex. Apr. 22, 2024) [hereinafter Gifford Complaint].

and a stalker.[113] Notably, much of the discourse surrounding this case stemmed from the overall negative media portrayal, with most sources poking fun at the claims and even nicknaming it the "Sad Beige Lawsuit."[114]

Gifford's claims of tortious interference, unfair competition, and unjust enrichment were dismissed in December 2024,[115] and Gifford dropped all claims against Sheil with prejudice in a non-monetary settlement agreement on May 28, 2025.[116] While Gifford has stated that she chose to walk away from the suit due to the cost of litigation and her desire to prioritize her family as a new mother,[117] Sheil's counsel has claimed that Gifford chose to drop the claims because she decided that she did not have a strong case.[118] Regardless, this situation has opened the door for similar claims and brought awareness to an unresolved area of law.

Although Gifford's lawsuit was based on the creative and financial aspects of this incident, the pattern of behavior alleged in her Complaint points to something more; specifically, this situation as a whole is similar to the instances of copycat stalking discussed in Part I. This incident essentially exists in a legal limbo where a perpetrator's actions are not yet severe enough to meet the threshold set by cyberstalking legislation, yet are still resulting in the victim feeling monitored, confused, unsafe, and like they must change their actions to avoid being targeted. While the ultimate goal is to strike a balance between helping victims of cyberstalking and avoiding overbroad limitations on speech and behavior, copyright law may serve as a sufficient alternative in the meantime for similar incidents.

A. *Background*

Gifford claimed that she, Sheil, and another influencer met up in

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[113] For example, in one Reddit thread, a poster called Gifford a "waste of oxygen creature" with a bland aesthetic. u/hillbilly909, Alyssa Sheil Wins "Sad Beige" Influencer Lawsuit!, REDDIT (May 28, 2025, 2:09 PM) https://www.reddit.com/r/Fauxmoi/comments/1kxome5/alyssa_sheil_wins_sad_beige_influencer_lawsuit. Other posters under this thread went back in forth, with another calling Sheil a "full-on stalker" and "seriously unhinged". *Id.*

[114] *E.g.*, Zoey Lyttle, *'Sad Beige' Influencer Alleges Creator 'Stole Her Likeness'*, PEOPLE (May 30, 2025, 2:20 PM), https://people.com/influencers-involved-in-sad-beige-lawsuit-ask-judge-to-dismiss-case-over-one-year-after-filing-11745484; Jonathan Roffe & Madison Mull, *Surprise, Surprise: The "Sad Beige Lawsuit" Ends*, CLARK HILL (May 30, 2025), https://www.clarkhill.com/news-events/news/surprise-surprise-the-sad-beige-lawsuit-ends.

[115] Gifford v. Sheil, Order Adopting/Rejecting Report and Recommendations, Dkt. 33 (Dec. 10, 2024). Note that Sheil's Motion to Dismiss was denied as to the claims of vicarious copyright infringement, DMCA violations, and misappropriation of likeness.

[116] Laura Lorek, *Media Attention, But No Case: Copyright Suit Fizzles Over Beige 'Vibe'*, TEXAS LAW., https://www.law.com/texaslawyer/2025/05/28/media-attention-but-no-case-copyrigh-suit-fizzles-over-beige-vibe/?slreturn=20250904112049 (May 28, 2025).

[117] *Id. See also* Sydney Slone (@Sydneynicoleslone), TIKTOK (May 28, 2025), https://www.tiktok.com/t/ZP8bxjTap (discussing the case and why she decided to drop it, noting that bringing the case to trial would cost her up to $500,000).

[118] *See* Lorek, *supra* note 1166.

December 2022 to go out to eat and film content together; the three women quickly became friends and made plans to meet up again the following month, keeping in contact regularly via a group chat in the meantime.[119] Gifford reported that their second meet up went just as well as the first and the women talked about making future plans once again, but a few days after their meeting, Gifford discovered that she had been blocked by Sheil on Instagram.[120] After this, Gifford received photos of Sheil's content from multiple people who initially thought the posts were Gifford's, showing that Sheil was replicating Gifford's social media content by recreating the photos, videos, products, captions, and styling used on her posts.[121] Specifically, Gifford alleged that Sheil had made nearly one hundred posts which replicated her own.[122] Further, Sheil began to visit the same locations as Gifford to recreate certain posts, obtained sponsorships with the same brands to promote the same products, posted the same outfits and poses, curated an Amazon Storefront with the same lists and products, and created a nearly identical website.[123]

Gifford's Complaint alleges that Sheil even changed her appearance to mimic her own, including dyeing her hair the same color as Gifford's shortly after she did, wearing her hair in the same style as Gifford, and going "so far as to obtain a flower tattoo on her upper arm that is nearly identical to a flower tattoo [Gifford] has on her upper arm."[124] As a result, Gifford reported suffering "mental anguish from [Sheil's] misappropriation of her likeness" and claimed "such misappropriation has a negative impacted [Gifford's] productivity and creativity with respect to her influencer work."[125] Those who interviewed Gifford reported that she discussed ways that her life and content have changed since this event, with one interviewer saying "[t]his is the minutiae that can preoccupy the minds of influencers—especially if they live in a constant state of unease, worrying someone else will copy their life."[126]

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[119] Sydney Slone (@Sydneynicoleslone), TIKTOK (May 28, 2025), https://www.tiktok.com/t/ZP8bxjTap.

[120] Gifford Amended Complaint, at ¶ 14; Mia Sato, *Bad Influence*, THE VERGE (Nov. 26, 2024) https://www.theverge.com/2024/11/26/24303161/amazon-influencers-lawsuit-copyright-clean-aesthetic-girl-sydney-nicole-gifford-alyssa-sheil ("'It was brought to my attention by someone who saw [Sheil's] post on their For You page, thought that it was my post, and then saw that the account name wasn't my name,' Gifford says. She heard of apparent confusion from 'numerous' followers, she says, and then noticed how similar their posts were. . . .").

[121] Amended Complaint & Demand for Jury Trial ¶¶ 7–36, Gifford v. Sheil, No. 1:24-cv-00423-RP (W.D. Tex. Dec. 11, 2024), ECF No. 35.

[122] Sydney Slone (@Sydneynicoleslone), TIKTOK (May 28, 2025), https://www.tiktok.com/t/ZP8bxjTap.

[123] Gifford Amended Complaint at ¶¶ 20–30. *See also* Sato, *supra* note 1200 ("[D]ays or weeks after she would share photos or videos promoting an Amazon product, Sheil shared her own content doing the same thing.").

[124] Gifford Amended Complaint at ¶ 78.

[125] Gifford Amended Complaint at ¶ 81.

[126] Sato, *supra* note 1200.

B. *Application of Reproductive Infringement Frameworks*

The claims raised in Gifford's complaint imply that Sheil infringed upon Gifford's right to reproduction. As noted above, whether a copyright holder's right to reproduction is infringed is dependent on an evaluation of substantial similarity.

Gifford v. Sheil was filed in the District Court for the Western District of Texas, in the Fifth Circuit, which utilizes a test similar to the Second Circuit's 'ordinary observer' test. Thus, "[t]o determine whether an instance of copying is legally actionable, a side-by-side comparison must be made between the original and the copy to determine whether a layman would view the two works as 'substantially similar.'"[127] When some of the similarities between the works involve unprotectable elements, Fifth Circuit courts apply a more discerning ordinary observer test to analyze "whether an ordinary person would consider the aesthetic appeal of the works the same if that person considered only the copyrightable elements of the plaintiff's work copied by the defendant."[128] The more discerning ordinary observer test For the purposes of future analysis, this Comment will also provide an analysis of Gifford's claims under the extrinsic/intrinsic test.

1. *Extrinsic/Intrinsic Analysis*

Gifford's complaint included side-by-side images in which Sheil appears in nearly identical outfits, poses in the same physical locations, and mimics Gifford's camera angles and filters.[129] The difficulty in applying the extrinsic test to *Gifford v. Sheil* is that the photographs may be considered too generic to be protectable due to their simple, trendy nature. While Gifford's expressive choices made when creating her content, such as her outfit, hair, pose, lighting, filters, etc., may be considered protectable as a whole, the fact that many of her choices were based on an existing aesthetic means that Gifford's content is likely to warrant only thin protection.[130]

If Gifford had prevailed under the extrinsic test, a jury would have then needed to find the works virtually identical under the intrinsic test for Gifford to prove infringement. Gifford learned of Sheil's actions after it was brought to her attention by "someone who saw [Sheil's] post on their For You page, thought that it was [Gifford's] post, and then saw that the account

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[127] Aspen Tech., Inc. v. M3 Tech., Inc., 569 F. App'x 259, 269 (5th Cir. 2014). Therefore, the question of whether works are 'substantially' similar is left to the factfinder. *Id.*

[128] *See, e.g.*, Knitwaves, Inc. v. Lollytogs, Inc., 71 F.3d 1003 (2d Cir. 1995); Osterberg, *supra* note 68.

[129] *See generally* Gifford Complaint Ex. 1; Sato, *supra* note 120 ("Exhibits submitted in court include nearly 70 pages of side-by-side screenshots collected by Gifford comparing her social media posts, personal website, and other platforms where she says Sheil copied her.").

[130] Sato, *supra* note 1200 ("You still need to get really close to [the original image or video] to actually infringe it. . . basically indistinguishable [or] identical, because the protection is thin for something like a picture of a doormat in front of a store and somebody's foot is a little bit in it.").

name wasn't [her] name."[131] Gifford had heard of similar confusion from other followers, but was unaware of the exact situation because she had been blocked by Sheil.[132] These instances of confusion are beneficial to Gifford because they are indicative of how an ordinary observer might view the photographs. According to Gifford, this confusion was so prominent that she was able to create a chart that tracked her decrease in earnings as Sheil's replicative posts increased.[133] This ultimately led to her securing fewer brand deals because of her decreased views.[134] Courts have long held that substantial similarity can be inferred where the "total concept and feel" of two works is indistinguishable.[135] In this case, Gifford's brand is built on a curated aesthetic that creates multiple types of content which she has transformed into her identity, and while it is indisputable that the works would be substantially *similar*, proving them virtually *identical* would be much more difficult.

Each of these categories could have provided a potential avenue for Gifford's copyright claim against Sheil, and together, they demonstrate the legal viability of framing instances of copycat cyberstalking as a form of copyright infringement.

2. *Ordinary Observer Test Analysis*

Gifford claims that Sheil's infringing posts "contain[ed] styling, themes, camera shots and angles, and text captions" that replicated hers.[136] Although the complaint did not address other technical elements, the visual similarities between the photographs suggest that Gifford's rendition is an intentional stylistic choice. The duplicative photographs feature similar lighting, filters, and angles. Under the *Mannion* framework, these aspects would fall squarely within the protectable rendition of the subject.[137] However, it can just as easily be stated that these elements are insufficient to establish rendition, especially if there is no proof that Gifford's photographs involved the use of specific camera settings and non-traditional angles. Furthermore, the choices that Gifford made in her rendition can be attributed to trends or commonalities of her aesthetic, rather than stylistic choices. As in *Feist*, it may be argued that certain aspects of Gifford's photographs were

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[131] Sato, *supra* note 1200.

[132] *Id.*

[133] *Id.*

[134] Gifford Amended Complaint at ¶ 80 ("Defendants received a benefit from the appropriation. The posts on Defendants' Platforms that appropriate Sydney's likeness have performed more successfully than other posts by Defendants, gaining at least triple the views on average. Based on the commission model of the influencer industry, Defendants have gained monetary compensation for this increased performance.").

[135] *See* Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970) (holding that greeting cards were substantially similar where, viewed as a whole, the artwork, mood, message, and arrangement of words were considered).

[136] Gifford Amended Complaint at ¶ 15.

[137] Mannion v. Coors, 377 F. Supp. 2d 444 (S.D.N.Y. 2005).

predictable.[138] Thus, in order to succeed, Gifford's photographs would have had to demonstrate consistent and individualized creative choices that establish originality.

Although the timing element in *Mannion* most directly applies to capturing fleeting moments (such as action shots or expressions),[139] it may also be relevant in a social media context when timing creates exclusivity or originality, such as posting from a particular event, location, or setting in real time. The general idea in *Mannion* was that "a photographer's choice and artistic ability to capture a photograph at the right time and place is a protectable element."[140] Thus, Gifford might have been able to argue the timing element if she chose to promote sales for certain items, which would create exclusivity in her choice to promote the item in the context of a limited time period. However, the best example of timing in Gifford's complaint was a video that she posted at The Tox Shop in Austin, Texas, as part of an invite-only, early access event during their influencer week.[141] Two weeks later, Sheil posted a video featuring nearly identical footage of the same elements that Gifford's video featured.[142] Because Gifford captured certain content in timely and context-specific ways, and Sheil reproduced that content shortly afterward, this can be an infringement of the originality that Gifford's work temporarily established. While this element is less central than rendition or subject creation, it may still have bolstered Gifford's claim that Sheil's conduct diminished the uniqueness of her digital presence.

Perhaps the strongest basis for Gifford's infringement claim would have lain within the "creation of the subject" prong, which encompasses the selection and arrangement of visual elements—outfits, props, settings, and the subject's pose—that reflect creative authorship.[143] In *Mannion*, the court held that a photograph's creative subject arrangement—distinct from the subject matter alone—was protectable expression.[144] However, courts have also stated that the inclusion and arrangement of certain items is not protectable if these items are natural to the setting and the technical choices

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[138] *See* Feist v. Rural, 499 U.S. 340, 362 (" It is equally true, however, that the selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever. The standard of originality is low, but it does exist."). While the *Feist* analysis is specific to factual compilations, the general idea that commonplace elements are unprotectable applies to all aspects of the copyright doctrine. In media, this idea is referred to as the scènes à faire doctrine.

[139] *See Mannion*, 377 F. Supp. 2d at 452 ("A photograph may be original in a second respect. '[A] person may create a worthwhile photograph by being at the right place at the right time.'")

[140] Benjamin Gitelman-Fonseca, *Photography Copyright Cases Photographers Should Know*, COPYRIGHT ALLIANCE (Aug. 16, 2023), https://copyrightalliance.org/photography-copyright-cases-photographers-should-know.

[141] Gifford Amended Complaint at ¶¶ 17–19.

[142] *Id.*

[143] *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) (holding that authorship can be created through the choices that a photographer makes when setting up a shot.).

[144] Mannion v. Coors, 377 F. Supp. 2d 444 (S.D.N.Y. 2005).

are incidental within the scene.[145] Gifford asserted that Sheil not only duplicated her outfits and poses, but deliberately sourced similar backgrounds and even replicated tattoos to reinforce the illusion of sameness.[146] While some aspects of Gifford's content may be unique, others may be attributed to naturally arising from her chosen aesthetic. With this said, an observation made by an interviewer seemed to reveal that Gifford was extremely intentional in her choices when creating content:

> Gifford knows, from experience, the exact angles she must capture to sell the items she features in videos: a slow, top-down panning shot of her coffee table; a few seconds of her stepping into the corner of the frame and placing cream ceramic pumpkins on her fireplace mantel. Laura acts as a second set of eyes, standing behind the iPhone on a tripod and telling her daughter whether she's in frame or whether anything in the shot looks off. Gifford darts around her home, grabbing brief clips that she will later splice together in the choppy, rapid-fire editing style that has become instantly recognizable as "shortform video." She can tell immediately if her disembodied hand plopped a mini plush pumpkin slightly awkwardly. The camera keeps rolling as she picks it up and does the motion again.[147]

These choices indicate a deliberate form of expression that Gifford implemented in her posts. While it can be argued that Gifford's choices are based in an aesthetic, which points towards a lack of originality, many of her posts seem to be highly curated to match her persona and may be protectable.

CONCLUSION

Despite this dispute having been dropped by Gifford, the media attention brought by Gifford's case highlighted a shortcoming in the law, which will only become more substantial as social media and content creation continue to evolve. While a copyright infringement claim is not a foolproof path for victims of copycat cyberstalking, it may be an alternative method when traditional cyberstalking statutes fail.

Based on the allegations set forth in Gifford's complaint, it is possible that copyright law would have provided a viable remedy to the copycat cyberstalking that she allegedly faced. Given that the parties in that case were both influencers, it is unlikely that cyberstalking laws would properly

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[145] Bill Diodato Photography, LLC v. Kate Spade, LLC, 388 F. Supp. 2d 382, 393 (S.D.N.Y. 2005) ("In a fashion photograph set in a toilet stall, it is natural to include a handbag . . . . If one is to be included, there are few places that it can be strategically positioned so as not to conceal the model's shoes or fade into the background. To make the handbag most visible, it must be placed at an angle.").

[146] Gifford Amended Complaint at ¶ 78.

[147] *See* Sato, *supra* note 1200.

address this issue. Likely, the potential monetary incentive for Sheil would undercut Gifford's arguments due to the strong emphasis that many anti-stalking laws put on intent. Even if the intent in this case is sinister, a monetary benefit is often seen as the dominant factor for impersonation.

Applying either circuit's substantial similarity test to *Gifford v. Sheil* reveals that the alleged copying has the potential to go beyond surface-level similarity. Under the extrinsic/intrinsic test, Sheil's conduct is likely to be seen as infringing. Further, under the *Mannion* test, Sheil's conduct implicates all three protectable categories: she reproduced Gifford's specific photographic choices (rendition), responded to her timing in real-time posting (timing), and recreated Gifford's curated visual identity (subject creation). These actions support a claim that Sheil's conduct constitutes more than mere emulation—it is a pattern of imitative harassment carried out through copyright infringement. This analysis demonstrates the utility of copyright doctrine in filling the gaps left by cyberstalking laws. The *Mannion* test can be used to provide courts with a framework for recognizing how digital creators express originality—not just in isolated images, but through the overall effect and effort of curated content.

However, there are certainly drawbacks to using copyright law to combat copycat stalking; copyright law is not intended to handle claims involving potentially serious allegations such as stalking, and a victim may not feel vindicated if they are unable to share how the incident has affected their life and mental health. Copyright law generally avoids considering a party's personal circumstances when deciding a case, which may make a plaintiff's claims appear less sympathetic, and even unnecessary for those who do not consider themselves to be influencers. Further, while laws surrounding copyright infringement have the potential to protect the victim's creative output in these scenarios, evidence of the perpetrator's copying must be overwhelming with copied material being nearly identical to support a finding of copyright infringement. Affording copyright protection in these scenarios also opens the floodgates for influencers to abuse copyright law, similarly to the current abuses that occur under the DMCA system.[148]

It is important to note that victims do not have to choose between handling their case with either cyberstalking laws or copyright laws. Each situation is different, and victims can experience both frustration at their content being stolen as well as fear of the perpetrator and their potential escalation. The inclusion of copyright law does not preclude a victim from also seeking recovery under stalking statutes because, when combined, both forms of law can provide civil and criminal remedies. While this approach

[148] *See* Natalia Krapiva, Rodrigo Rodriguez & Alejandro Menjivar, *Warning: Repressive Regimes Are Using DMCA Takedown Demands to Censor Activists*, ACCESS NOW (Oct. 22, 2020), https://www.accessnow.org/dmca-takedown-demands-censor-activists ("It is clear that the legal framework and current corporate practices do not sufficiently address situations where bad actors improperly file takedown requests to censor people and strip them of their privacy and anonymity. Even if your content is rightfully restored after a takedown, the harm has already been done.").

is certainty not perfect, it does provide victims with more options and raises awareness of these instances. Further, in some instances, it is easier for victims to prove that their content has been stolen, rather than trying to prove that the perpetrator intended to harm them. Ultimately, however, the goal should be to improve our existing systems in order to allow victims of cyberstalking to receive support and justice. New methods of cyberstalking must be addressed by the legal system instead of expecting victims to hope that different areas of law can provide some sort of relief.

If courts are willing to apply this framework in influencer-related disputes, the next case could establish precedent to establish that an infringement claim can succeed when based on relentless recreation and copying of another person's social media presence. As a result, victims of copycat cyberstalking may be able to use copyright law as a way to prevent perpetrators from continuing their cyberstalking.