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HARSH REALITIES: SUBSTANTIAL SIMILARITY IN THE REALITY TELEVISION CONTEXT

Daniel Fox*

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*Good artists copy. Great artists steal.*¹

I. INTRODUCTION

The television landscape and the copyright disputes that arise from it are dramatically different from those of just a generation ago. In 1980, three networks—ABC, CBS, and NBC—dominated the airwaves,² and primetime programming consisted almost entirely of scripted comedic and dramatic series shot on film.³ Today, however, we live in a universe of over 200 channels. In addition to traditional scripted fare, on a given night one can find dozens of unscripted, “reality” programs, featuring real-life participants engaged in activities ranging from surviving on a desolate island to surviving in a household of disparate socioeconomic status.⁴

Interestingly, despite the endless possibilities afforded by this burgeoning format, a look at the local TV listings reveals that a number of

¹ Pablo Picasso, as quoted by Steve Jobs in TRIUMPH OF THE NERDS: THE RISE OF ACCIDENTAL EMPIRES (Oregon Public Broadcasting 1996).

² See Media Dynamics Incorporated, *TV Dimensions 2006*, available at <http://www.mediadynamicsinc.com/tvexcerpt.htm>. In Los Angeles and New York, for example, of the seven broadcast channels available in the late 1970s and early 1980s, only ABC, CBS, and NBC regularly offered original content during primetime hours; they consequently attracted the largest share of viewers during that period. The remaining four channels, on the other hand, broadcast predominantly syndicated fare. See Richard M. Levine, *Syndicated Television: The Other Side of the Wasteland*, available at <http://www.aliciapatterson.org/APF0101/Levine/Levine.html>.

³ See Triplets and Us, Prime Time Schedule for 1980-81, available at <http://www.triplet-sandus.com/80s/primetime2.htm>.

⁴ See, e.g. TV Guide Online, *Prime Time Listing for Santa Monica: Adelphia*, available at <http://online.tvguide.com/myprofile/setup/Localizecomplete.asp?I=63019&zip=90024>. On the night of Monday, October 9, 2005, for instance, one could potentially watch 17 unscripted shows between 8:00 to 10:00 PM.

reality series appear quite similar to one another: ABC's *Wife Swap* and Fox's *Trading Spouses: Meet Your New Mommy*,⁵ NBC's *The Contender* and Fox's *The Next Great Champ*,⁶ Bravo's *Miami Slice* and E!'s *Dr. 90210*,⁷ and A&E's *Inked* and TLC's *Miami Ink*,⁸ just to name a few prominent examples. This new wave of reality TV, and its penchant for similarity, has consequently washed in a flood of litigation over alleged infringement of copyright.⁹

Given that the explosion of reality programming is a relatively recent phenomenon, dating back to the premiere of *Survivor* in the summer of 2000,¹⁰ existing case law applying copyright principles to television programming is crafted almost exclusively in the context of scripted or, occasionally, quasi-scripted series such as game shows.¹¹ However, with the fight for viewers fiercer now than it has ever been before,¹² in assessing the result of this competition that leads to litigation, copyright lawyers and courts alike need to determine the application to reality television of what seemed to be well-settled principles in the circuits. This is especially important in the Second and Ninth Circuits—which encompass the epicenters of the entertainment industry, New York and Los Angeles, respectively, and hence serve as the appellate forums through which the majority of federal reality television claims will pass—where established case law raises important questions regarding the level of protection afforded to reality programming and the techniques which courts employ to assess claims of substantial similarity between unscripted works. Moreover, from the defendant's perspective, a few recent cases disturbingly suggest that a plaintiff reality television producer may survive summary judgment regardless of

⁵ Both *Wife Swap* and *Trading Spouses* follow two families that have exchanged one or both parents.

⁶ Both *The Contender* and *The Next Great Champ* follow a group of amateur boxers as they compete for a cash reward.

⁷ Both *Miami Slice* and *Dr. 90210* follow the lives of plastic surgeons who live and work in glamorous urban areas.

⁸ Both *Inked* and *Miami Ink* follow the employees and denizens of tattoo parlors.

⁹ See Andrew M. White & Lee S. Brenner, *Reality TV Shows Difficult Concepts to Protect*, ENT. L. & FIN., Nov. 2004 at 5.

¹⁰ *Id.*

¹¹ Such quasi-scripted series may themselves be analyzed predecessors to reality programming. See, e.g., *Barris/Fraser Enters. v. Goodson-Todman Enters.*, No. 86 Civ. 5037, 1988 WL 3013 (S.D.N.Y. Jan. 4, 1988); *Sheehan v. MTV Networks*, No. 89-CIV-6244, 1992 U.S. Dist. LEXIS 3028 (S.D.N.Y. March 12, 1992).

¹² This is due in part to several factors, including the proliferation of basic, pay-cable, and satellite channels, atomization of views, and drops in advertising revenue. See, e.g., Chris Gaither, *The Plot Thickens Online: Producers of TV Dramas are Creating Web-Only Content That Adds Story Elements and Interactivity to Keep Viewers Engaged*, L.A. TIMES, Feb. 25, 2005, at A1.

whether the purportedly infringing work actually copies protectable expression from the plaintiff's series.

This Comment focuses on two such cases. The first is *Metcalf v. Bochco*,¹³ a 2002 Ninth Circuit decision that, while focusing on scripted dramatic works, has serious implications for the reality genre arising from its holding that the generic and non-copyrightable similarities between the plaintiff's and defendant's works were sufficiently alike to overcome summary judgment because of their sequencing, arrangement, and numerosness.¹⁴ The second is *CBS v. ABC*,¹⁵ a 2003 New York District Court opinion that likewise carries potentially far-reaching repercussions for reality programming, stemming from its failure to address distinctions between the unscripted shows at issue in the case and the literary works the court looked to for precedent.

This Comment argues that, in order to achieve fair and predictable substantial similarity analysis of reality programming, *Metcalf* and *CBS* should be read and interpreted narrowly, albeit to varying degrees, in light of each case's analytic failures, a number of relevant policy considerations, and, in the case of *Metcalf*, a subsequent line of Ninth Circuit opinions that calls into question that case's "sequence and arrangement" principle. Additionally, this Comment argues that the Second and Ninth Circuits should subscribe to an analytic framework that both ensures the accurate assessment of a reality program's expressive elements—i.e. those subject to copyright protection—and is tailored to gauge the unique characteristics of this popular format.

Part II offers a brief introduction to the elements of a copyright infringement claim and traces the origin and evolution of the Second and Ninth Circuit tests for substantial similarity. Part III addresses *Metcalf* and *CBS*, detailing each case's holding and reasoning and presenting a critique on their respective ramifications for copyright law and policy. Part IV examines post-*Metcalf* jurisprudence, specifically how a line of Ninth Circuit cases can be read to limit that case's "sequence and arrangement" principle. Part V proposes suggestions for how each circuit can fairly and accurately assess future reality show infringement claims.

¹³ 294 F.3d 1069 (9th Cir. 2002).

¹⁴ *Id.* at 1074.

¹⁵ No. 02 Civ. 8813, 2003 U.S. Dist. LEXIS 20258 (S.D.N.Y. Jan. 13, 2003).

II. THE “SIMPLE” LIFE: DEVELOPMENT AND EVOLUTION OF SUBSTANTIAL SIMILARITY ANALYSIS IN THE SECOND AND NINTH CIRCUITS

A. *The Basic Elements of Copyright Infringement*

Reduced to basic terms, there are only two elements necessary to a copyright infringement action: ownership of a valid copyright by the plaintiff and copying of constituent, original, elements of the work by the defendant.¹⁶ The latter requirement, copying, itself involves two components. First, there is a factual question of whether the defendant, in creating its work, used the plaintiff’s material as a model, template, or inspiration.¹⁷ Second, there is a question of whether the defendant’s copying represents an improper appropriation—that is, whether the two works are “substantially” similar to one another with respect to protectable expression, as opposed to unprotectable material such as ideas, facts, and public domain elements.¹⁸

B. *Substantial Similarity: Introduction and Related Doctrines*

The determination of what constitutes substantial—and hence infringing—similarity presents one of the most difficult questions in copyright law. As Judge Learned Hand observed, “the test for infringement of a copyright is of necessity vague”¹⁹ and “the line wherever it is drawn will seem arbitrary.”²⁰ Indeed, no bright-line rule governs what constitutes substantial similarity, and there are no mechanical guidelines that can be applied to decide whether one work is substantially similar to another. In this respect, copyright infringement cases are

¹⁶ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002).

¹⁷ See *Castle Rock Entm’t. v. Carol Publ’g. Group, Inc.*, 955 F. Supp. 260, 264 (S.D.N.Y. 1997), *aff’d* 150 F.3d 132 (2d Cir. 1998).

¹⁸ See 17 U.S.C. § 102 (b) (“In no case does copyright protection for an original work of authorship extend to 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.”). The policy rationale underlying this the Copyright Act’s exclusion of idea is clear: “To grant property status to a mere idea would permit withdrawing the idea from the stock of materials that would otherwise be open to other authors, thereby narrowing the field of thought open for development and exploitation. This effect, it is reasoned, would hinder, rather than promote, the professed purpose of the copyright laws, *i.e.*, ‘the progress of science and useful arts.’” 4-13 NIMMER ON COPYRIGHT § 13.03 (3)(B)(2)(a) (2003) [*hereinafter* NIMMER].

¹⁹ *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

²⁰ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930). In *Nichols*, Judge Hand concluded that “a comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of *Romeo and Juliet*.” See *id.*

unique, for it is impossible to say how much taking is too much without reference to the specific works at issue.²¹

In considering substantial similarity, the circuits have formulated a number of tests designed to assist in determining whether the copying is quantitatively and qualitatively sufficient to support the conclusion that infringement has occurred.²² However, there is no universally-accepted definition of substantial similarity that will serve in all cases; many courts have avoided defining the term altogether.²³ The Second and Ninth Circuits, on the other hand, have over the last half-century developed distinct and relatively complex tests for determining substantial similarity. Each circuit's approach incorporates a number of related legal doctrines, including access, *scenes à faire*, and merger, and it is helpful to understand these concepts before examining the tests themselves.²⁴

Access. Just as it is often impossible to directly prove copying, so too is it difficult for plaintiffs to present direct evidence that the defendant (or person who composed the defendant's work) actually viewed or had knowledge of the plaintiff's work. For this reason, it is clear that even if evidence is unavailable to demonstrate actual viewing, proof that the defendant had the opportunity to view is sufficient to permit the trier of fact to conclude that copying as a factual matter has occurred.²⁵ The fact finder thus has the discretion to reject even uncontradicted defendant testimony that it never viewed the plaintiff's work. This result is often reached through the courts' reasoning that the opportunity to view creates an inference of access, which in turn creates an inference of copying.²⁶

²¹ *Peter Pan Fabrics*, 274 F.2d at 489. See also *Neal Publ'ns v. F & W Publ'ns, Inc.* 307 F. Supp. 2d 928, 931 n.2 (N.D. Ohio 2004) (noting that decisions appear contradictory if one simply counts the number of words copied in different cases).

²² See, e.g., *Kohus v. Mariol*, 328 F.3d 848 (6th Cir. 2003).

²³ See, e.g., *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946).

²⁴ Access, merger, and *scenes à faire* were added to these tests under pressure from the First Amendment. They protect elements that necessitate Constitutional protection, despite the fact that they either fail to fit the test of expressiveness or fail the originality requirement.

²⁵ *Arnstein*, 154 F.2d at 472; see also *Smith v. Little, Brown & Co.*, 245 F. Supp. 451 (S.D.N.Y. 1965), *aff'd* 360 F.2d 928 (2d Cir. 1966).

²⁶ See, e.g., *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F.Supp. 177 (S.D.N.Y. 1976) (Plaintiff's song, "He's so Fine" was such a ubiquitous hit that access could be inferred, even though it was released some seven years before defendant's record, "My Sweet Lord.").

Scenes à faire. French for “scenes which must be ‘done,’”²⁷ *scenes à faire* is a label used to identify material that is not protected by copyright, and therefore excluded from traditional substantial similarity analysis, because it flows naturally from fact, subject, or context.²⁸ For instance, in films depicting the Old West, scenes involving gunfights, saloon brawls, or the protagonist galloping off into the sunset likely would all be considered unprotectable *scenes à faire*. The rationale behind this doctrine is that obvious and generic expressions of a basic idea cannot be protected without giving the copyright owner exclusive control over the underlying idea.²⁹

Merger. The merger doctrine refers to situations where there is a “merger” of idea and expression, such that a given idea is inseparably tied to a particular expression.³⁰ In such instances, protecting the expression would confer a monopoly over the idea itself.³¹ To prevent this result, courts invoke the merger doctrine as a defense to the charge of infringement via substantial similarity, and evaluate the inseparability of idea and expression in the context of the particular dispute.³²

The merger doctrine is closely related to *scenes à faire*.³³ However, whereas merger occurs when there is a limited number of ways to express an idea, stock elements may still be regarded as *scenes à faire* even when other means of expression exist, so long as those stock elements are so commonplace as to constitute unprotectable expression.³⁴

²⁷ The phrase appears to have originated in a 1945 California district court opinion; the court used the term to identify scenes in a motion picture that “must be done.” See *Schwartz v. Universal Pictures Co.*, 85 F. Supp. 270, 275 (S.D. Cal. 1945).

²⁸ *Swirsky v. Carey*, 376 F.3d 841, 850 (9th Cir. 2004).

²⁹ See *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994) (“Similarities derived from the use of common ideas cannot be protected; otherwise, the first to come up with an idea will corner the market”).

³⁰ Daniel A. Fiore & Samuel E. Rogoway, *Reality Check: A Recent Court Decision Indicates that Traditional Copyright Analysis May be Used to Protect Reality TV Shows from Infringement*, L.A. LAW., Jul.-Aug. 2005, at 36 [hereinafter Fiore & Rogoway].

³¹ In one famous case, for instance, the Ninth Circuit held that a jewel-encrusted pin shaped like a bee was only capable of one particular form of “expression.” See *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971).

³² The Register of Copyrights will not know about the presence or absence of constraints that limit ways to express an idea. The burden of showing such constraints should be left to the alleged infringer. Accordingly . . . the relationship between “idea” and “expression” will not be considered on the issue of copyrightability, but will be deferred to the discussion of infringement.

NEC Corp. v. Intel Corp., No. C-84-20799-WPG, 1989 U.S. Dist LEXIS 1409, at *9 (N.D. Cal. 1989). See also *Apple Computer, Inc. v. Microsoft Corp.*, 759 F. Supp. 1444, 1456 (N.D. Cal. 1991), *amended*, 779 F. Supp. 133 (N.D. Cal. 1991), *aff’d (rev’d as to fees)*, 35 F.3d 1435, 1444 (9th Cir. 1994), *cert. denied*, 513 U.S. 1184 (1995).

³³ See *Rice v. Fox Broad. Co.*, 330 F.3d 170, 1175 (9th Cir. 2003).

³⁴ *Swirsky v. Carey*, 376 F.3d at 849-50.

Consequently, *scenes à faire* factor prominently in the analysis of television programs, as the doctrine allows courts to disregard as unprotectable standard or “stock” characters, incidents, and any other elements that inevitably arise in the treatment of a certain theme, situation, or setting.

C. *The Test for Substantial Similarity: Second and Ninth Circuit Formulations*

Although it is clear the determination of substantial similarity presents an issue of fact, the correct procedure for this analysis remains elusive. Initially, courts applied an “audience test,” which focused on whether an “average, reasonable man . . . without any aid or suggestion or critical analysis by others . . . could spontaneously and immediately detect . . . that there had been piracy of the story.”³⁵ Over the last half century, the circuits significantly explicated and altered this test, with two of the most important judicial modifications occurring in the Second and Ninth Circuits.

1. Second Circuit: Bifurcating “Similarity”

In the 1946 case *Arnstein v. Porter*,³⁶ the Second Circuit modified the audience test by dividing the issue of substantial similarity into two separate determinations: first, whether the defendant copied from the plaintiff’s work, and second, whether that copying went so far as to constitute an improper appropriation.³⁷ On the first question, the Second Circuit subsequently clarified that the correct term for this determination is “probative,” rather than “substantial,” similarity.³⁸ Consequently, at this stage, similarity of copyrightable expression need not be demonstrated; rather, the two works are compared in their entirety, including both protectable and unprotectable material.³⁹ If evidence of access is absent, the plaintiff can prevail only by showing that the similarities between the two works are so striking that they pre-

³⁵ See *Harold Lloyd Corp. v. Witwer*, 65 F.2d 118 (9th Cir. 1933).

³⁶ 154 F.2d 464 (2d Cir. 1946).

³⁷ *Id.* at 468.

³⁸ See *Castle Rock Entm’t*, 955 F. Supp. at 137.

³⁹ Under the *Arnstein* doctrine, in making this comparison courts may resort to expert analysis regarding whether the works are probatively similar, and not merely to the spontaneous and immediate impression of the observer. See *Arnstein*, 154 F.2d at 468-69. Additionally, it has not been held an abuse of discretion to permit the plaintiff to offer his opinion as to the similarities between his and the defendant’s works. See *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981).

clude the possibility that the defendant created his work independently.⁴⁰

If the court determines that there has been copying, “then only does there arise the second issue, that of unlawful appropriation.”⁴¹ At this point the Second Circuit invokes the audience test,⁴² in which the trier of fact assesses whether an average lay observer would recognize the alleged copy as substantially similar to the copyright work.⁴³ “Analytic dissection” (piece-by-piece examination of the works’ constituent parts) and expert testimony generally are not considered in connection with the audience test.⁴⁴

2. Ninth Circuit: Extrinsic-Intrinsic Distinction

The Ninth Circuit’s approach to substantial similarity can be traced back to the 1977 case *Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp.*⁴⁵ The *Krofft* court divided determination of substantial similarity into two sequential tests, an “extrinsic” and an “intrinsic.” In the extrinsic test, so named “because it depends not on the responses of the trier of fact, but on specific criteria which can be listed and analyzed,”⁴⁶ the court listed and compared the ideas involved in each work to determine if such ideas were substantially similar.⁴⁷ Under *Krofft*, if this test revealed similarities in ideas, the court would proceed to perform an intrinsic test, which constituted a purely subjective evaluation of whether the total concept and feel of the two works were substantially similar through the eyes of an ordinary, reasonable person.⁴⁸

Thirteen years after *Krofft*, the Ninth Circuit sanctioned a modification of the two-pronged test in *Shaw v. Lindheim*.⁴⁹ Recognizing that district courts were not confining the extrinsic test inquiry to a compari-

⁴⁰ See *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997).

⁴¹ *Arnstein*, 154 F.2d at 468.

⁴² The *Arnstein* court justified its position with reference to the musical works at issue in the case: once copying is established, the issue of *unlawful* appropriation amounts to a question of “whether defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.” This, the *Arnstein* court concluded, is “an issue of fact which a jury is particularly fitted to determine.” *Id.* at 473.

⁴³ See, e.g. *Knitwaves, Inc v. Lollytogs Ltd. Inc.*, 71 F.3d 996, 1002 (2d Cir. 1995) (citing *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 766 (2d Cir. 1991)).

⁴⁴ See *Arnstein*, 154 F.2d at 468.

⁴⁵ 562 F.2d 1157 (9th Cir. 1977).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 919 F.2d 1353 (9th Cir. 1990).

son of ideas, the *Shaw* court held that the extrinsic part of the test could properly be described as an “objective and subjective analyses of expression.”⁵⁰ Accordingly, courts must list the elements of the works—for example, with respect to literary works, plot, theme, dialogue, mood, setting, pace, and characters—and determine whether there is any similarity in the expression of those elements.⁵¹ Under *Shaw*, this extrinsic determination is demonstrable by expert testimony.⁵²

As part of the modern extrinsic test, Ninth Circuit courts also engage in a “filtration” process for purposes of determining the scope of the plaintiff’s copyright.⁵³ This exercise requires courts to distinguish between protectable and unprotectable material,⁵⁴ and involves three steps.⁵⁵ First, the court analytically dissects the work, separating out from the protectable expression elements such as unprotectable ideas (as distinguished from the “expression” of those ideas), facts, historical events, “other information over which no individual is entitled to claim a monopoly,” and elements borrowed from another author or from the public domain.⁵⁶

Second, the court applies the relevant limiting doctrines in the context of the particular medium involved, including *scenes à faire* and the merger doctrine.⁵⁷ Invoking these principles, plaintiffs typically will compile long lists of purported similarities in an effort to show that the two works have far more in common than their shared idea.⁵⁸ Defendants, on the other hand, will typically highlight prior works that have similar plots, settings, themes, or characters in an effort to demonstrate that the only similarities between the works in question consist of ab-

⁵⁰ *Id.* at 1361. See also *Swirsky v. Carey*, 376 F.3d at 845.

⁵¹ *Shaw*, 919 F.2d at 1359.

⁵² *Id.* at 1356.

⁵³ See NIMMER, *supra* note 18, at § 13.03(E)(1)(b) (“To determine whether the similarity between plaintiff’s and defendant work is substantial, the comparison should not include unoriginal elements of the plaintiff’s work; rather the comparison should take place after filtering out of the analysis elements of the plaintiff’s work that are not protectable or otherwise not actionable.”).

⁵⁴ See, e.g., *Apple Computer*, 35 F.3d at 1446 (holding that a party claiming copyright infringement “may place no reliance upon any similarity in expression resulting from unprotectable elements.”).

⁵⁵ See *Fiore & Rogoway*, *supra* note 30, at 36.

⁵⁶ *Bethea v. Burnett*, No. CV04-7690, 2005 WL 1720631 at *10.

⁵⁷ See *Apple Computer*, 35 F.3d at 1443 (“Because only those elements of a work that are protectable and used without the author’s permission can be compared when it comes to the ultimate question of illicit copying, [the Court uses] analytic dissection to determine the scope of copyright protection before works are considered ‘as a whole.’”).

⁵⁸ See Andrew J. Thomas, *Access Hollywood*, L.A. LAW., May 2005, at 31.

stract ideas or staple elements that naturally follow the treatment of a particular idea.⁵⁹

Finally, the court defines the scope of the plaintiff's copyright, which will fall somewhere along the continuum between highly original works entitled to the broadest protection at one end, and works of a primarily factual nature, to which only "thin" protection is afforded, at the other.⁶⁰ As implied by its descriptive rubric, thin copyright protection only protects against virtually identical copying.⁶¹

Additionally, *Shaw* clarified that the intrinsic test is actually a subjective analysis of expression.⁶² Consequently, courts have focused on whether the "ordinary, reasonable audience would recognize the defendant's work as a 'dramatization' or 'picturization' of the plaintiff's work."⁶³ Unlike the extrinsic test, the intrinsic test is the exclusive province of the jury; expert testimony is not admissible. Moreover, under the Ninth Circuit's "inverse ratio rule," the court will require a lower standard of proof on substantial similarity when a high degree of access is shown.⁶⁴

Shaw further held that while the outcome of the extrinsic test may be decided on summary judgment, the outcome of the intrinsic test is a question of fact to be determined by the trier of fact, and not by the court on summary judgment.⁶⁵ Therefore, if the extrinsic test favors the defendant, summary judgment is entered in defendant's favor,⁶⁶

⁵⁹ *Id.* Despite the Ninth Circuit's caution that such lists of purported similarities are "inherently subjective and unreliable," Thomas argues these lists are unavoidable, since the Ninth Circuit has held that the court must first identify the similar elements in the works in question before the works can be considered and compared as a whole. *Id.*

⁶⁰ *Fiore & Rogoway*, *supra* note 30, at 36.

⁶¹ *See Apple Computer*, 35 F.3d at 1447. As we will see later, Ninth Circuit courts will occasionally fail to subscribe to—or even explicitly disregard—this dichotomy.

⁶² *Shaw*, 919 F.2d at 1359.

⁶³ *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985).

⁶⁴ *Smith v. Jackson*, 84 F.3d 1213, 1220 (9th Cir. 1996); *see also Shaw*, 919 F.2d at 1361 and *Krofft*, 562 F.2d at 1172. Conversely, a plaintiff may be excused from proving access if it can establish a very high degree of similarity under the doctrine of "striking similarity." *See Smith v. Jackson*, 84 F.3d at 1220. Nimmer roundly criticizes this analytic reciprocity in his treatise, arguing that, despite the validity of striking similarity rule—i.e., that the stronger the proof of similarity, the less the necessity for proof of access—the "converse proposition"—i.e., the inverse ratio rule—is not equally valid: "access without similarity cannot create an inference of copying . . . even massive evidence of access cannot by itself avoid the necessity of also proving the full measure of substantial similarity" NIMMER, *supra* note 18, at § 13.03(E)(1)(a).

⁶⁵ *Shaw*, 919 F.2d at 1357.

⁶⁶ *Id.*

and if the extrinsic test favors the plaintiff, there must be a trial on the intrinsic test.⁶⁷

The current iteration of the Ninth Circuit test, with its lengthy analytic process, thus presents a complex gauge for substantial similarity. The Ninth Circuit has conceded as much, with one recent holding characterizing the test as “turbid waters.”⁶⁸ However, beyond its complexity and purported turbidity, as evidenced in the following section, it is not necessarily the test itself that is problematic, but rather the inconsistent manner in which it is applied.

III. THE BIGGEST LOSER(S): *METCALF* AND *CBS*

This section presents close readings of two cases that may seriously impact future reality television copyright jurisprudence: *Metcalf v. Bochco* and *CBS v. ABC*. At first blush, these two opinions appear quite disparate. While *Metcalf* is a reported and oft-cited Ninth Circuit case from 2002, *CBS* is an unreported Southern District of New York case from the following year. While *Metcalf* focuses on scripted dramatic programming, *CBS* assays actual reality shows. And, while *Metcalf* ruled in favor of the plaintiffs, *CBS*’ holding definitively favored the defendants.

Despite these divergences, however, *Metcalf* and *CBS* are bonded by some important commonalities. First, commentators have interpreted both of these cases, albeit in different ways, to suggest that plaintiff reality television producers may overcome summary judgment motions with relative ease. Second, both *Metcalf* and *CBS* suffer from a number of flaws in their respective analyses of substantial similarity. Indeed, the extent to which future courts embrace, reject, widen, or narrow the reasoning of these cases will have significant consequences for reality television litigation.

⁶⁷ *Smith v. Jackson*, 84 F.3d at 1218. Ninth Circuit courts do, however, consider the intrinsic test on a motion for a preliminary injunction. See *Columbia Pictures Indus. Inc. v. Miramax Films Corp.*, 11 F. Supp. 2d 1179, 1184 n.3 (C.D. Cal. 1988). To evaluate substantial similarity on a preliminary injunction motion, the Ninth Circuit courts proceed just as they would at trial. The court will apply the extrinsic test; if the plaintiff passes that test, the court will then consider whether an ordinary person would be likely to consider the works as substantially similar. *Id.* at 1185.

⁶⁸ *Swirsky v. Carey*, 376 F.3d at 848. The *Swirsky* court later observes that the application of the extrinsic test, which assesses substantial similarity of ideas and expression, to musical compositions is a somewhat unnatural task, guided by relatively little precedent. . . The extrinsic test provides an awkward framework to apply to copyrighted works like music or art objects, which lack distinct elements of ideas and expression.

Id. “Nevertheless,” the court concluded, “the test is our law and we must apply it.” *Id.*

A. *Metcalf v. Bochco*

1. Overview

Commentators have called *Metcalf* “an uncharacteristically cryptic opinion.”⁶⁹ Scrutiny of the Ninth Circuit’s holding and reasoning reveals this to be something of an understatement.

The plaintiffs in *Metcalf* were a husband and wife writing team who, inspired by a 1989 newspaper article on the Army’s practice of training surgeons at inner-city hospitals, conceived of a story about a county hospital in inner-city Los Angeles and the struggles of its predominantly African-American staff.⁷⁰ Envisioning this concept as a television series, the plaintiffs discussed the idea with defendant Michael Warren, an actor, who had previously starred in television programs produced by defendant Steven Bochco.⁷¹ Warren expressed interest in the idea, and the Metcalfs, encouraged by his feedback, drafted a treatment of their idea entitled “Give Something Back.” Warren, in turn, relayed this treatment to Bochco, but later informed the Metcalfs that though Bochco enjoyed their story, the prolific producer was too busy with other projects to develop their idea.

The Metcalfs subsequently hired an author to write a screenplay based on their treatment; Warren also reviewed this work and submitted it to Bochco. Near the end of 1991, Warren again informed the Metcalfs that the producer lacked the time to collaborate. Unfazed, the Metcalfs revised the screenplay, and in 1992 they pitched that work to Bochco (again via Warren) and to defendant CBS Entertainment, Inc. When neither avenue proved successful, the Metcalfs abandoned the project.

Eight years later, however, on January 16, 2000, the television series *City of Angels* premiered on CBS. The pilot and first episode were produced and written by Bochco, starred Warren, and featured a county-run, inner-city hospital in Los Angeles with a predominantly African-American staff.⁷² The Metcalfs alleged copyright infringement, but the district court granted the defendants’ motion for summary judgment on the ground that *Metcalf*’s and Bochco’s works were not substantially similar.⁷³

The Ninth Circuit reversed the district court’s ruling on appeal. In an opinion authored by Judge Alex Kozinski, the court held that even

⁶⁹ See Thomas, *supra* note 58, at 30.

⁷⁰ See *Metcalf*, 294 F.3d at 1071.

⁷¹ This included a lead role in the classic police drama, *Hill Street Blues*. *Id.* at 1072.

⁷² See *id.* at 1072.

⁷³ *Id.* at 1073.

though all the alleged similarities between the plaintiffs' screenplay and the defendant's television series were generic and thus not protected by copyright law, the parties' respective arrangements of those generic elements were sufficiently alike to require a trial on the issue of substantial similarity.⁷⁴

The court arrived at this conclusion after a brief and murky application of the Ninth Circuit test. Noting that "the similarities between the relevant works are striking," the court commenced its extrinsic analysis by listing a series of seven similarities between the works, including setting,⁷⁵ thematic material,⁷⁶ physical traits of the characters,⁷⁷ broad emotional dilemmas,⁷⁸ interpersonal relationships,⁷⁹ and political elements.⁸⁰ Though Judge Kozinski acknowledged that nearly all of these elements were either unprotectable general plot ideas or *scenes à faire*,⁸¹ and that, "one cannot copyright the idea of an idealistic young professional choosing between financial and emotional reward, or of love triangles among young professionals eventually becoming strained, or of political forces interfering with private action,"⁸² the court nevertheless explained that the cumulative weight of these similarities allowed the Metcalfs to survive the extrinsic test. Likening the situation to unprotectable musical notes acquiring copyrightability once selected and arranged in the pattern of a tune, the court asserted that the presence of so many generic similarities and the common patterns in which they arise enabled the Metcalfs to satisfy the extrinsic test: "the particu-

⁷⁴ *Id.* at 1075.

⁷⁵ "Both the Metcalf and Bochco works are set in overburdened county hospitals in inner-city Los Angeles with mostly black staffs." *Id.* at 1073.

⁷⁶ "Both deal with issues of poverty, race relations and urban blight." *Id.*

⁷⁷ "[B]oth [are] young, good-looking, muscular black surgeons who grew up in the neighborhood where the hospital is located." *Id.* .

⁷⁸ "[B]oth surgeons struggle to choose between the financial benefits of private practice and the emotional rewards of working in the inner city." *Id.*

⁷⁹ "[B]oth [characters] are romantically involved with young professional women when they arrive at the hospital, but develop strong attractions to hospital administrators. Both new relationships flourish and culminate in a kiss, but are later strained when the administrator observes a display of physical intimacy between the main character and his original love interest." *Id.*

⁸⁰ "In both works, the hospital's bid for reaccreditation is vehemently opposed by a Hispanic politician." *Id.* at 1074.

⁸¹ "General plot ideas are not protected by copyright law . . . Nor does copyright protect 'scenes a faire' or scenes that flow naturally from unprotectable basic plot premises . . . Instead, protectable expression includes the specific details of an author's rendering of ideas, or 'the actual concrete elements that make up the total sequence of events and the relationships between the major characters.'" *Id.* (citing *Berkic v. Crichton*, 761 F.2d at 1292.).

⁸² *Id.*

lar sequence in which an author strings a significant number of unprotectable elements can itself be a protectable element.”⁸³

Directly before concluding, the court also inserted a paragraph regarding the issue of access. While not mentioning the inverse ratio rule explicitly, the court noted that the Metcalfs’ case was “strengthened considerably” by Bochco’s concession of access to their works.⁸⁴ “*In-deed, here we have more than access,*” Judge Kozinski wrote, “One of the defendants, Michael Warren, allegedly stated that he had read three versions of the script, and had passed them on to defendant Steven Bochco, who had also read them and liked them.”⁸⁵ Thus, the court reasoned, because Warren and Bochco were so intimately involved with *City of Angels* (as its star and writer-producer), a trier of fact easily could infer that the many similarities between the plaintiff’s scripts and the defendants’ work were the result of copying, and not mere coincidence.

2. Analysis

Before assessing *Metcalf* critically, the threshold question remains of how a case focusing on two scripted, dramatic works is relevant to the predominately unscripted format of reality television. The answer lies in *Metcalf*’s suggestion that the selection and arrangement of uncopyrightable ideas and *scenes à faire* can itself be copyrightable. Though stated with reference to dramatic works, this principle directly impacts reality TV, as unscripted shows are typically dominated by uncopyrightable ideas—most importantly, the show’s general, unprotectable concept—and *scenes à faire*—i.e., the several elements that flow naturally from the concept. Indeed, the value of an unscripted program may lie almost entirely in its basic concept, rather than in the plot, themes, dialogue, mood, setting, pace, or characters of a traditional scripted drama or comedy. Thus, *Metcalf*’s holding may directly affect unscripted formats, as it opens the opportunity for plaintiffs to raise viable infringement claims even when the similarities between the works at issue are solely generic and uncopyrightable.

It is unsurprising, then, that *Metcalf* is viewed differently by those who advocate for greater copyright protection of reality TV shows and those who advocate for a more restrictive protection analysis. Commentators and advocates who subscribe to the former viewpoint predictably view *Metcalf* in a positive light: the sequence and arrangement

⁸³ *Id.*

⁸⁴ *Id.* at 1075.

⁸⁵ *Id.* (emphasis added).

principle means that, “even if one reality television program infringes only the expression of an individually unprotectable ‘stock device’ of another reality television program (whatever those stock devices may be), a copyright infringement claim should remain viable.”⁸⁶ Conversely, this Comment contends that *Metcalfe* should be limited and regarded by future courts as an anomalous and analytically unsound departure from Ninth Circuit case law.

One could argue that *Metcalfe* should be narrowly applied based on its analytic problems alone. First, the case’s application of the extrinsic test is terse and opaque: although Judge Kozinski lists seven⁸⁷ similarities between the plaintiff’s screenplay and the defendant’s program, it is unclear what factors the Ninth Circuit actually considers decisive in finding that the *Metcalfe*s raised a triable issue of fact under the extrinsic test. Furthermore, it appears as if the court selected only the most abstract ideas and obvious *scenes à faire* to compare. For instance, Judge Kozinski observes that both programs focus on issues of “poverty” and “race relations.”⁸⁸ It is difficult to conjure less expressive element than these; in fact, a California District Court case decided over ten years before *Metcalfe* specifically held that, “the concept (and unfortunate reality) of racism is clearly not a product of plaintiff’s original expression.”⁸⁹

It is also important to highlight the similarities that *Metcalfe* fails to address in its extrinsic test analysis. Besides noting the uncopyrightable ideas and *scenes à faire*, the court engages in no analysis of dialogue, mood, setting, pace, or any of the other traditional extrinsic test factors.⁹⁰ By focusing solely on basic story points and overarching thematic elements, and eschewing analysis of the remainder of the traditional extrinsic test factors, the *Metcalfe* court thus ignores what the Ninth Circuit earlier termed “the actual concrete elements that make up the total sequence of events and the relationships between the major characters.”⁹¹ Moreover, the court’s omissions are particularly glaring in light of the fact that *Metcalfe* states its holding turns on “the presence

⁸⁶ See Fiore & Rogoway, *supra* note 30, at 38.

⁸⁷ See *Metcalfe*, 294 F.3d at 1073.

⁸⁸ *Id.*

⁸⁹ See *Pelt v. CBS*, No. CV-92-6532, 1993 U.S. Dist. LEXIS 20464 at *8. To take another example, Judge Kozinski noted that in both works the protagonists were “young,” “good looking” and “muscular.” Surely, one would be hard-pressed to find a drama televised in prime time whose male lead characters do not conform to this description. See *Metcalfe*, 294 F.3d at 1073.

⁹⁰ See Thomas, *supra* note 58, at 32. This is especially curious, considering that Judge Kozinski, the author of the opinion, is known for his pop-culture savvy. See, e.g. *Wendt v. Host Int’l, Inc.* 197 F.3d 1284 (9th Cir. 1999) (Kozinski J., dissenting).

⁹¹ See *Berkic v. Crichton*, 761 F.2d at 1293.

of *so many* generic similarities.”⁹² A list of seven basic resemblances between the shows hardly seems to constitute this emphasized quantity.

The court’s reliance on the so-called “sequence and arrangement” principle also deserves scrutiny. Although this principle has long been acknowledged by the Ninth Circuit, it has only sparingly been applied.⁹³ Prior to *Metcalf*, the Ninth Circuit never held that an arrangement consisting entirely of unprotectable elements was sufficient to satisfy the extrinsic test; in fact, decisions leading up to *Metcalf* repeatedly emphasized the importance of analytically dissecting works to filter out unprotectable material.⁹⁴ Significantly, in a case reported just one month before *Metcalf*, the Ninth Circuit stressed that, when applying the extrinsic test, courts “must filter out and disregard the nonprotectable elements.”⁹⁵ Some Ninth Circuit holdings have even gone beyond this proposition, advocating the filtering out of otherwise protectable similarities. For example, in *Apple Computer* the Ninth Circuit held that similar elements in the graphical user interfaces used by Microsoft and Apple had to be filtered out under the extrinsic test because the plaintiff had licensed those elements to the defendant.⁹⁶

Furthermore, courts acknowledging the sequence and arrangement principle have also emphasized that these arrangements enjoy “only ‘thin’ protection against virtually identical copying.”⁹⁷ As explained in the 1991 Supreme Court case *Feist Publications v. Rural Telephone Service*:⁹⁸

Where the compilation author adds no written expression but rather lets the facts speak for themselves, the expressive element is more elusive This inevitably means that the copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another’s publication to aid in preparing a competing work, *so long as the competing work does not feature the same selection and arrangement* [N]o matter how much original authorship the work displays, the facts and ideas it exposes are free for the taking . . . [T]he 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.⁹⁹

⁹² *Metcalf*, 294 F.3d at 1074 (emphasis added).

⁹³ Thomas, *supra* note 58, at 32.

⁹⁴ *See id.*

⁹⁵ *See id.* (citing *Cavalier v. Random House*, 297 F.3d 815 (9th Cir. 2002)).

⁹⁶ *See* Thomas, *supra* note 58, at n.21.

⁹⁷ *See, e.g. Apple Computer*, 35 F.3d at 1442.

⁹⁸ 499 U.S. 340 (1991).

⁹⁹ *Id.* at 349 (emphasis added) (internal citations omitted).

Metcalf, however, never addresses the appropriate level of protection, despite the fact that the court found a triable issue of substantial similarity in the arrangement of otherwise generic story elements. Rather, Judge Kozinski explained that “[t]he particular sequence in which an author strings together a significant number of unprotectable elements can itself be a protectable element.”¹⁰⁰ To illustrate this theory, the court analogized to musical notes in a scale, explaining, “Each note . . . is not protectable, but a pattern of notes in a tune may earn copyright protection.”¹⁰¹ This is hardly an informative analogy. For instance, the individual letters of the alphabet likewise are not copyrightable, but a story composed by arranging those letters into words may be.¹⁰² As one commentator observes, “[t]he real question is at what point does the sequence or pattern of unprotectable elements become sufficiently expressive that it may support a claim for copyright infringement and enable a claimant to satisfy the extrinsic test?”¹⁰³

With these questions in mind, it is difficult to discern the court’s intentions regarding subsequent application of the sequence and arrangement principle. The penultimate “access” paragraph offers some guidance on this issue. In this brief section, the court obliquely concedes that the *Metcalfs*’ case is “strengthened considerably” by Bochco’s admission of access to their works and by the connection that Warren and Bochco had to the *Metcalfs* and *City of Angels*.¹⁰⁴ Judge Kozinski’s emphasis on the atypically high degree of proven access suggests that future courts should interpret *Metcalf* narrowly, restricting its application to cases where the defendant has had extensive, first-hand exposure to the plaintiff’s arrangement of the generic elements at issue.¹⁰⁵

This reading of *Metcalf* coincides neatly with the Ninth Circuit’s inverse ratio rule. From this perspective, *Metcalf* may be read as a case of “top-heavy” access that the Ninth Circuit misguidedly analyzed, or misguidedly emphasized, as properly satisfying the extrinsic test. Certainly the facts of the case preliminarily appear to favor the plaintiffs:

¹⁰⁰ See *Metcalf*, 294 F.3d at 1074.

¹⁰¹ *Id.*

¹⁰² See Thomas *supra* note 58, at 33. To further illustrate this argument, consider the following two statements: “I love to be a 1L in law school” and “I hate to love hard work, but, to be honest, being a 1L at law school is an intellectually engaging, if occasionally grueling, endeavor.” Though the latter statement contains every word of the former, in order, the two statements convey entirely separate thoughts. *Metcalf*, however, suggests that these disparate statements could be found to be substantially similar.

¹⁰³ See Thomas, *supra* note 58, at 33.

¹⁰⁴ See *Metcalf*, 294 F.3d at 1075.

¹⁰⁵ See Thomas, *supra* note 58, at 33-34.

the Metcalfs repeatedly shared their ideas the defendants, in the form of pitches, treatments, and scripts, over the course of several *years*. *Metcalfe* may be reconcilable, then, as a unique situation whereby the court felt constrained that the Metcalfe's fact pattern merited a holding for the plaintiffs, but opted to employ an analytically dubious approach to justify this conclusion.

The *Metcalfe* holding also raises copyright policy concerns. Following Judge Kozinski's logic, if courts extend copyright protection to basic arrangements of the ideas, *scenes à faire*, and other unprotectable elements that constitute an unscripted series, then theoretically litigation could proceed successfully against almost any program similar to the plaintiff's. In effect, individuals could monopolize entire categories, or "sub-genres"¹⁰⁶ of reality programming. For instance, under *Metcalfe*'s reasoning, the producers of *Survivor* could potentially enjoin the production of any other reality series sharing a similar selection and arrangement of the uncopyrightable idea of a wilderness elimination contests and uncopyrightable elements such as a host, "attractive" and "muscular"¹⁰⁷ contestants, and elimination ceremonies.¹⁰⁸ Even more dangerously, this would confer on the producers of *Survivor* a monopoly over the broad concept of a wilderness elimination contest. The consequences of this undesirable effect are summarized in the 1985 California District Court case *Dick Clark Co. v. Alan Landsburg Productions*¹⁰⁹: "To permit copyrighting of the limited number of ways that plaintiff could express the idea of a blooper show would exhaust the possibilities of other's producing clip shows. *In effect, [the plaintiff] seeks to appropriate the subject matter itself.*"¹¹⁰

Perhaps the *Metcalfe* jury had some of these considerations in mind when they returned a verdict for all defendants finding no copyright infringement after the case went to trial in June 2004.¹¹¹ With the verdict in that case currently on appeal, it is timely to meditate on *Metcalfe*'s impact on reality television and, by extension, on the future of substantial similarity litigation as a whole.

¹⁰⁶ Just as scripted television series can be classified into genres narrower than "comedy" or "drama" (such as "workplace comedy" or "forensic procedural drama"), so too can reality series be classified in categories, or "sub-genres," narrower than the broad distinction of "reality TV." This classification system is especially desirable for a number of reasons relating both to logic and to judicial economy—see discussion *infra* §§ III(B)(2) and V.

¹⁰⁷ See *supra* note 90.

¹⁰⁸ Indeed, this example anticipates the following case examined in this comment, *CBS v. ABC* which focuses on *Survivor* and the purportedly substantially similar reality series *I'm a Celebrity—Get Me Out of Here*.

¹⁰⁹ No. 83-3665-JMI, 1985 U.S. Dist. LEXIS 18924

¹¹⁰ *Id.* at *7 (emphasis added).

¹¹¹ See White & Brenner, *supra* note 9, at 5.

B. CBS v. ABC

CBS v. ABC merits careful analysis for two reasons. First, *CBS* represents the only opinion to date where a court has had the occasion to discuss in any detail the applicability of the Copyright Act to reality television.¹¹² Second, like *Metcalf*, *CBS* provides substantial, and questionable, argumentative ammunition to commentators who support a thicker regime of copyright protection for reality programming.

1. Overview

In *CBS*, plaintiff television network CBS Broadcasting, Inc. sued defendant network ABC, Inc. to enjoin the latter from broadcasting the reality series *I'm a Celebrity—Get Me out of Here*, which CBS contended infringed its copyright in the show *Survivor*.¹¹³ *Celebrity* featured eight “celebrities” who, like the real-life contestants on *Survivor*, were marooned on a remote exotic locale and forced to fend for themselves with few amenities.

CBS's suit alleged that *Celebrity* infringed the plaintiff's copyright in *Survivor* by copying the format of *Survivor*'s “essential elements,” which according to expert testimony included “voyeur verite, hostile environment . . . building of social alliances, challenges, . . . and serial elimination.”¹¹⁴ Consequently, CBS asserted that *Celebrity* should be enjoined from airing, as *Survivor* was the initial series to combine the elements of its unique format. However, in an opinion delivered from the bench, District Judge Loretta Preska of the Southern District of New York denied CBS's motion to preliminarily enjoin the broadcast of ABC's *Celebrity*.¹¹⁵

¹¹² In recent years, a number of reality television producers and their networks have initiated copyright infringement lawsuits. However, all but one of those cases has been resolved without a reported court decision. See Fiore & Rogoway, *supra* note 30, at 36. For example, in 2000 the Fox Family Channel, which produced the reality series *Race Around the World*, sued to enjoin the production of CBS's *The Amazing Race*. Fox Family Prop. Inc. v. CBS Inc., No. 00-CV-11482 (CD. Cal. Oct. 27, 2000); see also Brett Sporich, *Fox Can't Stop CBS 'Race'*, THE HOLLYWOOD REPORTER, Nov. 27, 2000. Both *Race around the World* and *The Amazing Race* featured teams on a global scavenger hunt that concluded in New York City. Acknowledging that Fox Family's copyright claims raised “serious questions,” the court nevertheless denied the plaintiff network's request for a preliminary injunction as unwarranted by the balance of hardships. Janet Sprintz, *Federal Judge Denies Fox Motion on 'Race'*, VARIETY, Nov. 27, 2000, at 38.

¹¹³ *CBS*, 2003 U.S. Dist. LEXIS 20258 at *1.

¹¹⁴ *Id.* at *21. The plaintiff's expert noted that these elements were “never found in that combination in any other show” and that “the genre it's in was only emerging and [*Survivor*] is one of the definitional shows that defined what the genre would become as we started to define it.” *Id.*

¹¹⁵ *Id.* at *44-45. After the court denied CBS's motion for a preliminary injunction, CBS dismissed its complaint with prejudice. Fiore & Rogoway, *supra* note 30, at 37.

Commencing its analysis by noting that, “here, we have a combination of nonprotectable generic ideas,”¹¹⁶ the court emphasized that it was crucial to consider each program series as a whole. Looking to precedent, Judge Preska turned to cases applying copyright doctrine to scripted programs other literary works, and from these cases inducted a list of elements to be considered, including total concept and feel, theme, characters, plot, sequence, pace, and setting.¹¹⁷ Significantly, the court assumed the existence of analogous elements in reality programs without ever discussing possible differences between scripted and unscripted television.¹¹⁸

Total Concept and Feel. The court first considered total concept and feel, highlighting the disparity between the “unalterable seriousness” of *Survivor*¹¹⁹ and the “comedic” tone¹²⁰ of *Celebrity*.¹²¹ The court also contrasted each series’ production values, juxtaposing *Survivor*’s “lush, artful photography and painstaking etiquette” with *Celebrity*’s “home video look.”¹²² In light of these differences, Judge Preska

¹¹⁶ *CBS*, 2003 U.S. Dist. LEXIS 20258 at *11.

¹¹⁷ *Id.* at *13-21. For example, Judge Preska examined the substantial similarity case *Williams v. Crichton* and observed:

[W]hen evaluating claims of infringement involving literary works, we have noted while liability would result only if the protectable elements were substantially similar in our examination would encompass the similarities such aspects as the total concept in feel, theme, characters, plot, sequence, pace, and setting of the [plaintiff’s] books and the [defendant’s].

Id. at *13-14 (citing *Williams v. Crichton*, 84 F. 3d 581, 588 (2d Cir 1996)).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at *26. The court emphasized the *Survivor* contestants’ cutthroat competition for food and for the million dollar prize:

The seriousness of the situation is exemplified by a female contestant noting some weeks into the ordeal that she is losing her hair presumably from malnutrition. The serious concept and feel is evident, for example, in the opening scene, which again I will probably get to later. In *Survivor* the contestants cannot speak to each other, have been forbidden from speaking to each other as the narrator tells us. The camera focuses on their very tense faces. One or more of them, as was so delicately put in the testimony, were barfing into barf bags. After the plane lands the contestants frantically ran to use well the five minutes they had been given to garner enough supplies to survive without additional food for 45 days.

Id. at *26-27.

¹²⁰ *Id.* at *28.

¹²¹ Judge Preska contrasted the elimination ceremonies of the two shows, and observed that while *Survivor*’s torch-lit, tribal-drum-backed sequence was highly ritualized; *Celebrity*’s comparable sequence was devoid of such gravitas, with eliminated contestants departing on a “silly-looking party barge,” replete with fireworks, waiters, and glasses of champagne. *Id.* at *27-28.

¹²² *Id.* at *29. Judge Preska, perhaps a bit bombastically, even goes so far as to label *Survivor*’s shots “really moving art . . . we see very artful shots of, for example, a female contestant looking into a mirror with the faces of several other contestants reflected in the mirror.” *Id.*

concluded that the two series were substantially different in concept and feel.¹²³

Character. The court next examined the “characters” of each series, which it identified as the hosts and the contestants. Making no mention of the fact that, unlike characters in scripted programming, the interactions of the reality show contestants are not composed by a writing staff, Judge Preska discussed the real-life participants in the shows as if they were fictional creations—“real people playing themselves,” in her words.¹²⁴ The court defined these contestants¹²⁵ with reference to each series’ “plot,”¹²⁶ noting, for example, that because the *Survivor* contestants vote each other off, individuals formed mutual alliances and schemed constantly when separated from the larger group.¹²⁷ Because the “cut-throat competition” of *Survivor* was entirely absent from *Celebrity*, the court reasoned that the latter series’ characters’ motivations were consequently quite different: “They are not competing with each other to win a million dollars. They are trying to project the best image possible to the viewing audience, whether to continue a reputation as a good guy or can-do guy or to repair a less than perfect reputation.”¹²⁸ Based on these observations, the court concluded that each show’s “characters” were expressed differently.¹²⁹

Plot. Judge Preska subsequently considered plot, another element commonly associated with scripted dramatic or literary works. The court defined “plot” not by reference to the sequence of events of the individual episodes, but rather by reference to the “game show rules” of each series.¹³⁰ For instance, the court observed that while *Survivor*’s challenges were mandatory and arduous, *Celebrity*’s challenges were

¹²³ *Id.* at *30.

¹²⁴ *Id.* at *32.

¹²⁵ The *CBS* court also observed that each show expressed the “generic element” of host in a different fashion. While the host of *Survivor* appeared relatively infrequently, primarily played the role of judge and group therapist, and remained “unrelentingly serious” throughout the series, the comedic hosts of *Celebrity* appeared frequently in a series of skits and were “nothing if not funny.” *Id.* at *31-32.

¹²⁶ In its analysis of character, the court acknowledged that the “character consideration flows over into a consideration of what might be called plot in these shows.” *Id.* The court subsequently analyzed plot separately in the next section of the discussion.

¹²⁷ *Id.* at *33. Conversely, Judge Preska observed the characters on *Celebrity* were hardly “regular folks”—“they are celebrities, and the audience knows who they are and a good bit about each one of them going into the show.”

¹²⁸ *Id.* at *34.

¹²⁹ *Id.*

¹³⁰ *Id.*

typically voluntary and “silly or gross” rather than physically difficult.¹³¹

Scenes à faire. Finally, the court moved to consider each series’ expression of “the worm eating scene,” a sequence appearing in both *Survivor* and *Celebrity* in which a contestant devoured a worm in order gain some kind of strategic or material reward.¹³² Curiously, this is the only element in the opinion that Judge Preska identified as a *scene à faire*: “in a remote, hostile environment, or deserted island setup, eating unattractive crawling creatures is part of the *scenes à faire*.”¹³³ Noting that both sequences included scenes of the contestants gesticulating in preparation, Preska nevertheless differentiated the two in a number of ways. In *Survivor*, for instance, the worms were arranged in a “tribal-looking . . . layout” and the “[t]he intensity of the pressure was evident”¹³⁴; conversely, in *Celebrity* the worms appeared on a banquet table humorously set in an elaborate spread of fine food.¹³⁵

In sum, the court concluded that CBS was unlikely to prove that a lay observer would consider the works as substantially similar to one another.¹³⁶

2. Analysis

Plaintiff’s-side commentators have interpreted *CBS* as standing for the proposition that, in the substantial similarity context, courts may treat unscripted reality shows as they would any other scripted or literary work: “[I]t is clear from the [*CBS*] court’s opinion that the expressive content of reality programs is entitled to and receives the same protection as any other expressive content.”¹³⁷ A close reading of *CBS* suggests otherwise. In fact, it is quite unclear from the opinion what

¹³¹ The court also looked at the setting of each show, focusing on the visual expression of the generic concept of a “remote, inhospitable” locale. As it did with total concept and feel, character, and plot, the court found that the inhospitable settings of the two shows were expressed differently, contrasting the “low vegetation,” “wide sky,” and “wind-chiseled rocks” of *Survivor* with the “dense vegetation” of *Celebrity*. *Id.* at *30.

¹³² *Id.* at *40.

¹³³ *Id.* at *40 (emphasis added).

¹³⁴ *Id.* at *40-41.

¹³⁵ *Id.* at *41.

¹³⁶ *Id.* at *42. The court acknowledged that it was cognizant of the Supreme Court’s admonition in *Feist* that copyright protection in a factual compilation is thin, and, by analogy, that copyright protection in a compilation of ideas must also be thin; the court nevertheless concluded that this particular case did not depend on the difference between thin and normal protection, because the different expressions of the “*Survivor* concept” in these two shows compelled a finding, that, under either standard, CBS was not likely to succeed in showing substantial similarity.

¹³⁷ Fiore & Rogoway, *supra* note 30, at 38.

kind of treatment and degree of protection reality TV shows are entitled to and should receive.¹³⁸

First, the court's emphasis on elements traditionally associated with literary works, specifically character and plot, is fraught with ambiguity. Virtually all Second and Ninth Circuit substantial similarity case law examines these elements with respect to the fictional inhabitants of literary or scripted works and concordantly avoids invoking them (or at the very least the nomenclature "character" or "plot") when dealing with unscripted or quasi-scripted series such as game or talk shows.¹³⁹ Judge Preska, however, makes no mention of this distinction—aside from the confusing, possibly inaccurate statement that "both shows use multiple, real people playing themselves"—or even acknowledges that these shows are in any way different from the scripted dramas or comedies that previously dominated primetime airwaves.¹⁴⁰

The court's analyses of "character" and "plot" are particularly problematic. In fact, the elements Judge Preska identifies as expression frequently do not appear to be expression at all. For example, the court differentiates between each series' contestants with reference to the nature of their respective competitions, noting that because participants of *Survivor* have their attention focused on the competition, "there is suspicious musing and speculation" going on constantly.¹⁴¹ However, this seems more analyzable as *scenes à faire*, derived from the fact that *Survivor*'s "last man standing" concept necessitates and indeed fosters back-stabbing and alliance-formation, than it does as protectable expression. Moreover, in assessing plot the court reaches out on an even further analytical limb by defining *Survivor* and *Celebrity*'s plots with reference to each series' game show rules: "the tests imposed on the contestants and the elimination both shows give."¹⁴² This assertion is questionable, as game show rules are generally regarded as uncopyrightable ideas.¹⁴³ Thus, the decision fails to address actual expression of each reality series "plot," if such a term is even appropriate.¹⁴⁴

¹³⁸ It should be noted that *CBS*'s substantial similarity analysis is not uniformly assailable; it would be difficult to argue, for instance, that elements such as tone, production values, and pacing should *not* factor at least somewhat into an analysis of whether two unscripted shows are substantially similar.

¹³⁹ See, e.g. *Dick Clark Co*, 1985 U.S. Dist. LEXIS 18924; *Barris/Fraser*, 1988 WL 3013; *Sheehan*, 1992 U.S. Dist. LEXIS 3028.

¹⁴⁰ *CBS*, 2003 U.S. Dist. LEXIS 20258 at *32.

¹⁴¹ *Id.* at *33.

¹⁴² *Id.* at *34-36.

¹⁴³ See, e.g. *Barris/Fraser*, 1988 WL 3013; *Sheehan*, 1992 U.S. Dist. LEXIS 3028.

¹⁴⁴ Even plaintiff's-side attorneys subtly concede that this ambiguity is troubling, noting that, "it is clear from the court's opinion that some adaptation of conventional concepts of scripted expression, like 'plot' and 'characters' was necessary before those concepts could be

Additionally, as with *Metcalf*, many of CBS' more troubling aspects relate to what the opinion fails to address. Foremost among these omissions is the court's failure to fully acknowledge issues of *scenes à faire*. Of the dozens of comparisons between *Survivor* and *Celebrity*, Judge Preska explicitly identifies only one as a *scene à faire*: the worm-eating scene.¹⁴⁵ Labeling this sequence the sole *scene à faire* in either series is misguided and counterintuitive for several reasons. The first concerns issues of genre. Genre identification directly impacts the quantity and scope of *scenes à faire*: if *scenes à faire* is expression that "flows naturally" from a particular theme, situation, or setting, then the broader the genre's definition, the fewer the number elements that may be classified as *scenes à faire* and, contrarily, the narrower the genre's definition, the greater the number of elements that may be classified as *scenes à faire*. For example, if one categorizes *Survivor* as part of a broad "game show" genre, then scenes involving contestants eating worms would likely not be considered *scenes à faire*—devouring slimy maggots is not necessarily a standard, obvious element of a game show. However, if one categorizes *Survivor* as falling in a sub-genre of "game show" such as "wilderness elimination contest," then a worm-eating scene may indeed be considered as flowing naturally from this concept. Therein lies a paradox of CBS: the fact that the court identifies only one scene as a *scene à faire* indicates a broad conception of genre, but the fact that this scene involves such a peculiar activity signifies a narrower conception of genre.¹⁴⁶

The court itself appears somewhat cognizant of the opinion's shortcomings. Judge Preska notes early on that, "I confess some confu-

applied to *Survivor* and *Celebrity*." See Fiore & Rogoway, *supra* note 30, at 38. For a further explication of plot in the reality television context, as well as a proposal for a new, more customized, classification scheme, see Part V, *infra*. See also CBS, 2003 U.S. Dist. LEXIS 20258 at *40.

¹⁴⁵ CBS, 2003 U.S. Dist. LEXIS 20258 at *40.

¹⁴⁶ A close look at CBS in fact suggests the latter. Shortly after introducing the worm-eating scene, the court observes that, "in a remote, hostile environment, or deserted island setup, eating unattractive, crawling creatures is part of the *scenes à faire*." *Id.* Additionally, the court later references "the different expression of the *Survivor* concept in these two shows." *Id.* at *43. These combine to suggest that the CBS court indeed subscribed to a narrower definition of *Survivor* and *Celebrity*'s genre: they are both variations of "the *Survivor* concept"—a sub-genre of reality television perhaps best explicated as "wilderness elimination contest." *Id.* at *42-43. Furthermore, it is interesting to note that if this is indeed case, then a substantial portion of the purportedly expressive elements identified by CBS could also be characterized as *scenes à faire* in "the *Survivor* concept": elimination scenes, interstitial shots of wildlife, scheming contestants, tribal music, panoramic landscape photography—these are just a few of the elements that arguably should have been classified as unprotectable *scenes à faire*.

sion” with respect to the Second Circuit’s take on analytic dissection.¹⁴⁷ Like so much else in *CBS*, this statement suggests that Judge Preska’s opinion should be handled tentatively by future courts.

IV. *EXTREME MAKEOVER?*: POST *METCALF* JURISPRUDENCE

One aspect of *CBS* that is difficult to dispute is its analysis of *Metcalfe*. Though Judge Preska quotes liberally from *Metcalfe* in dicta,¹⁴⁸ she ultimately concludes that *Metcalfe*’s sequence and arrangement principle is undesirable from a policy standpoint: “providing protection to a combination of generic elements without more—that is, without consideration of the presentation or expression of those elements—would stifle innovation and would stifle the creative process that spawned the two shows at issue here.”¹⁴⁹

CBS is not alone. Since it was decided in June 2002, *Metcalfe* has not been followed by a single published appellate court decision upholding a copyright infringement claim on the basis of an allegedly protectable arrangement or pattern of generic elements that were individually unprotectable.¹⁵⁰ Moreover, as detailed in this section, subsequent Ninth Circuit case law indicates that *Metcalfe* does not herald a fundamental change in the court’s application of the extrinsic test.

Specifically, this section looks at two lines of post-*Metcalfe* jurisprudence. The first involves *Metcalfe* in the reality television context and focuses on *Rice v. Fox Broadcasting Co.*,¹⁵¹ a Ninth Circuit decision that addresses and limits *Metcalfe* explicitly. The second involves *Metcalfe* in the non-reality context, and focuses on three cases that, while assessing works dissimilar to reality TV, nevertheless collectively limit *Metcalfe*’s sequence and arrangement principle. Taken together, these cases illustrate the way in which the Ninth Circuit tends to narrow *Metcalfe*’s impact.¹⁵²

¹⁴⁷ *Id.* at *7.

¹⁴⁸ *See id.* at **8-9, 22.

¹⁴⁹ *Id.* at *24-25. For instance, Judge Preska notes that, under *Metcalfe*’s sequence and arrangement logic, one could erroneously find that *I Love Lucy* infringes on the *Honeymooners*, that *I Dream of Genie* infringes on *Bewitched*, or that *The Late Show with David Letterman* infringes on *The Tonight Show with Jay Leno*. *Id.*

¹⁵⁰ *See* Thomas, *supra* note 58, at 36.

¹⁵¹ 330 F.3d 1170 (9th Cir. 2003).

¹⁵² This section only focuses on post-*Metcalfe* Ninth Circuit jurisprudence, because, to date, there are no cases, published or unpublished, that cite to *CBS v. ABC*. This may be due to the fact that *CBS* is unreported, that *CBS* is a district court case, or that *CBS*, as detailed in the previous section, is a deeply flawed opinion.

A. *Metcalf in the Reality Context: Rice v. Fox Broadcasting*

In *Rice*, the Ninth Circuit considered two reality works: *The Mystery Magician*, a home video created by the plaintiff that revealed how to perform several magic tricks, and a series of television specials produced by the defendant, which also exposed the mechanics behind popular illusions. Between 1986 and 1999, approximately 17,000 copies of *The Mystery Magician* were sold, and the plaintiff alleged that the defendant's specials, broadcast between 1997 and 1999, infringed on the copyright of his video.¹⁵³ The Ninth Circuit, however, affirmed the district court's grant of summary judgment to the defendants.¹⁵⁴

The *Rice* court opened its analysis by observing, "[i]n applying the extrinsic test, we must distinguish between the protectable and unprotectable material because a party claiming infringement may place no reliance upon any similarity in expression resulting from unprotectable elements."¹⁵⁵ The court cited this proposition to *Metcalf*, perhaps in an effort to highlight the incongruity between *Metcalf's* holding and this fundamental tenet of copyright law. Speculation aside, this is but the first of several critiques *Rice* levies against its Ninth Circuit predecessor.¹⁵⁶

Noting that the mere fact that both *The Mystery Magician* and the defendant's specials revealed the secrets behind magic tricks did not by itself constitute infringement, the *Rice* court cautioned that the plaintiff's claim would succeed only if the specials infringed upon the presentation and stylistic elements of *The Mystery Magician*.¹⁵⁷ The court thus proceeded to consider many of the traditional Ninth Circuit extrinsic test factors: character, dialogue, setting, sequence of events, production values, and tone. The analysis in this section raises a number of salient issues.

First, the court repeatedly invoked the doctrines of merger and *scenes à faire* to preclude finding infringement between the similarities of the two series. For instance, while considering the masked star of each show, the court observed that any magician who reveals the secrets behind illusions risks ostracism in the professional community—and that there are only a discrete number of methods by which an illusionist can conceal his or her identity. The court therefore concluded that the masks constituted an unprotectable *scene à faire*.¹⁵⁸ Similarly,

¹⁵³ *Rice*, 330 F.3d. at 1173.

¹⁵⁴ *Id.* at 1182.

¹⁵⁵ *Id.* at 1174 (citing *Apple Computer*, 35 F.3d at 1446).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1175.

¹⁵⁸ *Id.* at 1176.

with regard to setting, the court later noted that “because any similarities, such as being filmed in a secret location without any audience, are generic and inconsequential, they fail to meet substantial similarity.”¹⁵⁹

Second, rather than using literary terminology such as “plot,”¹⁶⁰ the *Rice* court instead invoked nomenclature more readily compatible with reality formats such as “sequence of events.” Moreover, *Rice* actually considered the specific expression of these elements. For example, the court observed that, while *The Mystery Magician* opened with a shot of the feet of an unidentified magician and the specials opened with a shot of the host walking into the frame, these purported similarities in fact represented a divergence between the two works, as the *Specials* featured a host who was prominently onscreen and *The Mystery Magician* did not.¹⁶¹

Rice also harnessed its discourse on sequence of events to expose *Metcalf's* infirmities. Analyzing the plaintiff's allegation that both works involved a magician performing an illusion normally and then re-performing the same illusion to explain how it was done, the court noted that the sequencing of performance followed by revelation was subject to the limiting doctrines of merger and *scenes à faire*. Citing to *Metcalf*, the court explained, “[g]eneral plot ideas are not protected by copyright law; they remain forever the common property of artistic mankind. Nor does copyright law protect ‘*scenes à faire*,’ or scenes that flow naturally from unprotectable basic plot elements.”¹⁶²

Finally, the *Rice* court explicitly addressed *Metcalf* with regard to the issue of access. After introducing the notion of the inverse ratio rule, the court concluded that *Rice's* evidence of access¹⁶³ was insufficient to trigger the rule. However, in drawing this conclusion the court identified *Metcalf* as an inverse ratio rule case¹⁶⁴:

But here we are not presented with the same pattern of generic similarities as in *Metcalf*. And even more important, our decision in *Metcalf* was based on a form of inverse ratio rule analysis: the plaintiff's case was “strengthened considerably by [defendants'] concession of access to their works.” In *Metcalf*, the writer and producer of the al-

¹⁵⁹ *Id.* at 1177.

¹⁶⁰ The *Rice* court also considered character, but it should be noted that these series actually *did* have characters in the traditional, literary sense—the costumed magician at the center of each series. *See id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ This evidence included the publicity surrounding the release of *The Mystery Magician*, the fact that the video was featured on an entertainment news show and in a magic trade publication, and the fact that the 17,000 copies of *The Mystery Magician* were sold. *See id.*

¹⁶⁴ Additionally, *Rice* cited to *Metcalf* after the discussing other circumstances where the circuit has applied the inverse ratio rule. *Id.* at 1178.

legedly infringing work conceded that they had read the plaintiff's work. Here, there is no such concession of access as most of Rice's claims are based purely on speculation and inference. Because we are not confronted with the same totality of similarities and the same degree of access, this case is readily distinguishable from *Metcalfe*.¹⁶⁵

The *Rice* court thus distinguished *Metcalfe* in two ways. First, it read *Metcalfe* as being "based on a form of inverse ratio analysis." This makes sense, given that *Metcalfe* involved an unusually high degree of proven access, including multiple, direct transfers of the plaintiffs' scripts and treatments to the producers of the allegedly infringing work. Second, in finding that the programs at issue in *Rice* did not involve the same sequence and arrangement of generic elements as their counterparts in *Metcalfe*, *Rice* distinguished *Metcalfe* as presenting a unique "totality of similarities." The approach may signal that future Ninth Circuit cases will read *Metcalfe* as narrowly limited to situations presenting patterns of generic similarities that are uniquely alike.¹⁶⁶

B. *Metcalfe in the Non-Reality Context: Ets-Hokin, Satava, and Lamps Plus*

While the following set of cases, all decided after *Rice*, focus on artistic works ostensibly unrelated to reality television, they nevertheless elucidate how the Ninth Circuit limitedly reads and applies *Metcalfe*'s sequence and arrangement principle.

1. *Ets-Hokin v. Skyy Spirits, Inc.*¹⁶⁷

In *Ets-Hokin*, the Ninth Circuit held that two photographs of the defendant's blue vodka bottle were not substantially similar.¹⁶⁸ "This litigation," the court observed, "is fundamentally about how many ways one can create an advertising photograph . . . of a blue vodka bottle. We conclude there are not very many."¹⁶⁹

The court noted that when features of a work "are as a practical matter indispensable, or at least standard" in the treatment of a given idea, they are treated like ideas and therefore not protected by copy-

¹⁶⁵ *Id.* at 1179 (citing *Metcalfe*, 294 F.3d at 1075) The *Rice* court even noted in a footnote that the *Metcalfe* court did not explicitly state that it was applying the inverse ratio rule; however, as noted above, the court found defendants' access to the plaintiff's copyrighted work to be an important factor in its substantial similarity analysis. *Id.* at 1179, n.6.

¹⁶⁶ See Thomas, *supra* note 58, at 36. Thomas observes, however, that such an approach offers little concrete guidance to trial courts and even less comfort to infringement defendants: "plaintiffs invariably will claim that the pattern or totality of otherwise unprotectable elements is 'unique enough' to survive summary judgment in that particular case." *Id.*

¹⁶⁷ 323 F.3d 763 (9th Cir. 2003).

¹⁶⁸ *Id.* at 764-65.

¹⁶⁹ *Id.* at 764.

right.¹⁷⁰ As the Ninth Circuit explained, the similarities between the plaintiff and defendant's works were inevitable given their shared concept of depicting a particular design of bottle.¹⁷¹ Moreover, the court found that after applying the doctrines of merger and *scenes à faire*, the "range of protectable expression" was limited by both the "subject matter idea" of the photograph and "the conventions of the commercial product shot," and thus the appropriate standard for illicit copying was virtual identity.¹⁷² The *Ets-Hokin* court made no reference to *Metcalf* in reaching this conclusion.

2. *Satava v. Lowry*¹⁷³

In *Satava* the Ninth Circuit considered the works of two sculptors, both of whom fashioned and sold lifelike glass-in-glass sculptures of jellyfish.¹⁷⁴ The plaintiff sued for copyright infringement, but the Ninth Circuit reversed the district court's preliminary injunction, holding that the similar aspects of the two sculptures were unprotectable elements that "naturally followed" from the idea of a glass-in-glass sculpture of a jellyfish.¹⁷⁵ Moreover, the *Satava* court held that the plaintiff's selection and arrangement of those unprotectable elements did not qualify for copyright protection, as they were of a trivial "quantum of originality."¹⁷⁶

In reaching this conclusion, Judge Ronald M. Gould (who had been a member of the *Metcalf* panel) singled out and distinguished *Metcalf's* application of the sequence and arrangement principle. "It is true . . . a combination of unprotectable elements may qualify for copyright protection," Judge Gould observed, citing to *Metcalf*, "[b]ut it is not true that any combination of unprotectable elements automatically qualifies for copyright protection."¹⁷⁷ Instead, the court explained, a combination of unprotectable elements is eligible for copyright protection "only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship."¹⁷⁸ Applying this reasoning to the works

¹⁷⁰ *Id.* at 765-66 (citing *Apple Computer*, 35 F.3d at 1444).

¹⁷¹ *Id.* at 766.

¹⁷² *Id.* The court concluded that Sky's photographs were not virtually identical to those of Ets-Hokin: "indeed, they differ in as many ways possible within the constraints of the commercial product shot. The lighting differs; the angles differ; the shadows and highlighting differ, as do the reflections and background. The only constraint is the bottle itself." *Id.*

¹⁷³ 323 F.3d 805 (9th Cir. 2003).

¹⁷⁴ *See id.* at 808.

¹⁷⁵ *Id.* at 810.

¹⁷⁶ *Id.* at 811-12.

¹⁷⁷ *Id.* at 811 (emphasis in original).

¹⁷⁸ *Id.*

at issue, Judge Gould concluded that the allegedly infringing elements were so commonplace in glass-in-glass sculpture and so typical of jellyfish physiology “that to recognize copyright protection in their combination effectively would give [plaintiff] a monopoly on lifelike glass-in-glass sculptures of single jellyfish with vertical tentacles.”¹⁷⁹

3. *Lamps Plus, Inc. v. Seattle Lighting Fixture Company*¹⁸⁰

Finally, in *Lamps Plus*, the Ninth Circuit invalidated the plaintiff’s copyright in a Victorian-style table lamp. The court explained that the plaintiff’s lamp was a compilation consisting of four preexisting ceiling lamp elements and a preexisting table-lamp base.¹⁸¹ The opinion then addressed *Satava*, which it interpreted as standing for the proposition that “the combination of six unprotectable elements did not rise to the level of originality sufficient to merit copyright protection.”¹⁸² Based on this reading, the Ninth Circuit concluded that the plaintiff’s sequence and arrangement of the unprotectable lamp elements did not result in the expression of an original work of authorship.¹⁸³

4. Analysis

Ets-Hotkin, *Satava*, and *Lamps Plus* provide useful indicators of the limits of the *Metcalf*’s sequence and arrangement principle, with *Satava* in particular suggesting that *Metcalf* should be read narrowly, as it expressly limited that case to situations in which the unprotectable elements are “numerous” and sufficiently originally arranged.¹⁸⁴ Nevertheless, difficult questions remain, especially with regard to reality television programs. Will Ninth Circuit courts follow *Rice*, *Ets-Hotkin*, *Satava*, and *Lamps Plus*, and apply a more discerning extrinsic test to filter out the *scenes à faire* and stock devices of a particular reality sub-genre, leaving reality television producers protected against only virtually identical copying? Or will they subscribe to a literal reading of

¹⁷⁹ *Id.* at 811-12. The *Satava* court noted, however, that the plaintiff did make some copy-rightable contributions to his work, including, to the extent that such artistic choices were not governed by jellyfish physiology or the glass-in-glass medium, “the distinctive curls of particular tendrils; the arrangement of certain hues; [and] the unique shape of jellyfishes’ bells.” *Id.* at 812.

¹⁸⁰ 345 F.3d 1140 (9th Cir. 2003).

¹⁸¹ *Id.* at 1147. These parts included a finial, a cap, a glass light shade, and a metal filigree previously used to form a ceiling lamp. *Lamps Plus* mechanically modified these parts so that they could function as a table lamp. *Id.* at 1142.

¹⁸² *Id.*

¹⁸³ *Id.* at 1147. Because *Lamps Plus* was unable to survive the necessary first step on an infringement action (due to the fact that its copyright was found to be invalid), the court did not reach the question of whether the two lamps were substantially similar. *Id.*

¹⁸⁴ See Thomas, *supra* note 58, at 35.

Metcalfe, and allow reality television producers to protect particular sequences and arrangements of generic elements common to all deserted island elimination shows or spouse-exchanging shows?¹⁸⁵ The following section offers guidance for future courts grappling with these difficult issues.

V. AMERICA'S NEXT TOP MODEL: LOOKING AHEAD AND RECOMMENDATIONS

With so much left unclear by *Metcalfe*, *CBS*, *Rice*, *Ets-Hotkin*, *Satava*, and *Lamps Plus*, the only certainty in reality television copyright jurisprudence seems to be that Second and Ninth Circuit courts are open to resolving infringement claims in a number of ways. In light of this uncertainty, as well as the major concerns raised by these cases, this Comment offers three suggestions designed to effectuate fair and predictable substantial similarity analysis of reality programming in the circuits. First, this Comment proposes that *Metcalfe* should be read and interpreted narrowly by the circuits, especially with regard to claims involving unscripted formats. Second, this Comment proposes that, when addressing reality television copyright disputes, Second and Ninth Circuit courts should reexamine and recalibrate their tests for substantial similarity in order to more accurately assess the expressive elements of the programs at issue. Finally, conflating these proposals, this Comment urges the circuits to employ virtual identity as the appropriate standard to determine illicit copying between allegedly infringing reality programs.

Justifications for these proposals abound. First, the creation of clear methods by which federal courts can assess reality programming infringement claims ensures the maintenance of a theoretically pure copyright analysis. The basic principles of substantial similarity need to work by extension or adaptation to new genres; as scrutiny of *Metcalfe* and *CBS* reveals, the circuits cannot rely on tests and terminology developed to analyze works of different genres.¹⁸⁶ Thus, if the circuits apply more carefully and consistently reasoned principles and rules, both plaintiffs and defendants will have standards to show whether they can successfully satisfy the test for substantial similarity.

The first step in achieving this goal involves limiting *Metcalfe*'s impact. To this end, federal courts should read and interpret *Metcalfe* nar-

¹⁸⁵ See *id.* at 36.

¹⁸⁶ With respect to reality programming, such incongruous works include scripted television programming and literary works. For instance, as evidenced *supra* at § III(B)(2), one of *CBS*'s most troubling characteristics is its failure to properly delineate between reality and scripted formats.

rowly, especially with respect to reality programming. As evidenced by *Metcalfe* and its progeny, this case is an outlier that very likely turned on the issue of glaring access despite the Ninth Circuit's neglecting to name the inverse ratio rule specifically. The opinion, while perhaps properly decided,¹⁸⁷ nevertheless embodies defective reasoning. The *Metcalfe* court only fleetingly acknowledged traditional extrinsic test elements and completely ignored issues of *scenes à faire*; instead, Judge Kozinski opted to invoke the sequence and arrangement principle—a concept theretofore unutilized by the Ninth Circuit—while at the same time ignoring that the Supreme Court in *Feist* inextricably linked sequence and arrangement to thin protection.¹⁸⁸

Restricting the implications of *Metcalfe* also furthers the general policy goal of allowing unfettered creativity.¹⁸⁹ *Metcalfe* stymies this goal: as evidenced, if it is possible to protect the sequence and arrangement of generic elements that compose an unscripted series, then reality producers could successfully litigate against programs even only remotely similar to their own, in effect appropriating entire subject matters for themselves. Therefore, in consideration of *Metcalfe*'s analytic failures, its treatment by subsequent Ninth Circuit case law such as *Rice*, *Ets-Hotkin*, *Satava*, and *Lamps Plus*, and its potential policy implications, this Comment recommends that future courts contemplate this case only with respect to its unique pattern of facts, and limit its precedent accordingly.

However, merely limiting *Metcalfe* is not enough to engender balanced and accurate analysis of reality programming. The substantial similarity tests utilized by the Second and Ninth Circuits to evaluate these shows warrant two additional adjustments. Such recalibrations

¹⁸⁷ Granted, even if *Metcalfe* was properly decided, it was arguably on an unstated appropriate basis. See *supra* § III(A)(2).

¹⁸⁸ See *supra*, notes 101-05.

¹⁸⁹ In enumerating the powers vested in the federal government, the Constitution provides that Congress shall have powers "To promote the progress of science and useful arts, by securing for limited time to authors and inventors the exclusive right in their respective writings and discoveries." U.S. CONST. art. I, § 8, cl. 8 (emphasis added). It is from this clause that the federal power to enact both copyright (and patent) legislation is derived, and, under the currently prevailing view, set forth in *Mitchell Bros. Film Group v. Cinema Adult Theater*, the introductory phrase of the Copyright Clause does not require that each of the "writings" protected by copyright in fact promote science or useful arts, but only Congress shall be promoting these ends by its copyright legislation. Thus:

Congress could reasonably conclude that the best way to promote creativity is not to impose any governmental restrictions on the subject matter of copyrightable works. By making this choice Congress removes the chilling effect of governmental judgments on potential authors and avoids the strong possibility that governmental officials (including judges) will err in separating the useful from the non-useful [. . .]

Mitchell Bros., 604 F.2d 852, 860 (5th Cir. 1979), cert. denied, 445 U.S. 917 (1980).

will ensure both fair and predictable assessment of reality programs, without dramatically altering the entrenched methods each circuit employs to gauge the substantial similarity of other, non-reality works.

First, this Comment proposes that for the purposes of defining a reality program's *scenes à faire*, courts classify the program not as part of the ambiguous genre of "reality TV" but rather as part of a particular reality sub-genre—"wilderness elimination contest," for example, with respect to *Survivor*. In considering the desirability of this recommendation, it is useful to ponder the ramifications of classifying reality programs as examples of the more inclusive genre of "reality TV." Today, with dozens of unscripted series peppering broadcast lineups, unscripted programs span a wide gamut of content and tone, encompassing everything from the comedic to the serious,¹⁹⁰ the epic to the mundane,¹⁹¹ and the political to the personal.¹⁹² Consequently, there are no elements, scenes, or conventions, and hence no *scenes à faire*, common to all or even a majority of reality television programs.¹⁹³ Classifying unscripted series into narrower sub-genres thus presents the only logical option, for categorizing all unscripted programs for genre purposes as "reality TV" strips them of *scenes à faire* entirely. Additionally, it should be noted that the two major federal court opinions that address substantial similarity in unscripted programming, *CBS* and *Rice*, both subscribe to similarly narrow genre-definition schemes. *CBS* explicitly notes that both series at issue are variations on "the *Survivor* concept. . . a deserted island setup,"¹⁹⁴ and *Rice* likewise classifies sub-genre narrowly, treating both of its programs as falling in the highly specified niche of "works that feature a masked magician revealing magic tricks."¹⁹⁵

Of course, how to define a program's sub-genre is province for the courts, and some circuits may be prone to define the sub-genre in a greater quantum of specificity than others. However, the primary concern is not necessarily how narrow courts should go. What is important is that the sub-genre is tailored to the programs at issue, so as to make

¹⁹⁰ For example, *Celebrity* and *Survivor*, respectively.

¹⁹¹ For example, ABC's *The Amazing Race* (teams of ordinary people race against each other on a continent-spanning scavenger hunt) and MTV's *The Real World* (young adults live together in a co-ed house), respectively.

¹⁹² See, e.g., John Maynard, *Reality TV Gets Political Spin in "Red/Blue" Series Proposal*, WASH. POST, Jul. 21, 2005, at C1, and *Intervention*, *infra* note 193.

¹⁹³ In fact, many reality programs are quite disparate. Consider, for example, *The Surreal Life*, VH1's absurdist series that follows a group C-list celebrities cohabiting under one roof space versus *Intervention*, A&E's serious docudrama that profiles real people struggling with substance addiction.

¹⁹⁴ See *supra* note 136.

¹⁹⁵ *Rice*, 330 F.3d at 1176.

available the opportunity for the trier of fact to identify the relevant *scenes à faire*, if any. With *CBS* and *Rice*, two opinions that provide relatively sound guidance on how to properly make such distinctions, it should not be too taxing to realize this proposal in the federal court system.

Second, this Comment proposes that the Second and Ninth Circuits modify the descriptive rubrics of their respective substantial similarity tests, specifically the elements of plot and character, in order to more accurately reflect the nature of the expressive, and hence copyrightable, material in reality television programming.

The element “plot” presents a conundrum in that while most reality shows do not have a plot in the traditional, literary, sense of the term, they usually do have a sequence of events that warrants copyrightability. The question, then, is at what level does this sequence become copyrightable? Consider, for example, the scripted dramatic series *Law & Order*. Each episode of this program conforms to a rigid format, with the first half focusing on detective characters as they investigate a crime and the second half focusing on lawyer characters as they prosecute the captured criminals. This dichotomous format itself is not the protectable plot of each episode; indeed, many scripted dramas are structured similarly.¹⁹⁶ Rather, the expression of *Law & Order*’s plot plainly includes the actual, specific storylines of each episode.

Contrarily, *CBS* defines the plots of *Survivor* and *Celebrity* as little more than the sum of the rules that govern each series—the equivalent of describing the expressive plot of *Law & Order* as abstractly as “half police procedural, half courtroom drama.” Thus, *CBS*’s definition of plot hardly seems an accurate representation of a reality program’s *expressive* sequence of events. Moreover, *CBS*’s analysis fails to account for the fact that reality shows by and large feature non-actors responding spontaneously to the contrivances (or lack thereof) established by the show’s premise. With that in mind, this Comment suggests that the protectable plot of a reality show is in fact what spontaneously unfolds every week: the expression is what transpires in each installment of the series, rather than, as *CBS* would purport, a simple manifestation of the show’s concept. Therefore, in order to infringe on a reality series’ plot, another program would have to slavishly recreate the original’s organically unfolding storyline. Perhaps, then, it would be more accurate to term this element “sequence of events” rather than “plot,” as the latter expression carries a connotation of a simple narrative while the former

¹⁹⁶ For example, *Perry Mason*. See, e.g., Internet Movie Database, *Plot Summary for Perry Mason*, <http://www.imdb.com/title/tt0050051/plotsummary>.

more accurately suggests a series of naturally developing and evolving storylines.

The circuits should consider “character” similarly. As evidenced by *CBS*, it is problematic to make no distinction between fictional characters and “real people playing themselves,”¹⁹⁷ and to define participants not by their words and actions but by oblique reference to their collective situation. This conception fails to get to the core of actual expression. Alternatively, this Comment posits that the expression of an unscripted reality show participant involves that participant’s spontaneous and unrehearsed actions, words, and any other manifested characteristics as presented on the series. Reality program participants cannot be construed as thinly drawn characters or archetypes; for example, they are not “mother” or “doctor” but rather the sum of the televised acts, words and reactions of real people who are, in actuality, mothers or doctors. Thus, as with plot, in order to infringe on an unscripted participant in a reality series, a later work would have to feature a character who painstakingly duplicates the intricate characteristics and spontaneous actions of the original. With this in mind, it may be more accurate to term this element “participant” rather than “character”—at least with reference to the non-actors on a reality show¹⁹⁸—as while the latter term implies some kind of fictional or contrived figure, the former suggests real people whose interactions are organic and unfettered.

Considered separately, the aforementioned proposals—narrowing the impact of *Metcalfe*, defining *scenes à faire* with reference to sub-genre, and recasting the meaning of “plot” and “character” with reference to reality programming—do not threaten to alter fundamentally the Second and Ninth Circuits’ copyright analysis of reality programming. Viewed together, however, the incentive for broader reform emerges. Specifically, the collective application of these proposals to the current television landscape suggests that the prevailing standard for illicit copying between reality series should be that of virtual identity.¹⁹⁹

¹⁹⁷ *CBS*, 2003 U.S. Dist. LEXIS 20258 at *32.

¹⁹⁸ Several reality shows incorporate scripted participants or actors. Many, such as the popular singing contest *American Idol*, feature a panel of judges or some form of host or moderator. Others, such as MTV’s hidden camera *Punk’d* feature actors playing real people in order to dupe the unscripted participants—in *Punk’d*’s case, usually unsuspecting movie stars, musicians, or athletes—into thinking they are real policemen, security guards, etc.

¹⁹⁹ As explicated in §§ II(B)(2) and III(A)(2), this standard dictates that there can be no infringement unless the works at issue are virtually identical. See *supra* §§ II(C)(2) note 63 and III(A)(2) notes 99-105.

The case for a virtual identity standard begins with the programs themselves. A review of recent broadcast and cable network schedules reveals a number of reality series that can be paired off in doublets of similar sub-genre; prominent examples include ABC's *Wife Swap* and Fox's *Trading Spouses: Meet Your New Mommy*,²⁰⁰ NBC's *The Contender* and Fox's *The Next Great Champ*,²⁰¹ Bravo's *Miami Slice* and E!'s *Dr. 90210*,²⁰² A&E's *Inked* and TLC's *Miami Ink*,²⁰³ CBS' *The Cut* and NBC's *The Apprentice*,²⁰⁴ HBO's *Family Bonds* and A&E's *Dog: The Bounty Hunter*,²⁰⁵ and ABC's *Extreme Makeover* and Fox's *The Swan*.²⁰⁶ Bound by analogous sub-genre, the programs in these doublets may indeed share expression of traditional extrinsic test elements, such as such as theme, tone, pace, setting, or cinematic technique.²⁰⁷ However, under this Comment's proposed conception of sub-genre and *scenes à faire*, this shared expression should not be held as improper if it flows naturally from or merges with the series' unprotectable sub-genre concept. Rather, as evidenced, the protectable expression of a reality television program necessarily encompasses what specifically transpires in each series, including the participants' spontaneous actions and reactions as well as the distinct sequence and progression of events. Concordantly, because reasoned copyright analysis dictates that in order to infringe on this protectable expression, a reality producer must exhaustively replicate the elements of the original work,²⁰⁸ then it follows that in order for any reality series to be considered substantially

²⁰⁰ See *supra* note 5.

²⁰¹ See *supra* note 6.

²⁰² See *supra* note 7.

²⁰³ See *supra* note 8.

²⁰⁴ Both *The Cut* and *The Apprentice* are elimination contests in which participants compete for the chance to work for a celebrity executive (Tommy Hilfiger in the former, Donald Trump in the latter). ABC's *The Benefactor* (with Mark Cuban) and Fox's *The Rebel Billionaire: Branson's Quest for the Best* (with Richard Branson) may also be grouped in this sub-genre.

²⁰⁵ Both *Family Bonds* and *Dog: The Bounty Hunter* follow a bounty hunter and the family members in his business.

²⁰⁶ Both *Extreme Makeover* and *The Swan* follow an individual over the course of multiple plastic surgery procedures.

²⁰⁷ For example, the unscripted series *Wife Swap* and *Trading Spouses: Meet Your New Mommy* share unprotectable expression of a number of these elements: both series feature panoramic landscape shots of each family's locale, both series depict a final meeting sequence of the two wives (who subsequently return home to their own families), and both series juxtapose scenes in "real time" with later-recorded dialogue revealing what the participants were thinking during the segment broadcast. .

²⁰⁸ This supposition extends from this Comment's proposal that federal appellate courts modify the elements of character and plot to more accurately reflect the unscripted nature of reality television. See discussion *supra* at § V.

similar to another, the purportedly infringing series must be, in essence, duplicative. This is the virtual identity standard.

Adopting a virtual identity standard would accord with both established case law and the policy justifications espoused in this section. In *Apple Computer*, the Ninth Circuit held, “when the range of protectable and unauthorized expression is narrow, the appropriate standard for illicit copying is virtual identity.”²⁰⁹ This statement comports with the proposals set forth in this Comment: when two reality series in a copyright adjudication share the same, specific, sub-genre,²¹⁰ the range of protectable and unauthorized expression will be axiomatically “narrow” due to the quantity of shared *scenes à faire*, merging, and other stock elements.²¹¹ Additionally, moving to a virtual identity standard would further the realization of two important copyright policy goals. First, a set virtual identity standard would no doubt foster a theoretically pure copyright analysis, as plaintiffs and defendants would be able to predict easily and accurately the outcome of potential litigation between two reality series.²¹² Second, this standard would certainly engender unfettered creativity and competition, as it raises the bar for an actionable substantial similarity claim to near-insurmountable heights. Thus, implementing a virtual identity standard to determine illicit copying between reality television shows is at once logical, analytically sound, and desirable from a policy standpoint.

VI. CONCLUSION

Considering established copyright jurisprudence such as *Metcalf*, *CBS*, *Rice*, *Ets-Hotkin*, *Satava*, and *Lamps Plus*, as well as the growing popularity of reality programming, the moment to reflect on and reform the circuits’ substantial similarity analyses appears both timely and urgent. The public’s appetite for unscripted programming shows no signs of abating and, equally as significant, networks appear to have fewer qualms than ever with broadcasting reality series that apparently

²⁰⁹ See *Apple Computer*, 35 F.3d. at 1442 (“we conclude that only ‘thin protection,’ against virtually identical copying, is appropriate”).

²¹⁰ Granted, reality television copyright jurisprudence may not always include shows that can be classified in the same or similar sub-genres. However, one imagines that the vast majority of litigation will include programs identifiable as such—otherwise, embodying two or more distinct sub-genres, the shows would fail to be similar in almost any regard.

²¹¹ This assertion, of course, assumes that the theoretical court in question elects to follow this Comment’s proposal to define the *scenes à faire* of reality series in light of that series’ respective sub-genre.

²¹² That is, under this standard, potential plaintiffs and defendants may only need to inquire: “Is the expression of purportedly infringing series virtually identical to the expression in the original work?”

share similar concepts and *scenes à faire*. Indeed, it seems that every time a reality program gains in popularity, a slew of imitators springs up almost instantaneously—witness, for instance, in summer 2005 how quickly Fox's *So You Think You Can Dance* followed on the twirling heels ABC's breakout hit *Dancing with the Stars*. If and as litigation expands, and networks grow ever more protective of their shrinking slice of the ratings pie,²¹³ it seems likely that more and more content providers will turn to copyright law to protect unscripted programming.

Unfortunately, in the face of this litigation, reality producer plaintiffs and defendants today have little reliable precedent to draw upon for informed legal guidance. *Metcalf*, with its clouded application of the extrinsic test and enigmatic embrace of the sequence and arrangement principle, raises the specter of a deluge of potentially frivolous unscripted programming infringement claims; *CBS* merely confirms that several troublesome issues arise when reality series are shoehorned into an analytic framework tailored to assess scripted works. However, future courts need not—and, in fact, should not—feel bound by these holdings, properly analyzed. Equitable and straightforward judicial assessment of reality television may be achieved through other means. Indeed, if the Second and Ninth Circuits both continue to follow to the principles embodied by *Rice*, *Ets-Hotkin*, *Satava*, and *Lamps Plus* and lend credence to the proposals set forth in this Comment, then future litigants, counsel, and courts should have access to a dependable and consistent federal jurisprudence of substantial similarity in the reality television genre. A carefully-altered test for substantial similarity would ensure fair, predictable, and just copyright analysis for reality television, and secure for viewers the continued enjoyment of watching real people as they navigate through amazing races, extreme make-overs, and, perhaps most treacherous of all, the real world.

²¹³ See Levine, *supra* note 2.

