

**LIMITATIONS ON COPYRIGHT PROTECTION FOR
FORMAT IDEAS IN REALITY TELEVISION PROGRAMMING**

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I. INTRODUCTION

Television networks constantly compete to find and produce the next big hit. The shifting economic landscape forged by increasing competition between and among ever-proliferating media platforms, however, places extreme pressure on network profit margins. Fully scripted hour-long dramas and half-hour comedies have become increasingly costly, while delivering diminishing ratings in the key demographics most valued by advertisers. It therefore is not surprising that the reality television genre has become a staple of network schedules.

New reality shows are churned out each season.¹ The main appeal, of course, is that they are cheap to make and addictive to watch. Networks are able to take ordinary people and create a show without having to pay “A-list” actor salaries and hire teams of writers.² Many of the most popular programs are unscripted, meaning lower cost for higher ratings. Even where the ratings are flat, such shows are capable of generating higher profit margins through advertising directed to large groups of more readily targeted viewers.

On the surface, reality-based shows are a win-win situation. Recent litigation, however, sheds light on many problems producers and networks might not have considered before creating some of these shows. While hit shows can generate high revenues, they also are easily copied, forcing producers and their lawyers to try to protect their creative investments through resort to the courts. But reality lawsuits raise many questions, including privacy expectations, the legality of waivers, the use of hidden cameras, the possibility of show-rigging, and breach of contract.³ The most significant of these lawsuits for purposes of this article assert intellectual property rights, concentrating on allegations of idea and format theft.

II. DISCUSSION

A. Reality vs. Scripted Television: What’s So Different?

There has been a surge in reality programming over the past five years, fueled by some

¹ For example, during the summer of 2005, ABC premiered *Dancing With The Stars* (celebrities spent six weeks learning ballroom dances and competing against each other) and *Brat Camp* (unruly teens were sent away to a boot camp for attitude adjustment). NBC premiered *Hit Me Baby One More Time*, Fox debuted *Beauty And The Geek*, and CBS featured *The Cut* and *Rock Star*. Fox has *So You Think You Can Dance*. Fox and NBC both currently feature singing competitions—respectively, *American Idol* (the 800 pound gorilla of reality shows) and *America’s Got Talent*, intriguingly both with Simon Cowell involved. In fact, the list of so-called reality shows is so extensive it takes a substantial Wikipedia article simply to enumerate the more well-known programs. See http://en.wikipedia.org/wiki/reality_television, last viewed on December 3, 2009.

² Tara Brenner, *A ‘Quizzical’ Look Into The Need For Reality Television Show Regulation*, 22 CARDOZO ARTS & ENT. L.J. 873, 876 (2005).

³ See *id.*; Andrew M. White & Lee S. Brenner, *Reality TV Shows Difficult Concepts To Protect*, 20 ENT. L. & FIN. 3 (2004).

phenomenal successes in the genre.⁴ Success, of course, breeds imitation, for example in documentary-like programming (*Deadliest Catch*, *Ice Road Truckers*, *John & Kate Plus 8*); historical re-creations (*The 70s House*, *Kid Nation*); dating foibles (*Blind Date*, *ElimiDATE*, *Who Wants To Marry A Millionaire*, *The Bachelorette*, *Joe Millionaire*, *My Big Fat Obnoxious Fiancé*); makeovers (*Extreme Makeover*, *The Swan*); and games/contests (*Deal Or No Deal*, *Treasure Hunters*, *Boot Camp*, *Survivor*, *Big Brother*).⁵ Many of the risks and problems with the reality genre have surfaced through litigation.⁶ A popular tool employed to protect reality formats is the copyright law. Despite a surge in such litigation, however, the success rate remains as low as the likelihood of finding the next breakout hit program.

Reality shows are generally unscripted, although just how much is truly not scripted and not subject to direction or manipulation is subject to dispute. Take away the script and the remaining creative elements become the show's "format"—or, using copyright parlance, its overall "look and feel." As a result, the show's format becomes the focus of theft allegations, rather than the words, scripts, or images that are the focus in traditional copyright litigation involving television programming. But without a script to examine, the courts are left somewhat adrift in applying a copyright analysis to format cases. Past litigation of television-related disputes provides the framework for recent reality format litigation. So far, no "bright-line tests" have been developed for deciding these cases.

B. Past Television Litigation Provides A Framework.

1. A Background In Copyright Law In The Television Context.

A copyright infringement plaintiff must prove: (1) ownership of the copyright; and (2) copying by the defendant.⁷ Ownership can be satisfied by providing proof of a copyright registration certificate.⁸ To determine if copying occurred as a factual matter, a plaintiff may provide direct or circumstantial evidence of access to the infringed work and substantial similarity between the two works.⁹ Access is defined as the opportunity to copy.¹⁰ Alternatively, the access requirement may be presumed if there is so-called "striking" similarity between the two works,

⁴ See Robert Richards & Clay Calvert, *Suing The Media, Supporting The First Amendment: The Paradox Of Neville Johnson And The Battle For Privacy*, 67 ALB. L. REV. 1097, 1123 (2004).

⁵ The hold that reality programming now exerts on the American public was most recently highlighted by the "balloon boy" incident in which Richard Heene allegedly faked his son's ride on a homemade weather balloon to attract interest in his pitch for a reality-based storm-chasing series that had recently been rejected by a noted TV producer. See *Stupid Parents + Reality TV + Kids at Risk*, ENTERTAINMENT WEEKLY, Oct. 30, 2009, at 30-31. News reports on the notorious White House party crashers, Tareq and Michael Salahi, even suggest that their well-publicized stunt was staged, in part, to help Michael land a coveted role on the reality show, *The Real Housewives of DC*. See *Tareq And Michael Salahi: White House Party Crashers Walk Into State Dinner, Put Arm Around Joe Biden*, THE HUFFINGTON POST, Nov. 25, 2009, http://www.huffingtonpost.com/2009/11/25/tareq-and-michael-salahi_n_371336.html.

⁶ See Linda Moss, *Facing Legal Realities: Lawsuit Potential Challenges Producers Of Unscripted Shows*, BROADCAST & CABLE, Oct. 8, 2001, http://www.broadcastingcable.com/article/137427-Facing_legal_realities.php.

⁷ See *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977); 4 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01, at 13-5 (2007).

⁸ 17 U.S.C. §410(c); NIMMER, *supra* note 7, at §13.01[A].

⁹ *Olson v. NBC*, 855 F.2d 1446, 1448 (9th Cir. 1988) (citing *Sid & Marty Krofft Television Prods.*, 562 F.2d 1157); NIMMER, *supra* note 7, at 13-33.

¹⁰ NIMMER, *supra* note 7, at §13.02[A].

such that there could be no other reasonable explanation for such a high level of similarity than the fact that the alleged copier had access to the allegedly copied work.¹¹

The *Sid & Marty Krofft Television Productions* case supplied a two-part test in the Ninth Circuit for determining substantial similarity—an extrinsic test and an intrinsic test. The extrinsic test is an objective test used to determine whether there is a substantial similarity in ideas and depends on specific criteria that can be listed and analyzed. The intrinsic test is subjective, is used to compare forms of expressions, and depends on the response of the ordinary reasonable person.¹² These tests form the basis of the analysis in the litigation that is discussed below—most of which has taken place in the Ninth Circuit.¹³

Several copyright doctrines and themes emerge from these cases:

1. Ideas: Ideas are not protected by copyright, only the particular expressions of them are protected.¹⁴ In short, the basic concept—or “idea”—for a reality show will not enjoy copyright protection against imitation or downright copying.
2. Merger: If, however, the idea can only be expressed in a limited number of ways, then the expression itself will not be protected, except possibly against identical copying, as allowing that would give a virtual monopoly to the first person expressing the idea.¹⁵ One of the now classic merger cases, *Morrissey v. Procter & Gamble Co.*,¹⁶ involved rules to a game, in that case a sweepstakes game rather than a reality game show, but the same principle has later been applied in format cases. There were only so many ways that the rules for a standard sweepstakes promotion could be written. Enforcing the claimed copyright essentially would have granted a monopoly on the underlying concept or idea. The court concluded, “We cannot recognize copyright as a game of chess in which the public can be checkmated.”¹⁷
3. Scènes à faire: Stock scenes, characters, and settings that naturally flow from the subject matter are treated much the same as ideas or merger.¹⁸ In a case involving the novel and film *Jurassic Park*, the court failed to find any similarity with protected expression even though the plaintiff’s series of stories, *Dinosaur World*, included some similar dinosaur elements.¹⁹ The

¹¹ *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987).

¹² *Sid & Marty Krofft Television Prods.*, 562 F.2d at 1164.

¹³ Other courts, most notably the Second Circuit, use other tests. See NIMMER, *supra* note 7, at §13.03[E][3][a]. Nimmer discusses the Second Circuit’s somewhat different two-part test, which asks (1) whether the defendant copied, and, if so, (2) did the copying improperly appropriate protected expression. The test is, in many respects, very similar to the extrinsic/intrinsic test in the Ninth Circuit.

¹⁴ 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.”). This has led to the oft-cited idea/expression dichotomy. See generally, NIMMER ON COPYRIGHT §203[D] (2007)

¹⁵ See generally, NIMMER, *supra* note 7, at §1303[B][3].

¹⁶ 379 F.2d 675 (1st Cir. 1967).

¹⁷ *Id.* at 679.

¹⁸ See generally, NIMMER, *supra* note 7, at §1303[B][4].

¹⁹ *Williams v. Crichton*, 84 F.3d 581 (2d Cir. 1996). *Dinosaur World* was actually a series of four fictional children’s stories that take place in Dinosaur World, an imaginary present day man-made animal park where people can safely visit and observe dinosaurs and other pre-historic animals.

stories both depicted characters, including sibling children, who, with intelligent adult guides, spend a night in a dinosaur zoo and escape from dangerous dinosaurs by helicopter through the combined skills of the children and adults. However, as noted by the court, “[i]t is a fundamental principle of copyright law that a copyright does not extend protection to an idea, but only the expression of an idea. Similarly, *scènes à faire*, sequences of events that necessarily result from the choice of a setting or situation, do not enjoy copyright protection.”²⁰ Accordingly, the court ultimately found that the two sets of works were not substantially similar.

4. Trademark or trade dress protection: The name or title of a series may be protected if it identifies the particular reality program and is either distinctive or has acquired secondary meaning. Trade dress generally comprises the collection of non-verbal elements that contribute to the program’s overall look and feel. However, both forms of protection have been cast in serious doubt in the television arena in light of the Supreme Court’s 2003 decision in the *Dastar* case,²¹ discussed further below.

Any one of these doctrines or legal theories is capable of dealing a death blow to an asserted format claim. Working together, they serve to shrink format protection almost beyond any functionally useful margin.

2. Prior Television Litigation.

Game show formats have been the frequent subject of past litigation. According to the seminal copyright treatise, whether copyright protection extends to the particular expression of a game show format is questionable at best.²² In *Herwitz v. National Broadcasting Co.*,²³ the court found that the plaintiff’s television game show format for *Everybody Wins* was not subject to copyright protection and therefore could not preclude the defendants from producing the *Treasure Hunt* game show, both of which were game shows sharing a common format where contestants chose from a selection of boxes containing unknown prizes. In *Richards v. Columbia Broadcasting System*,²⁴ the court granted summary judgment to the defendant on the ground that the defendant’s *Bank On The Stars* quiz show was not substantially similar to the plaintiff’s *Name The Star* quiz show. Even though both formats involved contestants who were asked questions about movies, “the mere idea alone of basing a quiz program on motion pictures . . . [was] not . . . subject to protection under the copyright laws.”²⁵ To the extent protection for a particular game format exists, such protection is extremely narrow.²⁶

As noted above, the Ninth Circuit employs an extrinsic test, which is an objective test that rests upon specific criteria that can be listed and analyzed, and an intrinsic test, which examines an ordinary person’s subjective impressions of the similarities between two works, to determine

²⁰ *Id.* at 587 (internal quotations and citations omitted).

²¹ *Dastar v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 123 S. Ct. 2041, 156 L. Ed. 2d 18 (2003).

²² NIMMER, *supra* note 14, at § 2.09[G].

²³ 210 F. Supp. 231 (S.D.N.Y. 1962).

²⁴ 161 F. Supp. 516 (D.D.C. 1958).

²⁵ *Id.* at 518.

²⁶ NIMMER, *supra* note 14 (noting that it is possible that an original selection, organization, and presentation of “stock” devices might win protection as a “compilation” even if each of the “stock devices” is individually unprotectable).

substantial similarity.²⁷ These tests have been employed in numerous film- and television-related cases, all of which went in favor of the accused infringer.²⁸

The extrinsic test in the television context focuses on “articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events of the two works.”²⁹ Courts compare “not the basic plot ideas for stories, but the actual concrete elements that make up the total sequence of events and the relationships between the major characters.”³⁰ In applying the extrinsic test, the court “must take care to inquire only whether the *protectable elements, standing alone*, are substantially similar.”³¹ Courts first identify the similarities between the works and then filter out any unprotected elements such as ideas, *scènes à faire*, and unoriginal elements that are generic or in the public domain before considering whether the two works are “substantially similar.”³² This may help explain why game shows, in particular, receive little protection from the courts, which generally view them as “just the same old thing.”

For example, in the *Dick Clark Co.* case, the court granted summary judgment for the defendant after finding that the scope of copyright protection in the *Bloopers* television show did not extend to the format of the show: “The formats of the two shows look similar, but so do the formats of virtually every television news show. The ‘look’ of a show is not the proper subject of copyright protection. The scope of copyright protection was never intended to go this far.”³³

²⁷ *Funky Films, Inc. v. Time Warner Ent. Co.*, 462 F.3d 1072 (9th Cir. 2006).

²⁸ See, e.g., *Thomas v. The Walt Disney Co.*, 2008 U.S. Dist. LEXIS 14643 (N.D. Cal. Feb. 14 2008) (applying the extrinsic test and granting the defendant’s motion to dismiss a copyright infringement claim asserting that the film *Finding Nemo* infringed the plaintiff’s literary work, *Squisher The Fish*); *Zella v. The E.W. Scripps Co.*, 85 U.S.P.Q.2d 1751, 1759-64 (C.D. Cal. 2007) (applying the extrinsic test and granting the defendant’s Rule 12(b)(6) motion to dismiss the plaintiff’s claim that the *Rachel Ray* cooking show infringed a copyright in a treatment of a celebrity cooking show); *Bethea v. Burnett*, 2005 WL 1720631, at *8-9 (C.D. Cal. June 28, 2005) (applying the extrinsic test and granting defendant summary judgment on a copyright infringement claim alleging that the format of the *C.E.O.* game show was substantially similar to that of *The Apprentice*); *Pelt v. CBS, Inc.*, 30 U.S.P.Q.2d 1639, 1642 (C.D. Cal. 1993) (applying the extrinsic test and granting defendant summary judgment because the plaintiff had failed to identify elements of protectable expression for its talk show *Listen Up! Tribalism 1990s* that were copied by the defendant’s television show *Listen Up! Young Voices for Change*, the format shared by the two shows was generic, and the only other similarities were unoriginal ideas that were common to many talk shows); *Dick Clark Co. v. Alan Landsburg Prods., Inc.*, 1985 U.S. Dist. LEXIS 18924, at *7 (C.D. Cal. June 13, 1985) (format of the plaintiff’s blooper television show was not infringed by the defendants’ blooper show: “[t]o permit copyrighting of the limited number of ways that plaintiff could express the idea of a blooper show would exhaust the possibilities of others producing clip shows”).

²⁹ *Zella*, 85 U.S.P.Q.2d at 1759 (quoting *Funky Films*, 462 F.3d at 1077).

³⁰ *Id.*; see also *Rice v. Fox Broadcasting*, 330 F.3d 1170, 1174 (9th Cir. 2003); *Bethea*, 2005 WL 1720631, at *10.

³¹ *Zella*, 85 U.S.P.Q.2d at 1759 (quoting *Funky Films*, 462 F.3d at 1077).

³² *Id.*; see also *Pelt*, 30 U.S.P.Q.2d at 1642 (filtering out unprotected similarities between television talk shows); *Rice*, 330 F.3d at 1174 (9th Cir. 2003) (noting the rule that a party may not rely on “any similarity in expression resulting from unprotectable elements”); *Bethea*, 2005 WL 1720631, at *10 (“Once Plaintiffs have identified the alleged similarities, using analytic dissection, and, if necessary, expert testimony, the court must determine whether any of the allegedly similar features are protected by copyright.”).

³³ 1985 U.S. Dist. LEXIS 18924, at *10. Courts have consistently refused to consider such “stock elements” of television shows under the extrinsic test. See, e.g., *Bethea*, 2005 WL 1720631, at *12-14 (disregarding certain stock elements of *C.E.O.* and *The Apprentice* because the elements were not original to the plaintiff and were a “staple” of the reality television genre, including a group of “dynamic” contestants living together in the same quarters, the absence of scripted dialogue, the use of incidental characters, and episodes of approximately 44 minutes each); *Olson v. National Broad. Co.*, 855 F.2d 1446, 1451 (9th Cir. 1988) (granting the defendant’s JNOV, overturning the jury’s finding of copyright infringement, and holding that a television show format was different from the alleged

In a rare, but possibly pyrrhic, victory for the format owner, the court in *Barris/Fraser Enterprises v. Goodson-Todman Enterprises*,³⁴ denied the defendant's motion for summary judgment, stating, "even though a television game show is made up entirely of stock devices, an original selection, organization, and presentation of such devices can nevertheless be protected, much as is the original combination of words or notes that leads to a protectable book or song."³⁵ Goodson-Todman had developed the time-honored *To Tell the Truth* game show, in which a panel of questioners, moderated by the host, attempts to identify which of three on a panel of liars is telling the truth. The questioners comprised four celebrities and the liars all pretended to be the same person. *Bamboozle*, created by Barris/Fraser, included a host, a panel of two celebrities and one non-celebrity, and a panel of three "bamboozlers," each telling a different fantastic story, only one of which was real. The panel attempted to identify which of the amazing stories was true. Although the court found sufficient factual issues to preclude summary judgment, it nevertheless observed that "[t]he idea of a game in which people lie and contestants guess who is telling the truth is not protectable, any more than the idea of a story based upon the adventures of police officers in the South Bronx, or the idea that a man has superhuman powers and uses them to fight evil in the world is protectable."³⁶ According to the court, while an idea is not protectable, "a television producer's selection, organization, and presentation" of that idea *may* be.³⁷ In the court's view, it was inappropriate to rule, as a matter of law, that "there is no similarity of protectible material in the overall composition of the shows. Whether only 'idea' or 'expression of that idea' has been copied is at least a close enough question that it should be decided by way of an evidentiary hearing on the merits and not by way of summary judgment."³⁸

In *Sheehan v. MTV Networks*,³⁹ plaintiff Sheehan's game show proposal, *Laser Blitz*, including written rules, format, artwork depicting the set and props, and a schematic drawing of the audiovisual features of the program, had been registered with the Copyright Office. It showed two players competing in a two-round format and a "Video Blitz bonus" round in which a

infringed show as a matter of law; the court disregarded similarities in theme, mood, and pace between the *A-Team* show and the plaintiff's action-adventure screenplay because such similarities were "common to the genre of [an] action-adventure television series"); *Pelt*, 30 U.S.P.Q.2d at 1642 (disregarding similarities of "the use of an opening song, a moderator, audience participation, a panel of guests, a topic for discussion, pauses for commercials and a closing statement by the moderator" in two talk-shows); *Sheehan v. MTV Networks*, 22 U.S.P.Q.2d 1394, 1397 (S.D.N.Y. 1992) ("While both [game] shows do involve three players, multiple rounds of play in order to eliminate contestants, a 'host' posing questions to contestants, and the same kind of 'hand-held device,' these features are simply 'stock devices' common to game shows generally."). Indeed, many similarities are not protected because they constitute *scènes à faire* of game shows in general. See *Apple Computer Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1444-45 (9th Cir. 1994); see also *Interactive Network, Inc. v. NTN Communications, Inc.*, 875 F. Supp. 1398, 1403 (N.D. Cal. 1995) (noting that the *scènes à faire* doctrine "denies copyright protection to elements of expression that are, as a practical matter, indispensable or at least standard in the treatment of a given [idea]"); *Dick Clark*, 1985 U.S. Dist. LEXIS 18924, at *8 (use and expressions of the host, characters, blooper clips, and a studio audience for the show *TV's Censored Bloopers* were *scènes à faire* and, therefore, not protected by copyright; such elements were "inevitable to the treatment of the subject" of an outtake show).

³⁴ 5 U.S.P.Q.2d 1887 (S.D.N.Y. 1988).

³⁵ *Id.* at 1891 (citing *David v United Artists, Inc.*, 547 F. Supp. 722, 726 (S.D.N.Y. 1982)).

³⁶ *Id.* at 1889.

³⁷ *Id.* at 1891 (citing *David v United Artists, Inc.*, 547 F. Supp. 722, 726 (S.D.N.Y. 1982) (emphasis added)).

³⁸ *Id.*

³⁹ 22 U.S.P.Q.2d 1394 (S.D.N.Y. 1992).

functional laser gun manipulated by the contestants and aimed at a game board determines what happens to the player. The challenged show, *Remote Control*, was set in the basement of the host, a character who supposedly dreamed of having his own game show. The three players were strapped into easy chairs with non-functional television remote controls. The players selected from a variety of question categories by calling out the television “channel” number while pretending to use the remote. Quoting *Barris/Fraser Enterprises*, the court found the combination of stock game show devices sufficiently original to justify copyright protection. That finding, however, was immediately turned against the plaintiff: “*Laser Blitz* is an original work of authorship because it has a number of unique attributes. However, those same attributes render it sufficiently different from *Remote Control* to preclude a claim of infringement.”⁴⁰

3. Is *I Love Lucy* Really *The Honeymooners*?

In *Olson v. National Broadcasting Co., Inc.*,⁴¹ the plaintiff sued NBC for copyright infringement, claiming that NBC’s show, *The A-Team*, was copied from his original series pilot for a show entitled *Cargo*.⁴² The plaintiff asserted that NBC created *The A-Team* after reading Olson’s submission. Both shows shared a common theme: an action adventure show that featured Vietnam veterans in a positive light.⁴³ The court applied the substantial similarity test to compare the two works. The plaintiff argued that under this test substantial similarity existed in the characters in and “series concept” for the show.⁴⁴ The court, however, applied the Ninth Circuit’s *Berkic*⁴⁵ analysis of the extrinsic test and found little similarity between the two shows in overall plot, sequence, dialogues, or setting. It stated that while the shows were similar in theme, mood, and pace, the similarities were common to the genre of action adventure television shows and movies.⁴⁶ While there were some loose similarities between some of the characters, it found no copyright infringement based on the characters because the *Cargo* characters were thin and differed significantly from the *The A-Team* characters.⁴⁷ The court held that copyright law did not protect the format proposed by the plaintiff.

Olson is significant because it reflects the prevailing view that courts will not extend copyright protection to elements of television shows that are generic. If courts were to start extending such protection, the opportunity for networks to continue to create new series would be restricted.⁴⁸

⁴⁰ *Id.* at 1397.

⁴¹ 855 F.2d 1446 (9th Cir. 1988).

⁴² *Id.* at 1448.

⁴³ *Id.* at 1450.

⁴⁴ *Id.* at 1451.

⁴⁵ The *Berkic* test states: “The test for ‘substantial similarity of ideas’ compares, not the basic plot ideas for stories, but the actual concrete elements that make up the total sequence of events and the relationships between the major characters. The extrinsic test for similarity of ideas looks beyond the vague, abstracted idea of a general plot and instead ‘focuses on . . . the objective details of the works The extrinsic test requires a comparison of plot, theme, dialogues, mood, setting, pace, and sequence.’” *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985), *cert. denied*, 474 U.S. 826 (1985).

⁴⁶ *Olson*, 855 F.2d at 1450-51.

⁴⁷ *Id.* at 1453 (saying that protection for characters that are especially distinctive is allowed).

⁴⁸ See Thomas Smart, *et al.*, *Reality Check: When Will Two TV Shows In The Same Genre Be Considered Substantially Similar Under Copyright Law*, 21 ENT. & SPORTS LAW 1 (Summer 2003) (stating that television continues to thrive because of continued reworkings of basic elements, in novel ways, different proportions, new combinations, and different styles and production values).

This is true even though the format of a reality show may provide the most value to the show.⁴⁹

4. The Ninth Circuit Provided A Glimmer Of Hope For Format Creators In *Metcalf*.

The Ninth Circuit's decision in *Metcalf v. Bochco*,⁵⁰ looked, for a while, like it was going to open the door to protecting reality television formats, but subsequent cases have limited the efficacy of the holding. A husband and wife writing team created a story about an African-American staff working in a county hospital near inner-city Los Angeles. They presented several treatments and screenplays to Steven Bochco, through the help of defendant and former friend, Michael Warren. Bochco rejected the submissions, but created *City Of Angels* a few years later.⁵¹ The plaintiffs sued Bochco and Warren.⁵² The district court granted summary judgment in favor of the defendants on the copyright infringement claim and the plaintiffs appealed.

The Ninth Circuit applied the substantial similarity test and found a striking similarity between the two works. There were substantial similarities in the plots and settings of both works. Both were set in county hospitals in inner-city Los Angeles, with predominately African-American staffs. The shows addressed issues of poverty, race relations, and urban blight. The main characters in both were young, good-looking, black surgeons who grew up in the same neighborhood as the hospitals.⁵³ While Bochco argued that copyright law does not protect general plot ideas or *scènes à faire*, the court held that many generic similarities in common patterns may satisfy the extrinsic test for substantial similarity. The Ninth Circuit explained that the particular sequence in which an author strings a significant number of unprotectable elements can itself be a protectable element. "Each note in a scale . . . is not protectable, but a pattern of notes in a tune may earn copyright protection."⁵⁴ Proof of a substantial amount of access to the plaintiff's work is a key component in finding substantial similarity under the *Metcalf* test.⁵⁵ The Ninth Circuit reversed the summary judgment.

Metcalf concludes that many generic elements presented in a recognizable pattern may be copyrightable and enough to pass the extrinsic test in determining copyright infringement. Significantly, until *Metcalf*, the Circuit had never held that the sequence and arrangement of completely generic elements would be enough to satisfy the extrinsic test.⁵⁶ Subsequent interpretations, however, suggest that the *Metcalf* court intended a much narrower reading of the opinion.⁵⁷ In *Metcalf* there was an unusually high degree of access. Such circumstances likely

⁴⁹ Andrew Thomas, *Access Hollywood*, 28 L.A. LAW. 29, 36 (2005) ("In current reality television, the value of an unscripted program may lie almost entirely in its basic concept . . .").

⁵⁰ *Metcalf v. Bochco*, 294 F.3d 1069 (9th Cir. 2002).

⁵¹ The show featured defendant Michael Warren as the lead character.

⁵² The plaintiffs asserted various claims based upon theft of literary property and then amended the complaint to include a claim of copyright infringement. The state law claims were dismissed and Bochco moved for summary judgment on the copyright infringement claim.

⁵³ *Metcalf v. Bochco*, 294 F.3d 1069, 1073.

⁵⁴ *Id.* at 1074.

⁵⁵ The Ninth Circuit also stated that the plaintiffs' case was significantly strengthened because of Bochco's concession of access to the Metcalfs' work. *Id.* at 1075.

⁵⁶ Smart, *supra* note 48, at 32.

⁵⁷ *Id.* ("The end of the *Metcalf* opinion suggests that a narrower reading may have been intended by the court.").

would make a court more inclined to accept a plaintiff's argument of substantial similarity through sequence and arrangement because the defendant had extensive, first-hand knowledge of how the plaintiff had arranged certain elements. This theory is consistent with the Ninth Circuit's "inverse ratio" rule, which states that the court requires a lower standard of proof for substantial similarity when a high degree of access is shown.⁵⁸

5. Subsequent Cases Have Limited *Metcalf's* Reach.

Subsequent cases have limited *Metcalf's* holding. In *Satava v. Lowry*,⁵⁹ the Ninth Circuit stated that "'a combination of unprotectable elements' may qualify for copyright protection, [but] 'it is not true that any combination of unprotectable elements automatically qualifies for copyright protection. Instead, such a combination 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.'"⁶⁰

In a case pitting plaintiff Capcom's zombie videogame, *Dead Rising*, against MKR's considerable George Romero franchise, including *Dawn Of The Dead*, one court found little life in Capcom's copyright infringement claim, holding that all extrinsic similarities were solely in the realm of ideas, public domain, merger of ideas and expression, and *scènes à faire*.⁶¹ The few similarities found by the court were held to be "the wholly *unprotectable* concept of humans battling zombies in a mall during a zombie outbreak."⁶² The court cited, but distinguished, *Metcalf*, stating that "[e]ven were *Metcalf* to be applied here, the totality of the separate comparative factors do not amount to a finding of substantial similarity between the works at issue. MKR's alleged similarities constitute nothing more than *a string of disconnected facts and generic ideas* which are not protected under copyright law."⁶³

The most comprehensive decision interpreting *Metcalf* is *Rice v. Fox Broadcasting*.⁶⁴ The plaintiff sued Fox, claiming that the network had infringed his copyright in the home video *The Mystery Magician*, which featured a masked magician who reveals how various magic tricks are performed.⁶⁵ Fox created a similar special to air in different installments, also featuring a masked magician revealing the secrets behind certain magic tricks. The plaintiff sued for copyright infringement and false advertising.⁶⁶ Summary judgment was granted in favor of Fox in the case on the ground that the asserted similarities were no more than generic similarities and were foreclosed by the doctrines of merger and *scènes à faire*. The court also found that the similarities were too abstract to invoke copyright infringement.⁶⁷ *Rice* distinguished *Metcalf* in two ways. First, *Metcalf* presented an unusual "totality of similarities" and the claim in *Rice* did

⁵⁸ *Id.* (citing *Smith v. Jackson*, 84 F.3d 1213, 1220 (9th Cir. 1996)).

⁵⁹ 323 F.3d 805 (9th Cir. 2003).

⁶⁰ *Id.* at 811.

⁶¹ *Capcom Co., Ltd. v The MKR Group, Inc.*, 2008 U.S. Dist. LEXIS 83836 (N.D. Cal. Oct. 20, 2008).

⁶² *Id.* at *21 (emphasis in original).

⁶³ *Id.* at *33 (emphasis added).

⁶⁴ 330 F.3d 1170 (9th Cir. 2003).

⁶⁵ *Id.* at 1173.

⁶⁶ *Id.* at 1174.

⁶⁷ *Id.* at 1180.

not include “the same pattern of generic similarities as in *Metcalf*.”⁶⁸ Second, the Ninth Circuit read *Metcalf* as being based on the inverse ratio rule.⁶⁹

Given this body of relatively parsimonious case law,⁷⁰ a considered review of some particular reality format decisions may help illustrate the extent, or lack thereof, of contemporary format protection. Despite the limitations placed on *Metcalf* by *Satava* and *Rice*, the networks continued to assert copyright infringement claims in the reality television space.

C. Welcome To The Real World.

1. *Race Around The World* vs. *Global Adventure*: Fox Sues CBS Over A Competing Global Race Reality Show.

An early reality format case was *Fox Family Properties Inc. v. CBS Inc.*⁷¹ Fox Family had created what it was calling a “signature” show called *Race Around The World* that would feature the emotional impact on families as they traveled the globe in fierce competition to overcome challenges and be the first to return to the U.S.⁷² Fox claimed that it disclosed the show to a Los Angeles talent agency, only to find out that agents within the same agency were working with CBS on a similar global race show, later publicly announced as bearing the same *Race Around The World* name (later changed by CBS to *Global Adventure*). Fox asserted copyright infringement, reverse passing off, and false advertising claims, and sought a TRO.

For the copyright claims, Fox did not claim direct copying. Instead, it claimed that CBS had access to the treatment for the show and that the two shows were substantially similar. The court first moved to a copyright analysis. It found a serious question as to the issue of CBS’s access to Fox’s program. It then turned to substantial similarity. For the extrinsic test, Fox highlighted ten similarities between the shows. The court found that most of the elements, such as camera crews following contestants, running for 13 episodes, air dates and titles, were unprotectable. After “filtering out the unprotected or dissimilar elements” the court was “left with 2 shows focused on the stress on relationships between and among competing globetrotters” Nevertheless, the court found that “based on the present evidentiary record, whether these expressive elements are substantively similar in both shows presents a very serious question.”⁷³ The court then found that the balance of hardships tipped very sharply in Fox’s favor and issued the requested TRO against CBS’s show and ordered the parties back to argue about the issuance of a preliminary injunction.⁷⁴

⁶⁸ *Id.* at 1179.

⁶⁹ *Id.*

⁷⁰ Indeed, the relatively few decisions favorable to format creators has led one commentator to conclude that, “[u]nfortunately, in the face of this litigation, reality producer plaintiffs and defendants today have little reliable precedent to draw upon for informed legal guidance.” Daniel Fox, *Harsh Realities: Substantial Similarity In The Reality Television Context*, 13 UCLA ENT. L. REV. 223, 261 (2006). See also Andrew M. White, Lee S. Brenner, *Reality Shows Difficult Concepts To Protect*, ENT. L. & FIN. (Nov. 2004).

⁷¹ Case No. 00-CV-11482 RMT (Ex) (C.D. Cal., filed Oct. 27, 2000).

⁷² *Id.*, court’s *Memorandum In Lieu Of Findings Of Fact And Conclusions Of Law*, at pp. 1-2, filed Nov. 14, 2000.

⁷³ *Id.* at p. 8.

⁷⁴ *Id.* at p. 11.

Two weeks later, the court heard the preliminary injunction request. It found that the balance of hardships no longer tipped sharply in favor of Fox and denied the preliminary injunction.⁷⁵ Ultimately, the parties stipulated to stay all proceedings in the case in light of a pending transaction in which a parent of one of the parties to the action was acquiring plaintiff Fox Family, and the case was dismissed without any further findings from the court.⁷⁶

2. *Survivor vs. Boot Camp: The Pioneer Of Reality Television Sues For Protection From Format Infringement.*

Another early reality format case was *Survivor Productions LLC v. Fox Broadcasting Co.*⁷⁷ CBS sued rival network Fox for copyright infringement, alleging that Fox's *Boot Camp* was simply *Survivor* in fatigues.⁷⁸ CBS claimed that co-defendant LMNO Productions had originally pitched *Boot Camp* to CBS in order to capitalize on the success of *Survivor*. When CBS rejected the show, LMNO turned around and sold it to Fox, which hired Scott Messick, a producer on the first season of CBS's *Survivor*.⁷⁹ Fox moved for summary judgment, but the district court concluded that CBS could proceed with its claim. The case was settled in September 2001 on undisclosed terms and both parties agreed to dismiss the case.⁸⁰ One reason for the settlement may have been that *Boot Camp* was unlikely to return to Fox's schedule due to a drop in ratings.⁸¹

3. *Survivor vs. I'm A Celebrity . . . Get Me Out Of Here!: CBS And Survivor Productions Are Again Unsuccessful With A Copyright Infringement Claim.*

In November 2002, CBS again felt its rights in *Survivor* were being infringed, this time by ABC. In *CBS Broadcasting Inc., v. ABC, Inc.*,⁸² CBS alleged that ABC's reality show *I'm A Celebrity . . . Get Me Out of Here!* ("Celebrity") infringed CBS's copyright and sought a preliminary injunction to prevent ABC from continuing to air the show.⁸³ The motion was denied, with the court finding an absence of substantial similarity between the two shows.⁸⁴ The two shows were combinations of "well-known and frequently used generic elements of earlier works."⁸⁵ The court stated that providing protection to a combination of generic elements without consideration of the presentation or expressions of those elements would stifle innovation and the creative process that spawned the two shows.⁸⁶

⁷⁵ Court's Memorandum In Lieu Of Findings Of Fact And Conclusions Of Law, filed Dec. 1, 2000; *Order Denying Plaintiff's Motion For Preliminary Injunction*, filed Dec. 1, 2000.

⁷⁶ Court's *Order To Stay All Proceedings*, filed Aug. 16, 2001.

⁷⁷ 2001 U.S. Dist. LEXIS 25511 (C.D. Cal. June 12, 2001).

⁷⁸ CBS also sued for common law unfair competition, statutory unfair business practices, and civil conspiracy, but agreed to dismiss those claims without prejudice. *Id.* at *2-3.

⁷⁹ See Bill Carter, *Survivor v. Boot Camp In Latest TV Lawsuit*, N.Y. TIMES, April 11, 2001, at C2; *Fox Suffers First Blow In Reality TV War*, 13 No. 3 ANDREWS ENT. INDUS. LITIG. REP. 5 (July 30, 2001).

⁸⁰ *Fox Suffers First Blow In Reality TV War*, 13 No. 3 ANDREWS ENT. INDUS. LITIG. REP. 5 (July 30, 2001).

⁸¹ Josef Adalian, *CBS Drops Suit Over Fox's "Boot Camp"*, VARIETY, Sept. 9, 2001.

⁸² 2003 U.S. Dist. LEXIS 20258, at *1 (S.D.N.Y. Jan. 14, 2003).

⁸³ *Id.*; see also *Eye Tribe Has Spoken: "Survivor" Clone Sued*, REUTERS, Nov. 6, 2002.

⁸⁴ *CBS Broadcasting*, 2003 U.S. Dist. LEXIS 20258, at *43; see Smart, *supra* note 48, at 1.

⁸⁵ *Id.* at *19.

⁸⁶ *Id.* at *24-25.

Each show has certain elements that are not present in the other show. For example, there are elements in *Survivor* of a hostile environment, building of social alliances, and “challenges arising from the game show element and serial elimination.”⁸⁷ In contrast, *Celebrity* adds the elements of the “celebrity tabloid genre and audience participation in a game show genre.”⁸⁸ Combinations of stock devices strung together in a unique way might be protectable, but to determine whether unlawful misappropriation has occurred requires an examination of the expression of those common elements consisting of “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 parties.”⁸⁹ The possible flaw in CBS’s argument was its focus on protecting a combination of generic elements without explaining how the presentation or expression of these elements played into the show.⁹⁰

ABC argued that the filtration test, which looks at whether the protectable elements of the shows were substantially similar, should be used in analyzing the two works.⁹¹ CBS, in turn, argued that the “total concept and feel” test should be applied. The latter test requires looking at the two works as a whole, including the protectable and non-protectable elements. Ultimately, the court combined the two, saying that “the court must examine ‘the similarities in such aspects as the total concept and feel, theme, characters, plot, sequence, pace and setting’ of the works and then determine whether the similarities arise from noncopyrightable elements, as opposed to protected elements.”⁹² In applying this hybrid test, the court concluded that each show contained well-known generic elements, but also contained generic elements that were not present in the other work. Other significant differences between the two works were the tone and feel of *Survivor* being very serious and intense, while *Celebrity* had a more humorous tone.⁹³ The court also found differences in the production values, elimination sequences, competitions, and even the hosts. Considering these differences, the works were not substantially similar and the court denied the preliminary injunction. CBS then announced that it was dropping the suit, without further explanation.⁹⁴

4. Howard Stern’s *Evaluators* vs. *Are You Hot*: Stern Brings His Radio Show Into The Copyright Infringement Arena.

ABC was not off the hook with the end of the *Celebrity* litigation. In March 2003, Howard Stern sued the network.⁹⁵ Stern alleged that Telepictures Productions, along with ABC and Scott Einziger, a former executive producer of Stern’s show on E! Entertainment Television, had copied the format from his show *Evaluators* to create *Are You Hot? The Search for America’s*

⁸⁷ *Id.* at *21.

⁸⁸ *Id.* at *22.

⁸⁹ *Id.* at *8 (quoting *Metcalf*, 294 F.3d at 1074).

⁹⁰ *CBS Broadcasting*, 2003 U.S. Dist. LEXIS 20258, at *24; Smart, *supra* note 48, at 17.

⁹¹ *CBS Broadcasting*, 2003 U.S. Dist. LEXIS 20258, at *12-14.

⁹² *Id.* at *17.

⁹³ *Id.* at *26-27.

⁹⁴ Debra Johnson, *Castaway Gives Lawsuit The Heave-Ho*, VARIETY, April 24, 2003.

⁹⁵ Stern brought claims for unfair business practices, unfair competition, breach of fiduciary duty, misappropriation of trade secrets, interference with prospective economic advantage, unjust enrichment, and imposition of a constructive trust. Complaint at 1, *Stern v. Telepictures Prods.*, No. BC292018 (C.D. Cal. 2003), available at <http://www.thesmokinggun.com/archive/hotsuit1.html>.

Sexiest People.⁹⁶ Stern alleged that *Are You Hot* incorporated many elements similar to *Evaluators*, such as a three-judge panel, a ten-point rating system, and having a single male host. Stern also alleged that hiring a former executive producer from his show proved ABC's bad faith. Stern further alleged that the defendants were aware of the plaintiff's negotiations to develop a television series based on the radio segment and that, after *Are You Hot* aired, those discussions ceased.⁹⁷ Stern ultimately dismissed the case in August 2003, which suggests that a settlement was reached, so we do not have the benefit of a court ruling.

5. *The Contender vs. The Next Great Champ: Contender Partners Brings Out The Gloves In The Copyright Ring.*

NBC, through one of its programs, joined the format wars in 2004. Contender Partners LLC, the producers of *The Contender*, sued Fox. Instead of bringing a copyright infringement claim, however, it sued for unlawful business practices in violation of California Business & Professions Code §§ 17200, *et seq.* Although creative, that effort also proved unsuccessful.

A fierce bidding war had ensued between the networks to gain rights to *The Contender*, with NBC winning out in the end. Contender Partners alleged that a senior Fox executive angrily told one of its representatives that Fox would develop and produce a competing unscripted boxing television drama series that would be on air before *The Contender*. The executive also allegedly said that Fox's series would destroy the prospects for the NBC series.⁹⁸

Contender Partners asserted that Fox had violated state boxing regulations in an attempt to gain a competitive advantage in airing *The Next Great Champ* before *The Contender* premiered on NBC.⁹⁹ Nevertheless, it was clear that format infringement was at the heart of the action.¹⁰⁰ In August 2004, the California Superior Court refused to grant a preliminary injunction, stating that doing so would violate the First Amendment as a prior restraint.¹⁰¹ The case was dismissed in December 2004.

6. *Wife Swap vs. Trading Spouses: RDF Media Sues To Protect Its International Hit.*

One of the most recent legal battles in the reality television arena was between ABC's *Wife Swap* and Fox's *Trading Spouses*.¹⁰² RDF had produced *Wife Swap UK*, a hit in Britain. In 2002, RDF agreed with ABC to produce a U.S. version of the show. In 2004, ABC announced that *Wife Swap US* would be part of its fall schedule. In July 2004, Fox began airing *Trading Spouses*. RDF sued, alleging that Fox's *Trading Spouses* had copied expressive elements (a Copyright Act claim) and trade dress (a Lanham Act claim) of *Wife Swap UK* and *Wife Swap US*, including the formats of the shows, opening segments, casting, the rules of the shows, production values, and

⁹⁶ *Id.* at 3-4.

⁹⁷ *Id.*

⁹⁸ Complaint at 5, *Contender Partners LLC v. Fox Broadcasting Co.*, No. SC 082559 (Cal. Super. Ct. 2004).

⁹⁹ *Id.* at 4.

¹⁰⁰ See Andrew M. White & Lee S. Brenner, *Reality TV Shows Difficult Concepts To Protect*, 20 ENT. L. & FIN. 3 (2004).

¹⁰¹ Michael Schneider, *The Show Will Go On: Judge Rules In Favor Of "Champ,"* VARIETY, Aug. 27, 2004.

¹⁰² *RDF Media Limited v. Fox Broadcasting Company*, 372 F. Supp. 2d 556 (C.D. Cal. 2005).

dialogue.¹⁰³

Fox moved to dismiss the copyright claims based on alleged lack of a copyright registration and the Lanham Act claims. The court denied the motion to dismiss the copyright claims, but granted the motion to dismiss the Lanham Act trade dress claim.

RDF had taken its copyright claims and reasserted them as the following trade dress claim:¹⁰⁴

[T]he total image and appearance of “Wife Swap US,” as defined by the selection, compilation, arrangement, sequence, and combination of the cast of characters, the structure of events, the plot, the tone, the theme, the pace, the scene set-ups, the narration, the dialogue that arises from constructed situations, the contrasting settings, the structured before-and-after dialogue, the topics explored, the dramatic and comedic effect created by music, and the introductory segment, constitutes the trade dress of “Wife Swap US.” The unique images, scenes, themes, and artistic choices employed by RDF Media in “Wife Swap US” serve to identify the source of the program.¹⁰⁵

The court, however, rejected RDF’s attempt to establish that the reality show itself (*i.e.*, the “product”) served as its own trademark, finding that RDF was improperly trying to conflate the distinctions between trademark and copyright protections.¹⁰⁶ It stated:

If this Court were to accept the proposition that “visual expression necessarily will form the overall look and appearance of the program—in other words, the trade dress,” then every incident of visual expression would be subject to copyright and trademark protection and that protection would last in perpetuity. This theory has been rejected on numerous occasions.¹⁰⁷

Following some further proceedings, the parties dismissed the case before the court could rule on the copyright claims.¹⁰⁸

7. *Most Extreme Elimination Challenge, Ninja Warrior, Women Of Ninja Warrior vs. Wipeout: The Latest Foray Into The Format Wars.*

A very recent case involving competing reality formats is pending in Los Angeles. In *Tokyo Broadcasting System v. American Broadcasting Companies, Inc.; Endemol USA*,¹⁰⁹ plaintiff TBS

¹⁰³ *Id.* at 559.

¹⁰⁴ *Id.* at 564.

¹⁰⁵ *Id.* at 562-63.

¹⁰⁶ *Id.* at 563.

¹⁰⁷ *Id.* at 564 (citing *Dastar Corp.*, 539 U.S. 23 (2003)).

¹⁰⁸ For documentation of the proceedings, see the federal judiciary’s PACER database, Case No. CV 04-10227 SJO.

¹⁰⁹ Consolidated Case Nos. CV 08-06550 MAN and CV 08-06622 MAN (C.D. Cal., filed against ABC Oct. 6, 2008 and against Endemol Oct. 8, 2008).

asserts copyright infringement, false designation of origin, and unfair competition claims against ABC and Endemol, claiming that Endemol's and ABC's show *Wipeout* infringes the copyright in TBS's Japanese shows aired in the U.S. as *Most Extreme Elimination Challenge*, *Ninja Warrior*, and *Women Of Ninja Warrior*. TBS argues that its shows and the challenged show all involve contestants who compete in a variety of physical challenges on an obstacle course, and that *Wipeout* "incorporates not only the total concept and feel of the Shows but also the most significant, original and expressive elements of the Shows," including the use of silly but difficult physical challenges, the comical portrayal of contestants' failed attempts, the methods of highlighting those failed attempts, the use of two commentators who make humorous comments, similar camera angles, instant replay and slow-motion devices, and the use of the same challenges and obstacle courses.¹¹⁰

ABC filed a motion to dismiss, but did not move on the copyright claims, instead moving only on the Lanham Act and unfair competition claims.¹¹¹ In an interesting twist to the reality litigation template, TBS's Lanham Act and unfair competition claims assert that ABC had purchased Google keywords for TBS's three shows through Google's AdWords service. When consumers search for TBS's shows, the AdWords service displays a link to ABC's *Wipeout* show. That link identified ABC.¹¹² The court rejected ABC's argument that an initial interest confusion theory could not be made in the Ninth Circuit in light of the fact that ABC was expressly identified in the link. The court stated that, while ABC might prevail on the evidence to be produced for trial, TBS's claim could not be barred at the pleading stage.¹¹³

D. Can Reality Television Formats Be Protected?

Very high hurdles remain in trying to protect the formats of reality shows under the copyright laws. However, because most of the cases have been settled and few have gone to final judgment, there is little guidance from the courts. A small, common theme, however, appears to run through these cases.

1. Aspects Of Format Litigation.

Judges are frequently determining that the reality shows in question are based on stock, generic elements that are borrowed from previous genres, such as game shows, talk shows, and situation comedies. As one commentator has noted, television has a history of "major genre trends comprised of programs with common traits that reflect the viewing audience's . . . interests."¹¹⁴ "After Steve Allen, there could have been no Johnny Carson, Jay Leno or David Letterman; 'Wagon Train' would have precluded 'Rawhide, Gunsmoke, or Bonanza' from ever airing The reason that television continues to thrive is that there are endless reworkings of many basic generic elements applied in novel ways, in different proportion, in different combinations and with different styles and production values."¹¹⁵

¹¹⁰ Court's *Order Denying Motion To Dismiss*, at p. 3, filed Aug. 12, 2009.

¹¹¹ *Id.* at p. 7.

¹¹² *Id.* at p. 4.

¹¹³ *Id.* at p. 28.

¹¹⁴ Smart, *supra* note 48, at 19.

¹¹⁵ *Id.*

There are very few decisions addressing copyright infringement of television programs. Of those reported, not a single court found, after a final hearing on the merits, that there was any infringement. So the question remains, what does it take to have a valid copyright in a reality television show format? And if so protected, what is it protected against? A valid format copyright will do little good if it cannot prevent a slightly altered copycat.

The courts are hesitant to grant copyright protection to reality television series because such action would limit creativity and freedom in producing new shows. To prevail on a claim for copyright infringement, it takes more than showing that two rival shows use the same format on a generic level. The plaintiff must be able to show substantial similarity in expression in the execution of the format. This means proving that the feel, theme, characters, plot, sequence, pace, and setting are substantially similar in both shows.¹¹⁶ From *Metcalf* and subsequent cases, it appears that courts are more inclined to find substantial similarity when a high degree of access is proven as well.

CBS's suit against ABC for *Celebrity* possibly failed because CBS did not make a sufficient showing that the expression of the show was unique and that those unique elements were then copied. There were significant differences in the feel of the shows, the characters were different and had different interactions with each other, and the paces of the shows were different. While both shows were set in Australia, one was set in the dry and hot outback and the other in a lush jungle. Simply having the same format of taking persons and making them survive in the great outdoors and compete for rations is not enough for copyright protection.

2. Producing A Reality Show.

When deciding to produce a new reality series, it is important to keep in mind that the courts are not likely to provide much protection if the show is copied later. Production companies must realize that ideas are in the public domain and whoever has the idea first does not have a monopoly on that idea.

An important lesson learned from past reality litigation is that producers of reality shows will leave the network and do similar shows on other networks, such as in Howard Stern's case against ABC. It is important to have in the agreement that the production company or those affiliated with the company will not produce the same show for other networks. Such a provision can prevent format infringement in the future. It should be noted, however, that most jurisdictions, and particularly in California, tend to severely restrict the enforcement of noncompete clauses in employment agreements, so any such restrictions will have to be very narrowly drafted in order to avoid those laws restricting competition.¹¹⁷

Other techniques reality format producers should consider are discussed in the following section.

¹¹⁶ *Id.* at 20.

¹¹⁷ *See, e.g.*, CALIFORNIA BUSINESS & PROFESSIONS CODE § 16600.

E. Is There Any Means Left To Try To Protect A Format?

1. Stringing Together Unprotectable Elements.

In recent years, the Ninth Circuit has had several opportunities to demonstrate the application of the extrinsic test in comparing two works consisting of an assemblage of individually unprotectable elements. In each case, the gravamen of the plaintiff's claim was that its work, comprised of a compilation of elements, each lacking in the originality requisite for copyright protection, nevertheless mustered sufficient originality from the assemblage of its component parts to merit copyright protection.

In *Satava v. Lowry*, discussed above, the court held that the six allegedly similar aspects of two artists' colorful glass-in-glass jellyfish sculptures—namely, selection of “clear glass, oblong shroud, bright colors, proportion, vertical orientation, and stereotyped jellyfish form”—considered together, “lacks the quantum of originality needed to merit copyright protection.”¹¹⁸ Shortly thereafter, in *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*,¹¹⁹ the Ninth Circuit relied on *Satava* in holding that the mechanical combination of four preexisting ceiling-lamp elements (a finial, a cap, a Tiffany-style glass shade, and a metal filigree) with a preexisting table-lamp base to create a Victorian Tiffany table lamp did not rise to the level of originality required for copyright protection because “Lamps Plus did not create any of the ‘design . . . features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects’ of any of the lamp’s component parts” as required by the Copyright Act.¹²⁰ The court noted that, in light of the use of preexisting elements, to be afforded copyright protection “sufficient originality must arise from the assemblage of its component parts” but concluded that, as in *Satava*, the amalgamated lamp “lack[ed] the quantum of originality needed to merit copyright protection.”¹²¹

Notably, these cases do not cite *Metcalf v. Bochco*,¹²² the Ninth Circuit's *City Of Angels* case. There the court found that the “cumulative weight” of at least seven common “generic similarities and the common patterns in which they arise” enabled the plaintiffs to survive summary judgment.¹²³ Therefore, the decisions in *Satava* and *Lamps Plus* indicate that the holding in *Metcalf* did not establish a precedent for a broadly-inclusive application of the extrinsic test.

In contrast, in *Open Source Yogan Unity v. Choudhury*,¹²⁴ the Northern District of California held that a trier of fact could determine that Bikram Choudhury's proprietary prescribed sequences of 26 classic yoga asanas, or poses, along with two breathing exercises, were arranged in a sufficiently creative manner to entitle Choudhury to copyright protection, with the result that the plaintiff's motion for summary judgment on the grounds of copyright misuse was defeated.¹²⁵

¹¹⁸ 323 F.3d 805, 811 (9th Cir. 2003).

¹¹⁹ 345 F.3d 1145 (9th Cir. 2003).

¹²⁰ *Id.* at 1147 (quoting 17 U.S.C. § 101).

¹²¹ *Id.* at 1147 (quoting *Satava*, 323 F.3d at 811).

¹²² 294 F.3d 1069 (9th Cir. 2002).

¹²³ *Id.* at 1074.

¹²⁴ 74 U.S.P.Q.2d 1434 (N.D. Cal. 2005).

¹²⁵ *Id.* at *4, *8.

The court noted, however, that as the non-moving party, Choudhury was entitled to have the facts construed in his favor.¹²⁶ Furthermore, the court pointed out that, “if the Bikram yoga sequence can be copyrighted, any copyright protection is necessarily considered ‘thin’” because “when the range of protectable expression is narrow, the appropriate standard for illicit copying is virtual identity.”¹²⁷

In *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*,¹²⁸ a case involving two oriental-design rugs, the Second Circuit, relying on an older Second Circuit case that noted that “where design elements can be identified as reflecting the designer’s artistic judgment exercised independently of functional influences, conceptual separability exists,”¹²⁹ found that a copyrighted oriental rug design, created by selective elimination of elements from an ornate carpet in the public domain, was infringed by a competitor’s rug from which essentially the same selective eliminations were made, despite the fact that the competing rug also added other features which gave it a different overall concept and feel. The plaintiff designer applied a creative process to the elements taken from the rug in the public domain, known as the Battilossi carpet, culling selective motifs from the central third of the upper half of the Battilossi carpet, and then stretching the field slightly to turn the formerly symmetrical pattern asymmetrical. The results of these creative machinations became the entire field of the plaintiff’s rug, to which were then added several borders, including one border taken from another rug in the public domain (and modified) and two minor borders of plaintiff’s own creation.¹³⁰

These cases suggest that reality producers should always try to list each element that, when taken together, comprises the uniquely creative web or fabric that establishes the formatted program’s themes, framework, and public identity. While random similarities are not entitled to copyright protection,¹³¹ and striking similarity cannot be established with a list of such alleged random similarities between the plaintiff’s work and the defendant’s work,¹³² should someone copy a substantial number of the listed identifiable elements, whether separately protected or otherwise, especially in sequence, a court would seem much more likely to at least allow the case to get past a motion to dismiss or summary judgment motion, thus increasing the possibility for prevailing on the merits.

¹²⁶ *Id.* at *9.

¹²⁷ *Id.* at *12-13 (quoting *Feist Publ’ns, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 349 (1991)).

¹²⁸ 338 F.3d 127 (2d Cir. 2003).

¹²⁹ *Brandir Int’l, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987).

¹³⁰ *Tufenkian*, 338 F.3d at 129.

¹³¹ *Cavalier v. Random House, Inc.*, 297 F.3d 815, 825 (9th Cir. 2002) (holding that lists of random similarities “are inherently subjective and unreliable The *Litchfield* argument is especially strong here since the alleged similarities are selected from over 280 pages of submissions.”); *Shaw v. Lindheim*, 908 F.2d 531, 540 (9th Cir. 1990) (“Shaw’s list misrepresents the order and similarity of many of these events, and relies heavily on ‘scenes a faire’—that is, scenes that flow naturally from basic plot premises. Indeed, defendants provide a list of similarities between ‘The Wizard of Oz’ and ‘Star Wars’ that is virtually as compelling as Shaw’s.”) (internal citations omitted); *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984) (noting that courts are “particularly cautious where, as here, the list emphasizes random similarities scattered throughout the works”).

¹³² *Towler v. Sayles*, 76 F.3d 579, 584 (4th Cir. 1996) (refusing to find striking similarity between two screenplays where “[t]he only similarity shared by the two screenplays is that they both have a black female character and a white female character who are friends”).

2. Trademark, Trade Dress, And The *Dastar* Case.

Trademarks and trade dress, at least facially, seem to provide an alternative to copyright protection as a basis for controlling format rights. If format elements are not sufficiently original to justify protection against copying under the copyright laws, one might argue that they are sufficiently distinctive to constitute source-identifying features, namely identifying the producer as the source of the format programming. The problem here, however, is that trademark and trade dress protection arises only once the marks or trade dress have acquired secondary meaning, and to acquire that they must have been “in use” in commerce. As a result, pitched, but unpublished, formats could not claim such protection. Also, otherwise unprotected trade dress elements will need to acquire “secondary meaning” through broad public exploitation and recognition before they will enjoy any protection.

But even this slender reed of protection seems to have been snapped by the Supreme Court’s relatively recent decision in the *Dastar* case.¹³³ Fox had collaborated with Time, Inc. to produce a 26-episode television series, first broadcast in 1949, based on General Dwight David Eisenhower’s book, *Crusade In Europe*. The book copyright was renewed but the television series copyright was not.¹³⁴ Dastar released a video set entitled *World War II Campaigns In Europe* that included an edited version of the Fox Crusade TV series, removed references to the book and series, and sold the video as its own product bearing the possessory production legend, “Produced and Distributed by: *Entertainment Distributing*” (such distributor being owned by Dastar).

The court characterized the claim as one for false designation of origin under Section 43(a) of the Lanham Act:

That claim would undoubtedly be sustained if Dastar had bought some of New Line’s (the video distributor) Crusade videotapes and merely repackaged them as its own. Dastar’s alleged wrongdoing, however, is vastly different: It took a creative work in the public domain—the Crusade television series—copied it, made modifications (arguably minor), and produced its very own series of videotapes. If “origin” refers only to the manufacturer or producer of the physical “goods” that are made available to the public (in this case the videotapes), Dastar was the origin.¹³⁵

In trying to draw a distinction between the fundamental building blocks of intellectual property—namely, patents, trademarks and copyrights—the court, relying on its trade dress decision in the *Wal-Mart v. Samara* case,¹³⁶ discussed how, “[t]his (the doctrine of acquired secondary meaning in which the name or trade dress identifies the producer not the product) would be entirely pointless if the ‘original’ producer could turn around and pursue a reverse-

¹³³ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 123 S. Ct. 2041, 156 L. Ed. 2d 18 (2003).

¹³⁴ The Supreme Court expressly declined to comment on the effect of the renewal copyright in the book as such question was not before the court. *Id.* at 37-38.

¹³⁵ *Id.* at 31.

¹³⁶ *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 120 S. Ct. 1339, 146 L. Ed. 2d 182 (2000).

passing-off claim under exactly the same provision of the Lanham Act.”¹³⁷ Most tellingly, the court admonished that, “[a]ssuming for the sake of argument that *Dastar*’s representation of itself as the ‘Producer’ of its videos amounted to a representation that it originated the creative work conveyed by the videos, allowing a cause of action under § 43(a) for that representation *would create a mutant copyright law* that limits the public’s federal right to copy and to use expired copyrights.”¹³⁸

Subsequent courts have consistently applied *Dastar* in virtually all situations where it appears that plaintiffs are asserting trademark or trade dress rights to extend control over creative works of the kind typically protected by copyright.¹³⁹ Two notable examples include the *Capcom* and *RDF Media* cases discussed above.¹⁴⁰ In *Capcom*, the court considered whether the plaintiff avoided the *Dastar* restrictions on “mutant copyrights” by pleading that the source-identifying elements identified the producer and not the product, but found that none of these elements (use of film director George Romero’s name on a disclaimer, use of the word “dead” in the title, and alleged use of a zombie head design) rose to the level of a protected trademark.¹⁴¹ The courts, in short, seem to be saying, “[i]f it’s not copyrighted, it’s not trademarked.” So where does that leave format producers?

3. Protection Of Disclosure—Implied-In-Fact Contracts.

In certain limited situations, the owner of a particular format may find refuge in a venerable line of cases extending back to the California Supreme Court’s 1956 decision in *Desny v. Wilder*.¹⁴² In *Desny*, the plaintiff sued for the value of a literary composition, or an idea for a film, based on the true life story of Floyd Collins, who died while exploring a newly discovered cave. *Desny*’s story was allegedly filmed by writer/producer/director Billy Wilder as *Ace In The Hole* starring Kirk Douglas. Rather than relying on copyright protected content, and even conceding the lack of any such protection of the idea, *Desny* sought recovery because the defendants had agreed to

¹³⁷ *Dastar*, 539 U.S. 23 at 36.

¹³⁸ *Id.* at 34 (emphasis added).

¹³⁹ See *Zyla v. Thomson Corp.* 360 F.3d 243 (1st Cir. 2004) (claim for failure to properly acknowledge authorship precluded by *Dastar*); *TMTV Corp. v. Pegasus Broad. of San Juan*, 490 F. Supp. 2d 228 (D.P.R. 2007) (*sua sponte* dismissal of Section 43(a) Lanham Act claim under *Dastar* where claim was based upon alleged similarities of two television sitcoms); *Mitchell Int’l, Inc. v. Fraticelli*, 2007 U.S. Dist. LEXIS 86787 (D.P.R. Nov. 26, 2007) (the court dismissed a claim pursuant to *Dastar* against a claim that a copyright infringer’s unauthorized use of the plaintiff’s software deceived customers into believing that the defendant’s body shops were authorized to use the plaintiff’s programs); *Silverstein v. Penguin Putnam, Inc.*, 522 F. Supp. 2d 579 (S.D.N.Y. 2007) (*Dastar* foreclosed a false designation claim alleging Penguin’s reproduction of Silverstein’s compilation of poems with authorship credit to Penguin); *Michael Grecco Photography, Inc. v. Everett Collection, Inc.*, 2008 U.S. Dist. LEXIS 101512 (S.D.N.Y. Dec. 9, 2008) (Grecco claimed that Everett’s overlay of “Everett Collection” on the allegedly infringed images would lead purchasers into believing that the defendant had a business relationship with the plaintiff; Grecco’s claim of copyright infringement upheld on summary judgment but 43(a) claim dismissed under *Dastar* as being no more than a disguised copyright infringement claim); *Steele v. Turner Broad. System, Inc.*, 2009 U.S. Dist. LEXIS 34551 (D. Mass. Apr. 3, 2009) (claim that the defendants’ failure to attribute authorship to the plaintiff for an alleged unauthorized use of a derivative version of song was precluded by *Dastar* because Steele failed to assert that he was the producer of any tangible goods distributed by the defendants).

¹⁴⁰ *Capcom Co. Ltd. v. The MKR Group, Inc.*, 2008 U.S. Dist. LEXIS 83836 (N.D. Cal. Oct. 20, 2008); *RDF Media Ltd v. Fox Broad. Co.*, 372 F. Supp. 2d 556 (C.D. May 10, Cal. 2005).

¹⁴¹ 2008 U.S. Dist. LEXIS 83836 at *36-39.

¹⁴² 46 Cal. 2d 715 (1956).

pay him the reasonable value for using his story idea if they used it. The court found that this stated a valid cause of action for breach of an implied-in-fact contract, and reversed the lower court's dismissal on summary judgment.

Since *Desny*, claims for breach of disclosure agreements for movie or television ideas focus on whether the particular claim is preempted under the Copyright Act. Section 301 of the Act expressly preempts claims for rights equivalent to those protected by copyright. Implied-in-fact contract claims have been held to survive if qualitatively different, or, in other words, allege an "extra element" that changes the nature of the cause of action.¹⁴³ As explained by the *Grosso* court, "[t]he *Desny* rule is justified on the theory that the bargain is not for the idea itself, but for the services of conveying the idea."¹⁴⁴ Such a claim requires that the plaintiff show he prepared the work, disclosed it to the offeree for sale, and did so under circumstances under which it could be concluded that the offeree voluntarily accepted the disclosure knowing the conditions for disclosure and the work's reasonable value.¹⁴⁵ The recent decision in *Attachmate Corp. v. Sentry Insurance*,¹⁴⁶ in dismissing an idea disclosure claim on the pleadings, distinguished an implied-in-law, or unjust enrichment claim, from the kind of claim in *Grosso*. Holding that the plaintiff had failed to effectively plead either the necessary extra element of an implied-in-fact contract or an express promise to pay, the court found the claim preempted by the Copyright Act.

By way of summary, implied-in-fact contract claims for idea/format disclosure may continue to have some limited utility. Such utility, however, appears limited to those situations involving a formal pitch of idea submissions and, even then, only under circumstances where the offeree has clearly consented to payment for use. It would seem as though such circumstances could easily be negated by simply requiring the idea submitter to disclaim any such understanding as a pre-condition for the offeree's consideration of the submission. The best protection for idea submitters is an express agreement with the offeree. Such express agreements are unlikely, however, because the offeree is generally in a much more favorable bargaining position than the submitter. In short, *Desny* claims may overcome a preemption analysis on summary judgment, or judgment on the pleadings, but face substantial factual hurdles should they survive to trial.

F. A Format Organization.

One possible solution is a voluntary organization to regulate, mediate, or arbitrate format disputes among organization members. Such an organization already exists in Europe, namely, the Format Recognition and Protection Association ("FRAPA").¹⁴⁷ The need for such an organization flows from the mutual recognition that format producers have as much to gain by protecting the formats of others as they do by protecting their own formats. Absent any meaningful format protection, the incentive to copy, or "rip off," formats from others becomes overwhelming because failing to copy formats would then put the more ethical producer at a competitive disadvantage. Ultimately, however, this produces a disincentive to create any new

¹⁴³ *Grosso v. Miramax Film Corp.*, 383 F.3d 965 (9th Cir. 2004) (reversing a dismissal on summary judgment of a complaint based on an implied-in-fact contract for idea disclosure).

¹⁴⁴ *Id.* at 967.

¹⁴⁵ *Id.*

¹⁴⁶ 2009 U.S. Dist. LEXIS 72460 (W.D. Wash. 2009).

¹⁴⁷ See FRAPA's website for general information at www.frapa.org.

formats, to the benefit of no one, including the public who merely seeks to be entertained and enlightened.¹⁴⁸

FRAPA is an independent non-profit whose goal is “to ensure that television formats are respected by the Industry and protected by law as intellectual property.”¹⁴⁹ It does so by registering format proposals, mediates disputes arising from claims of format plagiarism, formulates industry guidelines for business practices and conduct for fair competition, and lobbies for legal recognition of format rights.¹⁵⁰ The website includes a long and distinguished list of members including such well-recognized format producers as FremantleMedia (UK) and Endemol International B.V. (Germany).¹⁵¹ FRAPA claims to have resolved 80% of its disputes by agreed and signed solutions. FRAPA states that it successfully mediated 24 format plagiarism disputes in 2004, apparently the most recent year for which statistics were disclosed. The facts behind those disputes, however, are not well-known as all are treated as confidential.¹⁵²

Whether a similar organization would work in the United States would depend in large part on the good will of the affected format producers and a willingness to be bound by the organization’s findings.

III. CONCLUSION

Reality programming has become a staple of television programming, but is virtually begging for some modicum of protection that continually seems just beyond the conceptual reach of the case law. The courts continue to find that stock elements may be arranged in unique sequences, while holding that even this is not enough to grant copyright protection. It appears that the courts are more interested in keeping an open flow of ideas, rather than letting networks garner monopolies over certain show formats. Stated another way, the First Amendment marketplace of ideas appears to trump the more commercial marketplace for original programming concepts and formats. Ultimately, the expression of the stock elements of these shows—the originality in their selection and arrangement—is going to be the determining factor in most cases dependent on format protection. Perhaps more importantly, and just as obviously, the success of one format over a cheap imitator will depend on the unique combination and contributions of the creative personnel that will lead the public to accept and support one show, such as an *American Idol* or *The Biggest Loser*, over its less attractive and imaginative competitors. Hit show magic remains most dependent on the chemistry of the cast and its connection to the audience, none of which can be defined or easily protected by legal theory.

Self-help may be the only viably reliable source of protection, whether through contract or possibly through the creation of a generally accepted trade association such as an American version of FRAPA. But lacking such an organization with effective enforcement mechanisms, it

¹⁴⁸ See generally, Jay Rubin, *Television Formats: Caught in the Abyss of the Idea/Expression Dichotomy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 661 (2006).

¹⁴⁹ FRAPA Home Page, www.frapa.org, (last visited Oct. 23, 2009).

¹⁵⁰ FRAPA Aims, www.frapa.org/about-frapa/aims.html, (last visited Oct. 23, 2009).

¹⁵¹ FRAPA Members, www.frapa.org/about-frapa/members.html, (last visited Oct. 23, 2009).

¹⁵² FRAPA Mediation Overview, www.frapa.org/dispute-resolution/mediation.html, (last visited Oct. 23, 2009).

is essential to provide protection for reality shows in the initial agreements crafted when producing these shows. Provisions that limit producers from creating similar shows for other networks may be the best, albeit imperfect, solution, at this time, for format infringement. As the reality genre flourishes, networks are going to be forced to become more creative in programming and in negotiating deals that will provide more protection for the shows from the beginning.