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## No More Format Disputes: Are Reality Television Formats the Proper Subject of Federal Copyright Protection?

Jessica E. Bergman

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# NO MORE FORMAT DISPUTES: ARE REALITY TELEVISION FORMATS THE PROPER SUBJECT OF FEDERAL COPYRIGHT PROTECTION?

JESSICA E. BERGMAN<sup>1</sup>

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## I. INTRODUCTION

Society loves reality television.<sup>2</sup> Some people deny this truth, vowing that they have never seen an episode of *Survivor* or called in to vote for a contestant on *American Idol*. Others surrender to this craze, planning social gatherings and nightly dinners around the lineup of reality programming. Regardless of which category you fall into, the presence of reality content cannot be denied.<sup>3</sup> Further, the specific subject matter with which people seem to be so intrigued (be it a weight-loss challenge, a search for the perfect mate, or a survival competition) seems to matter very little. Rather, the basic structure of these shows makes them a surefire winner in the entertainment industry.

Generally speaking, viewers tune in on a weekly basis to watch a group of people in a particular setting engage in a series of events. Season after season, viewers invest in a diverse cast of characters that are placed in a new environment and faced with various challenges. Moreover, the success of one reality program gives rise to a multitude of lookalike content.<sup>4</sup> Relying on the same and/or similar underlying structure, one network piggybacks off the success of another and provides new content with only minor tweaks and twists.<sup>5</sup>

For example, CBS's successful program, *Survivor*, gave rise to similar programs on Fox (*Boot Camp*) and ABC (*I'm A Celebrity, Get Me out of Here*). Furthermore, Fox's *Trading Spouses* and ABC's *Wife Swap* are nearly identical, just as are Fox's *The Next Great Champ* and NBC's *The Contender*. Despite equivalent premises, each of these shows is widely successful, raking in millions of viewers on a weekly basis. Though the list does not end there, this trend suggests that the format of reality programs, not the content, is the fundamental element that drives the success of the reality craze.

According to the Writers Guild of America, a "format" refers to:

[T]he framework within which the central running characters will operate and which framework is intended to be repeated in each episode; the setting, theme, premise or general story line of the proposed serial or episodic series; and the

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<sup>2</sup> The emergence of the reality genre onto the television market can be traced back to 2000 with the premiere of *Survivor*. Jesse Stalnaker, *Has Reality Programming Been Voted Off The Island Of Copyright Protection? Finding Protection As A Compilation*, 16 SETON HALL J. SPORTS & ENT. L. 162 (2006). The success of this genre is epitomized by the ratings of *Survivor*, which received a 28.6 rating for the first season finale (meaning 28.6 million viewers tuned in). *Id.* 58.4 million viewers tuned in for the premiere of the second season. *Id.* See also ANNETTE HILL, REALITY TV – AUDIENCES AND POPULAR FACTUAL TELEVISION 2 (Routledge ed., 2005) (noting that the popular series, *American Idol*, attracts up to fifty percent of the market share, suggesting that more than half of the population tunes in to watch the program).

<sup>3</sup> Stalnaker, *supra* note 2, at 163.

<sup>4</sup> Consider such similar reality programs as *Supernanny* and *Nanny 9-1-1* or, similarly, *The Apprentice* and *The Rebel Billionaire*. J. Matthew Sharp, *The Reality of Reality Television: Understanding the Unique Nature of the Reality Genre in Copyright Infringement Cases*, 8 VAND. J. ENT. & TECH. L. 177, 179 (2006). See also Bill Carter, *The Ratings Teach Some New Rules*, N.Y. TIMES, Dec. 26, 2004, at 34 (emphasizing the existence of "rip-off" reality shows).

<sup>5</sup> *Id.*; see also Matthew Belloni, *Courts Are Gaining on TV Networks in the Race For Reality Programming*, HOLLYWOOD REP., Oct. 22, 2008, [www.whiteo.com/articles/10\\_22\\_THR.pdf](http://www.whiteo.com/articles/10_22_THR.pdf). See generally 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*, 28 L.A. LAW. 34 (Aug. 2005).

central running characters which are distinct and identifiable, including detailed characterizations and the interplay of such characters. It also may include one or more suggested story lines for individual episodes.<sup>6</sup>

Just as with any prized possessions that an owner yearns to protect, producers and networks of reality programs long to guard their formats, material that they claim is their most prized possession. It should come as no surprise, therefore, that “format” is also the subject of a great deal of debate.<sup>7</sup> Specifically, in an attempt to eliminate the potential success of lookalike content, producers and networks of hit reality programs have increasingly turned to the legal sector for copyright protection of their reality formats.<sup>8</sup>

Producers argue that in combining a specific set of elements (i.e. characters, location, competitions and prizes), an original literary work emerges that warrants the benefits of copyright protection.<sup>9</sup> As such, producers and networks file copyright infringement suits, claiming that they have the right to prevent others from using their original combination of elements (i.e. their “format”) to create new programs.<sup>10</sup>

The producers of *Survivor*, for example, claim that they are the creators of, and thus the copyright owners of, the combination of placing a group of people in an unfamiliar and isolated location without basic necessities, subjecting those people to rigorous physical and mental challenges, and eliminating those people one-by-one in weekly, ritualized ceremonies.<sup>11</sup> As a result, the producers of *Survivor* argue that another program making use of these same elements unlawfully infringes their copyright and should be punished.

A resolution of this debate turns on whether or not the courts recognize reality television formats as the proper subject of copyright protection. Though no plaintiff to date has succeeded on such a claim, courts’ willingness to hear such cases and analyze the issue not only suggests that copyright principles apply to reality television formats, but also suggests that a finding of infringement could

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<sup>6</sup> Writers Guild of America, 2008 Theatrical and Television Basic Agreement, [http://www.wga.org/uploadedFiles/writers\\_resources/contracts/MBA08.pdf](http://www.wga.org/uploadedFiles/writers_resources/contracts/MBA08.pdf). This document is known as the Minimum Basic Agreement (“MBA”) and includes such provisions as the terms and compensation requirements in connection with television programming.

<sup>7</sup> Andrew M. White & Lee S. Brenner, *Intellectual Property*, 27 NAT’L L.J. 1, 1-2 (Oct. 2, 2004), <http://www.whiteo.com/articles/lbarticle.pdf>.

<sup>8</sup> *Id.*

<sup>9</sup> 17 U.S.C. § 102(a) (2000). According to the U.S. Constitution, the one prerequisite to copyright protection, regardless of the form or components of the work, is that the work must be original. *Id.* It seems as though Congress left this requirement purposefully vague in order to leave open the door for the type of works for which copyright protection will be appropriate. At the same time, this standard does not leave the door so open, such that an author can claim copyright protection for his work without meeting some minimal requirement.

<sup>10</sup> White, *supra* note 7. Explaining the rash of lawsuits that surround reality television, the author notes that suits “come in varying and sometimes unusual forms.” *Id.* He goes on to highlight that “[t]he most significant claims have been over intellectual property rights, primarily idea and format theft.” *Id.*

<sup>11</sup> Thomas A. Smart et al., *Reality Check: When Will Two TV Shows In The Same Genre Be Considered Substantially Similar Under Copyright Law?*, 21 ENT. & SPORTS L. 1, 15-16 (2003) (discussing Judge Loretta Preska’s analysis of one such claim for infringement in the case of *CBS Broad. Inc., v. ABC, Inc.*, 2003 U.S. Dist. LEXIS 20258 (S.D.N.Y. 2003)).

result in the future.<sup>12</sup> Such an outcome would not only have harsh repercussions on the reality sector, but also on the general breadth of content that has shaped the entertainment industry.

This article will explore the applicability of the Copyright Act to reality television formats and the potential ramifications of identifying such formats as protectable expression. This comment will argue that formats are not the expressive element of a reality television program and, therefore, that granting copyright protection is improper.

Part II introduces the concept of the idea-expression dichotomy, presents the legal standards for copyright infringement claims, and discusses the topic of formats within the framework of copyright law.<sup>13</sup> Part III examines the recent legal battles involving reality television programs and infringement suits.<sup>14</sup> This section emphasizes a general unwillingness of courts to enjoin the production of copycat programs based on a claim for infringement of format, and then addresses the networks' response in terms of resorting to alternate means for resolving format disputes.<sup>15</sup> Part IV navigates the policy rationale for eliminating copyright protection of reality formats and suggests that this approach will likely incentivize, rather than discourage, the creation of new content.<sup>16</sup> Finally, this comment will conclude by suggesting that producers and networks already receive appropriate legal protection in the form of copyright for their expressive works – i.e. the specific reality television programs they create.<sup>17</sup>

## II. THE COPYRIGHT ACT – PROTECTING PROPER SUBJECT MATTER

The Copyright Act of 1976 grants federal copyright protection to “original works of authorship fixed in any tangible medium of expression.”<sup>18</sup> Essential to this basic principle is the exclusion of ideas, facts, procedures or concepts from the realm of protectable expression.<sup>19</sup> Known as the “idea-expression” dichotomy, courts have enumerated that “[c]opyright monopoly inheres only in the expression of a copyrighted work, and the theme, plot or ideas may be freely borrowed.”<sup>20</sup> In

<sup>12</sup> White, *supra* note 7; *see also* Belloni, *supra* note 5.

<sup>13</sup> *See infra* notes 18-73 and accompanying text.

<sup>14</sup> *See infra* notes 74-103 and accompanying text.

<sup>15</sup> *See infra* notes 74-103 and accompanying text.

<sup>16</sup> *See infra* notes 104-44 and accompanying text.

<sup>17</sup> *See infra* notes 145-53 and accompanying text.

<sup>18</sup> 17 U.S.C. § 102(a). According to the House Report by Congress, the phrase “original works of authorship” is purposely undefined and does not include requirements of novelty, ingenuity or esthetic merit. H.R. REP. NO. 94-1476, at 52 (1976). Similarly, the fixation requirement is vague. *Id.*

Under the bill it makes no difference what the form, manner, or medium of fixation may be—whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device “now known or later developed.”

*Id.*

<sup>19</sup> 17 U.S.C. § 102(b) (2000); *see Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985) (“In addition, no author may copyright facts or ideas.”).

<sup>20</sup> *Id.*; *see generally* Dellar v. Samuel Goldwyn, Inc., 150 F.2d 612 (2d Cir. 1945).

articulating this dichotomy, courts highlight the importance of the “concreteness” of the expression element, noting that an expression is a concrete form of an idea articulated by the author.<sup>21</sup>

#### A. *The Idea-Expression Dichotomy*

The “idea-expression” dichotomy is tied to a very specific policy rationale. Namely, Congress acknowledges that ideas are simply concepts or thoughts and that to offer protection to such broad instrumentalities will restrict the creation of new literary content.<sup>22</sup> If people are allowed to claim ownership of ideas, more and more material will be taken out of the public domain and hence there will be less content for others to build upon. To see this policy in practice, copyright law does not protect an idea, like the story of two young lovers from feuding families in Italy, but does protect the expression of that idea, such as Shakespeare’s *Romeo and Juliet*.

As applied to reality television programming, copyright law does not protect an idea, like a travel competition show where people compete in various challenges for a prize, but does protect the expression of that idea, such as CBS’s *The Amazing Race*. It is this distinction, idea versus expression, which surrounds much of the controversy in claims for copyright infringement of reality formats.

#### B. *The Test For Copyright Infringement*

In order to establish a claim for copyright infringement of a reality television format, a plaintiff must prove two elements: (1) ownership of a valid copyright and (2) copying by the alleged infringer of the work’s protected elements.<sup>23</sup> The first element of this claim is rather simple to establish, as an infringement action can be filed so long as the owner has registered his copyright.<sup>24</sup> In order to prove the

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<sup>21</sup> MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 2.02 (2009). “The expression of an idea to which copyright may attach requires concreteness only in the sense that concrete is the polar opposite of abstract.” *Id.*

<sup>22</sup> U.S. CONST. art. I, § 8, cl. 8. The primary objective of copyright is to “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” The effect of removing ideas from the public domain would hinder this purpose of promoting the progress of science and the useful arts. NIMMER, *supra* note 21, at § 13.03(3)(B)(2)(a); *see also* Smart, *supra* note 11, at 16.

<sup>23</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

<sup>24</sup> 17 U.S.C. § 409 (2000).

The application for copyright registration includes the following: (1) the name and address of the copyright claimant; (2) in the case of a work other than an anonymous or pseudonymous work, the name and nationality or domicile of the author or authors, and, if one or more of the authors is dead, the dates of their deaths; (3) if the work is anonymous or pseudonymous, the nationality or domicile of the author or authors; (4) in the case of a work made for hire, a statement to this effect; (5) if the copyright claimant is not the author, a brief statement of how the claimant obtained ownership of the copyright; (6) the title of the work, together with any previous or alternative titles under which the work can be identified; (7) the year in which creation of the work was completed; (8) if the work has been published, the date and nation of its first publication; (9) in the case of a compilation or derivative work, an identification of any preexisting work or works that is based on or incorporates, and a brief, general statement of

second element of this claim, however, the court must find that the alleged infringer made an improper appropriation of the plaintiff's work.<sup>25</sup> An improper appropriation, moreover, occurs only after the court determines that the alleged infringer's work and the plaintiff's work are "substantially similar."<sup>26</sup>

### *C. Substantial Similarity – A Complicated Standard*

In theory, the guidelines for a finding of copyright infringement are clear. However, for several reasons, the application of this two-step analysis is incredibly complicated. First, the "substantial similarity" standard only applies to the protected elements of a work of authorship.<sup>27</sup> Therefore, courts must distinguish whether an alleged infringer has misappropriated protectable expression, or whether there has been a mere taking of the unprotectable ideas that serve as a backdrop to the plaintiff's original expression.<sup>28</sup>

The protectable elements to which the "substantial similarity" standard does apply are often referred to as the "constituent elements."<sup>29</sup> The "constituent elements," contrasted from underlying basic ideas, are the aspects of a work that are original to the creator and that require innovation and creativity, thereby earning the benefits of copyright protection.<sup>30</sup> Put another way, the "constituent elements" refer to the creator's own translations or interpretations of the underlying ideas. This distinction is tied back to the underlying rationale of copyright law, which insists that only "original works of authorship" are afforded with protection in order to ensure the continued progress of the arts and sciences.<sup>31</sup>

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the additional material covered by the copyright claim being registered; (10) in the case of a published work containing material of which copies are required by section 601 to be manufactured in the United States, the names of the persons or organizations who performed the process specified by subsection (c) of section 601 with respect to that material, and the places where those processes were performed; and (11) any other information regarded by the Register of Copyrights as bearing upon the preparation or identification of the work or the existence, ownership, or duration of the copyright.

*Id.* Additionally, the copyright owner must deliver to the Copyright Office a "deposit," dependent on the nature of the work, and an application fee. 17 U.S.C. § 408(a) (2000). It is important to note, however, that while registration is required for instituting an infringement suit, it is not required for obtaining copyright protection. 17 U.S.C. § 411(a) (2000) ("no action for infringement of the copyright in any United States work shall be instituted until registration of the copyright claim has been made in accordance with this title.").

<sup>25</sup> 17 U.S.C. § 102(b) (2000).

<sup>26</sup> *Id.*; see generally Daniel Fox, *Harsh Realities: Substantial Similarity In The Reality Television Context*, 13 UCLA ENT. L. REV. 223, 227 (2006).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Feist Publ'ns*, 499 U.S. at 361.

<sup>30</sup> *Id.*; see NIMMER, *supra* note 21, at § 2.01(B). As was addressed in the discussion of the "idea-expression" dichotomy, when analyzing the "constituent elements" of a work of authorship, the courts look for a particular level of originality. *Id.* Nimmer emphasizes this notion when he explains, "[a]ny 'distinguishable variation' of a prior work will constitute sufficient originality to support a copyright if such variation is the product of the author's independent efforts, and is more than merely trivial." *Id.*

<sup>31</sup> 17 U.S.C. § 102(b) (2000).

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

As Judge Learned Hand emphasized,

Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the [work] is about and at times might consist only of its title. But there is a point in this series of abstractions where they are no longer protected, since otherwise the [author] could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended.<sup>32</sup>

In so stating, Judge Hand applied the “idea-expression” dichotomy and acknowledged that some copying – copying of the underlying ideas - does not amount to infringement.<sup>33</sup> Therefore, in analyzing “substantial similarity” of reality formats, courts must determine whether the format functions as a “constituent element” unique to the plaintiff, or whether it functions as a mere unprotectable idea that underlies the plaintiff’s work.

The complications surrounding a claim for copyright infringement do not end with the aforementioned inquiry. The “substantial similarity” standard as applied to protectable expression is further complicated by a lack of consistency in its application.<sup>34</sup> Specifically, courts choose from among four unique tests – the abstraction test, the dissection or filtration test, the pattern test, and the total concept and feel test – when analyzing the second element of a copyright infringement claim.<sup>35</sup>

### 1. *The Abstractions Test*

The first attempt to enumerate a framework for analyzing the “substantial similarity” standard was Judge Learned Hand’s “abstractions test.”<sup>36</sup> This test asks the court to compare the plaintiff’s work and the alleged infringer’s work on a scale of various levels of “abstractions,”<sup>37</sup> placing the general idea of the work on one side of the scale, and the specific expressive elements of that idea on the other side of the scale.<sup>38</sup> According to Judge Hand, the trier of fact can then determine whether there has been an improper misappropriation based on “substantial similarity” of expressive elements, or whether the alleged infringer has lawfully

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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.”

NIMMER, *supra* note 21, at § 13.03(3)(B)(2)(a).

<sup>32</sup> *Nichols v. Universal Picture Corp.*, 45 F.2d 119, 121 (2d Cir. 1930); *see also* Smart, *supra* note 11, at 16.

<sup>33</sup> *Nichols*, 45 F.2d at 121.

<sup>34</sup> *See* Jarrod M. Mohler, *Toward a Better Understanding of Substantial Similarity in Copyright Infringement Cases*, 68 U. CIN. L. REV. 971, 980 (2000) (noting that courts and commentators have proposed several tests for analyzing the substantial similarity standard).

<sup>35</sup> *Id.*; *see* NIMMER, *supra* note 21, at § 13.03(A).

<sup>36</sup> Mohler, *supra* note 34, at 981.

<sup>37</sup> *Id.* at 982.

<sup>38</sup> *Id.* According to Judge Hand, “the constituent elements of any work might be broken down into a number of levels of abstraction, from the most general to the specific.” *Id.*

made use of an idea that is also found in the plaintiff's work.<sup>39</sup>

### 2. *The Dissection or Filtration Test*

Similarly, the dissection or filtration test asks the court to distinguish an expression of an idea from the underlying idea itself, thereby "filtering" out the unprotectable ideas in order to determine whether the protectable expressions of the two works are "substantially similar."<sup>40</sup> According to this test, only after the court has "dissected" a copyrighted work into ideas (unprotected elements) and expressions (protected elements) can it make an accurate comparison of the elements that actually warrant copyright protection.<sup>41</sup> Moreover, after such a "dissection," the court can be assured that it is appropriately inquiring into the question of "substantial similarity."<sup>42</sup>

### 3. *The Pattern Test*

The pattern test, first enumerated by Professor Zechariah Chafee, requires the court to create a list of expressive elements that generate a particular pattern in both the plaintiff's and the alleged infringer's works.<sup>43</sup> The court then must analyze the degree of similarity of these patterns of expressive elements in order to make a determination on the infringement claim.<sup>44</sup> As Chafee explains, "the protection covers the 'pattern' of the work. . . the sequence of events, and the development of the interplay of characters."<sup>45</sup>

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<sup>39</sup> *Id.* This test allows the trier of fact to determine the point on the scale where idea becomes expression, and thus, attempts to distinguish the appropriate point of analysis for the infringement claim. *Id.* Finding the point on the scale where idea becomes expression is paramount to an appropriate infringement analysis due to the fact that the alleged infringer is liable only if he has taken "substantial" parts of the expressive elements of the plaintiff's work. See Stalnaker, *supra* note 2, at 175. Nimmer explains the relevance of the abstractions test as follows: "The abstractions test is helpful in that it vividly describes the nature of the quest for 'the expression of an idea.' It does not, of course, tell us where in any given work the level of abstraction is such as to cross the line from expression to idea." NIMMER, *supra* note 21, at § 13.03(A) (internal footnote omitted).

<sup>40</sup> See Mohler, *supra* note 34, at 987.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See Sharp, *supra* note 4, at 185.

<sup>44</sup> *Id.* Application of the pattern test is perhaps best demonstrated by comparing the musical play and motion picture *West Side Story* to Shakespeare's *Romeo and Juliet*, where it can be argued that *West Side Story's* essential sequence of events and interplay of characters follows a substantially similar pattern to that of *Romeo and Juliet*. See NIMMER, *supra* note 21, at §13.03(A)(1)(b). Specifically, both works contained thirteen of the same elements, a pattern that would likely warrant a finding of substantial similarity. *Id.* Nimmer goes on to note, "[t]he pattern test, if correctly applied, offers a guide to decision that avoids the abandonment of reasoned analysis implicit in the conclusion that nothing more can be said than that each case turns on its own facts." *Id.*

<sup>45</sup> Mohler, *supra* note 34, at 983.

#### 4. *The Total Concept and Feel Test*

Finally, the total concept and feel test, unlike the aforementioned tests, does not require the courts to distinguish expressive elements from unprotected ideas in determining “substantial similarity.”<sup>46</sup> Rather, the court compares the overall “feeling” of the plaintiff’s work and the alleged infringer’s work (including both expressive elements and unprotectable ideas) to determine how substantially they resemble one another.<sup>47</sup> As such, this final test utilizes a subjective approach to determining “substantial similarity.”<sup>48</sup>

As the previous discussion highlights, there is no bright line rule with respect to the “substantial similarity” standard. Therefore, the test that is applied in each claim for copyright infringement of a reality program format will ultimately impact the outcome of the suit.

#### *D. Application of Copyright Principles to Reality Television Formats*

Creators of literary content, including television producers, depend on the courts to resolve disputes that concern the protection of their works of authorship. Whereas in the past infringement claims by television producers revolved around the protection of scripts, today’s claims for infringement relate to a much less concrete subject matter.<sup>49</sup>

Recognizing that their creative output loses value when competing against similar content, reality television producers attempt to obtain the broadest protection available and analogize the format of their literary works to the scripts of TV-past.<sup>50</sup> As such, the test for copyright infringement and the basic principles

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<sup>46</sup> NIMMER, *supra* note 21, at § 13.03(A)(1)(c). Nimmer shows a great deal of concern with the “total concept and feel test,” likely in part due to the subjective nature of its application.

[T]he touchstone of the “total concept and feel” threatens to subvert the very essence of copyright, namely the protection of original expression. “Concepts” are statutorily ineligible for copyright protection; for courts to advert to a work’s “total concept” as the essence of its protectible [sic] character seems ill-advised in the extreme. Further, the addition of “feel” to the judicial inquiry, being a wholly amorphous referent, merely invites an abdication of analysis. In addition, “total concept and feel” should not be viewed as a sine qua non for infringement-similarity that is otherwise actionable cannot be rendered defensible simply because of a different “concept and feel.” In sum, therefore, the frequent invocations of this standard do little to bring order to the inquiry into what constitutes substantial similarity, and would be better abandoned.

*Id.*

<sup>47</sup> *Id.* This test is unusual because it asks the court to look at the works as a whole, both protectable and unprotectable parts, before making a determination on substantial similarity. Mohler, *supra* note 34, at 984. Moreover, this test compares the alleged infringer’s work to the plaintiff’s work by analyzing broad categories such as mood. *Id.*

<sup>48</sup> See Sharp, *supra* note 4, at 186 (suggesting that the total concept and feel test allows judges to consider their gut reactions as to whether infringement has occurred).

<sup>49</sup> Before the reality television craze, scripted programming dominated television for more than fifty years. Sitcoms, unlike reality programs, rely on scripts to draw in audiences. Fiore, *supra* note 5, at 36.

<sup>50</sup> *Id.* “Consequently, 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.” *Id.*

underlying copyright law have become intimately linked to reality formats.<sup>51</sup>

The format of a reality television program refers to the combination of characters, theme, plot, sequence, pace and setting that serve as a blueprint for the basic premise of a show.<sup>52</sup> For example, in the case of *Survivor*, the format would refer to the combination of stranding a group of participants in a deserted location without basic necessities, dividing the participants into teams, requiring the participants to engage in challenges in order to win competitive advantages and rewards, and having those participants engage in weekly elimination ceremonies. When programs such as *Bootcamp* and *I'm A Celebrity, Get Me Out of Here* emerge with very similar components, the creators of *Survivor* follow the lead of television producers in the past and expect the courts to afford proper protection.

Applying standard copyright analysis to reality television formats, however, suggests that protection is improper. Starting with the most basic premise of copyright law, that only original works of authorship reap the benefits of copyright protection,<sup>53</sup> the following legal principles support the notion that a claim for copyright infringement of a reality format is unfounded.

### 1. *Scènes À Faire*

*Scènes à faire* refers to the scenes, situations, incidents, characters or events that flow naturally from a fact, subject or context.<sup>54</sup> *Scènes à faire* is a term used to identify generic material, or stock elements, that are not the proper subject of a claim for copyright infringement.<sup>55</sup> Since such elements are said to “flow naturally” from a particular work, their appearance in a work of authorship does not require any originality and, therefore, they do not meet the most basic requirement of copyright law.<sup>56</sup>

For example, in *Survivor*, conflict that arises among the participants of rival tribal teams would be considered *scènes à faire*. Similarly, any show about racing around the world will make use of stock elements including planes, maps, tourist attractions, and landmarks. Courts distinguish *scènes à faire* from protectable expression because these generic elements cannot serve as the basis for a finding of copyright infringement.<sup>57</sup> More specifically, “similarity between plaintiff’s and

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<sup>51</sup> *Id.*; see also Mindy Farabee, *Can Reality Be Copyrighted?*, DAILY J., June 24, 2009, [www.linerlaw.com/data/1250106471.pdf](http://www.linerlaw.com/data/1250106471.pdf) (suggesting that there has been an evolution in the history of applying standard copyright principles, including substantial similarity analysis, to reality television).

<sup>52</sup> See *supra* note 6 and accompanying text.

<sup>53</sup> 17 U.S.C. § 102(a) (2000).

<sup>54</sup> *Schwarz v. Universal Pictures Co.*, 85 F. Supp. 270, 275 (S.D. Cal. 1945). This case first used the term *scènes à faire* to refer to the scenes in a motion picture that must be done. For example, the *scènes à faire* of an Old West film include gunfights, saloon brawls, and a protagonist galloping into the sunset. See also *NIMMER*, *supra* note 21, at § 13.03(B)(4).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* This doctrine is invoked to “immunize from liability similarity of incidents or plot that necessarily follows from a common theme or setting.” *Id.* The public domain would have a limited selection of stock elements if, for example, material such as the “Las Vegas Strip” or even a church picnic scene were afforded with copyright protection. *Scott-Blanton v. Universal City Studios Prods. LLLP*, 539 F. Supp. 2d 191, 201 (D.D.C. 2008).

<sup>57</sup> *NIMMER*, *supra* note 21, at § 13.03(B)(4).

defendant's works that are limited to [stock] elements cannot furnish the basis for finding substantial similarity."<sup>58</sup>

Looking at reality television, one can assert that each of the components of a reality format is scènes à faire, an element that flows naturally from the context of the program. Thus, a plaintiff who claims infringement of his reality format based on substantial similarity of such stock elements will likely find little merit in his claim.

### 2. Merger

The merger doctrine suggests that when there are only a limited number of ways of expressing a particular idea, the expression and the corresponding idea merge into a single entity.<sup>59</sup> Essentially, that particular idea is no longer protectable, regardless of the way it is expressed, because the idea and expression are inseparable.<sup>60</sup> Moreover, an alleged infringer who makes use of an expression that has merged with an idea is not liable for infringement, for the merged expression is no longer the proper subject of copyright protection.<sup>61</sup>

For example, though the creators of *Survivor* may claim copyright in the use of a weekly tribal elimination ceremony, the articulation of this event has only a limited number of ways of being expressed. Another show may make use of the "elimination ceremony" without infringing *Survivor's* copyright because the expression of the tribal elimination ceremony and the idea of eliminating contestants merged. With respect to reality programs, it can be argued that each of the elements of a reality format has "merged" with an underlying idea and, therefore, that a claim for infringement will likely never succeed.

### 3. Compilation

A compilation refers to a collection of ideas or facts arranged in a particular way.<sup>62</sup> Although it is clear that mere ideas or facts are not copyrightable, courts have suggested that a compilation *could* warrant copyright protection if there is a definite degree of originality involved in combining the ideas or facts that make up the work.<sup>63</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at § 13.03(B)(3); *see also* Stalnaker, *supra* note 2, at 168.

<sup>60</sup> *Id.*

<sup>61</sup> NIMMER, *supra* note 21, at § 13.03(B)(3); *see also* Fox, *supra* note 26, at 229. The merger doctrine is used as a defense to a claim of infringement. *Id.* Moreover, the merger doctrine serves to facilitate the underlying principle of copyright law. If a person were allowed to assert rights to an expression that merged with an idea, that person would also be allowed to assert rights to the underlying idea. Since copyright law does not protect mere ideas, this would run afoul of Congress' intent in passing the Copyright Act.

<sup>62</sup> 17 U.S.C. § 101 (2000). "A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." *Id.*

<sup>63</sup> *Feist Publ'ns*, 499 U.S. at 351-52 (acknowledging the constitutionally mandated originality requirement for copyright protection generally and suggesting that this requirement extends to compilations).

The Court first addressed this issue in *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*<sup>64</sup> In *Feist*, Rural Telephone Company (“Rural”) alleged that Feist Publications (“Feist”) infringed Rural’s copyright in its telephone directory book when Feist created a directory using the same names and telephone numbers from Rural’s book.<sup>65</sup> The Court recognized the potential for copyright protection of a compilation, but qualified such protection with specific requirements.<sup>66</sup>

Accordingly, the following three requirements must be met in order for a work to qualify as a copyrightable compilation: (1) a collection and assembly of preexisting material, facts or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by virtue of the particular selection, or arrangement, of an original work of authorship.<sup>67</sup>

The Court limited the right to copyright protection of a compilation to a “particular selection or arrangement” of elements, thereby reinforcing the importance of the originality requirement addressed by Congress in the Copyright Act.<sup>68</sup> Furthermore, the Court suggested that the underlying components of the compilation remained free to be used by competitors, so long as a different “selection or arrangement” was made.<sup>69</sup> Ultimately, the Court found that Feist had not infringed upon Rural’s copyright due to the fact that Rural’s compilation of names and telephone numbers was not sufficiently original to warrant protection.<sup>70</sup>

In the context of reality television formats, the compilation theory is particularly important. One may argue that the components of a format equate to a compilation and, therefore, that there is a legitimate claim to copyright protection in a format. For example, the creator of *Survivor* casts a group of participants in the Australian outback, crafts weekly challenges, and sets up an elimination ceremony. He may claim that a compilation is created and that copyright protection is appropriate.

Under *Feist*, however, these individual characteristics of setting, characters, plot and theme become a compilation only once they are arranged in a particular way.<sup>71</sup> The format itself (i.e. the setting, character, plot and theme), without an expression of those elements, is simply a collection of unprotectable ideas.<sup>72</sup> Therefore, the Australian setting itself, along with a sequence of weekly challenges and the concept of an elimination ceremony remain in the public domain. Moreover, when another producer comes along and casts a different group of participants in an alternate outback setting, crafts new weekly challenges, and sets up an alternate version of an elimination ceremony, his compilation of the

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<sup>64</sup> *Id.* at 340.

<sup>65</sup> *Id.* at 342-44.

<sup>66</sup> *Id.* at 357.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 358.

<sup>69</sup> *Feist Publ’ns*, 499 U.S. at 348.

<sup>70</sup> *Id.* at 362-63.

<sup>71</sup> *See id.* at 358.

<sup>72</sup> *See* Frank L. Fine, *A Case For The Federal Protection Of Television Formats: Testing The Limit Of Expression*, 17 PAC. L.J. 49, 70 (1985).

underlying format elements are sufficiently original to warrant its own copyright protection.

Though the creator of *Survivor* may claim infringement of his format compilation, the successive producer has expressed this compilation in a new, original way. To provide copyright protection to a basic reality format, therefore, would allow the creator of such content to monopolize ideas that are general to the reality genre. In turn, this would frustrate the underlying principle of copyright law by limiting the ability of future creators to take format elements and create new programs (i.e. their own protectable expressions).<sup>73</sup>

As these principles suggest, reality format disputes face many challenges in the form of copyright principles. A plaintiff has a variety of hurdles to overcome before the traditional infringement analysis is applied and the court addresses whether two works are substantially similar such that an improper appropriation has occurred.

### III. LEGAL PRECEDENT – THE FAILURE OF THE COPYRIGHT INFRINGEMENT CLAIM IN THE REALITY TELEVISION CONTEXT

Since the courts have yet to confirm the applicability of copyright protection to reality formats, a look at the legal proceedings involving reality format disputes will help to shed additional light on the topic. Specifically, format jurisprudence to date suggests that a reality program's format is not the proper subject of copyright protection. Though there have been a number of lawsuits filed on infringement grounds, the courts have been generally unwilling to apply copyright principles to reality format disputes, resulting in a scarce amount of judicial analysis on the topic.<sup>74</sup> Additionally, claims are often dismissed or settle out of court before a judgment is rendered.<sup>75</sup> Finally, of those cases that have been decided on the merits and reported, no network has been able to successfully prosecute a copyright infringement claim.<sup>76</sup>

#### A. *Fox v. CBS*

The first relevant claim dates back to 2000 when Fox Family, producer of *Race around the World*, filed a copyright infringement suit against CBS, seeking to enjoin CBS's production of *The Amazing Race*.<sup>77</sup> Fox Family claimed that CBS

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<sup>73</sup> See U.S. CONST. art. I, § 8, cl. 8; see also Fine, *supra* note 72, at 70.

<sup>74</sup> See Farabee, *supra* note 51 (noting that it was not until 2003 that the courts formally applied copyright principles to the reality television context).

<sup>75</sup> White, *supra* note 7; see generally Fiore, *supra* note 5, at 36 (referencing the settlement of a reality format dispute between Fox and CBS before the court considered the merits of the case).

<sup>76</sup> White, *supra* note 7, at 2. "In the disputes between them thus far, no one network clearly has been able to use a lawsuit to protect its own reality program from alleged cherry picking by the other network – no matter what legal theory is advanced." *Id.*; see also Smart, *supra* note 11, at 193 ("[N]etworks have realized that their chances of succeeding in the courts is virtually non-existent due to the manner in which courts examine for substantial similarity.').

<sup>77</sup> Fox Family Prop. Inc. v. CBS Inc., No. 00-CV-11482 (C.D. Cal. Oct. 27, 2000). See also Brett Sporich, *Fox Can't Stop CBS 'Race,'* HOLLYWOOD REP., Nov. 27, 2000, available at <http://www.allbusiness.com/services/motionpictures/4828053-1.html>.

misappropriated Fox Family's format because both shows featured teams of individuals sent around the world to compete in various time-sensitive tasks.<sup>78</sup> The injunction was denied without a discussion of the copyright claim and the case was voluntarily dismissed.<sup>79</sup>

### B. CBS v. Fox

Shortly thereafter, CBS, creator of *Survivor*, brought suit against Fox for copyright infringement, claiming that Fox's show *Boot Camp* unlawfully copied CBS's program.<sup>80</sup> *Survivor* was described as

[A] "reality" series that places non-actor contestants in harsh and unfamiliar settings and requires the contestants to work together in teams to accomplish various tasks. At the end of each episode, each contestant must vote to eliminate one team member from the competition in a "highly ritualized elimination ceremony." The ultimate goal of each contestant is to win the cash prize of \$1 million dollars. Interspersed between the group challenges are private interviews in which individual contestants discuss their strategies for playing the game and their social relationships with the other contestants.<sup>81</sup>

CBS asserted a number of "substantial similarities" among the programs, namely that *Bootcamp*, like *Survivor*, placed teams of contestants in a harsh, unfamiliar location, required contestants to compete in challenges, and held ritualized elimination ceremonies.<sup>82</sup>

Appealing to the "total and concept and feel" test under the substantial similarity standard, CBS also suggested that *Bootcamp* used comparable music and photography techniques.<sup>83</sup> Although CBS claimed rights to the underlying format of *Survivor*, this case was also dismissed and settled pursuant to a confidential settlement agreement before the courts could weigh in.<sup>84</sup>

### C. CBS v. ABC

Just a few years later, in 2003, CBS again was at the center of a legal debate when it sought a preliminary injunction against ABC and its series *I'm A Celebrity, Get Me Out Of Here* ("*Celebrity*").<sup>85</sup> CBS claimed that ABC's show infringed its copyright in the *Survivor* format.<sup>86</sup> Referencing substantial similarities to *Survivor*, CBS asserted *Celebrity* stranded a group of participants in a remote location, subjected participants to challenges, offered rewards to the winner of

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<sup>78</sup> Fiore, *supra* note 5, at 36.

<sup>79</sup> *Id.*

<sup>80</sup> *Survivor Prods. LLC v. Fox Broad. Co.*, 2001 U.S. Dist. LEXIS 25512, at \*2-3 (C.D. Cal. June 11, 2001); *see also* White, *supra* note 7.

<sup>81</sup> *Survivor Prods.*, 2001 U.S. Dist. LEXIS 25512, at \*203.

<sup>82</sup> *Id.* at 3.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*; *see* Fiore, *supra* note 5, at 36.

<sup>85</sup> *CBS Broad.*, 2003 U.S. Dist. LEXIS 20258, at \*1, \*4.

<sup>86</sup> *Id.*

such challenges, and eliminated one participant at the conclusion of each episode.<sup>87</sup> Dismissing what they thought were minor differences, including the involvement of at-home viewers to vote off participants on *Celebrity* and a more “humorous” approach to challenges, CBS suggested that ABC copied its unique format.<sup>88</sup>

U.S. District Judge Loretta Preska of the U.S. District Court for the Southern District of New York denied the claim and held that CBS’s “format” was comprised of generic elements that were not the proper subject of copyright protection.<sup>89</sup> Judge Preska went on to explain that the alleged similar components of the two shows, which she referred to as *scènes à faire*, actually derived from other sources, including game shows and other television genres.<sup>90</sup> Acknowledging the concept of a compilation, Judge Preska’s noted that short of proving some degree of originality or creativity in the piecing together of the generic material, CBS could not claim that its compilation (i.e. its format) amounted to protectable expression.<sup>91</sup>

Additionally, Judge Preska explained that *Celebrity* “adds significant elements not found in *Survivor*,” supporting the notion that ABC had expressed the generic elements of the format in an original way.<sup>92</sup> Referencing the underlying goal of copyright law, Judge Preska explained, “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.”<sup>93</sup> Judge Preska concluded her opinion by holding that CBS failed to establish that *Celebrity* was “substantially similar” to *Survivor*.<sup>94</sup>

#### D. The Aftermath of CBS v. ABC

The suit between CBS and ABC had immediate impact. Though the trend of copycat reality programs continued in steady fashion, networks and producers began to avoid infringement claims as a means to attempt to prevent second-comers from prospering off already successful content. Either avoiding legal proceedings altogether or turning to alternate outlets for remedies, networks and producers seemed to accept the notion that reality formats were not the appropriate subject of copyright protection.

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<sup>87</sup> *Id.*

<sup>88</sup> Fiore, *supra* note 5, at 36-37.

<sup>89</sup> *CBS Broad.*, 2003 U.S. Dist. LEXIS 20258, at \*4-5.

<sup>90</sup> *Id.* Judge Preska explained, “the evidence shows that both parties combined standard, unprotectable elements of reality shows, game shows and other television genres, and used them separately to create the programs.” *Id.*

<sup>91</sup> *See id.* at 42. Judge Preska explained, “I am 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.” *Id.*

<sup>92</sup> *Id.* at 21-22.

<sup>93</sup> *Id.* at 24-25.

<sup>94</sup> *Id.* at 42.

### 1. ABC's Passive Approach

For example, in 2004, ABC fairly outbid Fox for rights to *Wife Swap*.<sup>95</sup> Before *Wife Swap* aired, however, Fox released a program called *Trading Spouses: Meet Your New Mommy*.<sup>96</sup> Both shows were strikingly similar, both featuring the swapping of wives to foreign households and the controversies of the wives' adapting to a new set of familial rules.<sup>97</sup> While ABC acknowledged that Fox, having had access to the show, likely recognized the potential for success of the format and created a copycat version in an accelerated manner in order to get its version on the air first, ABC did not institute any proceedings.<sup>98</sup> Such inactivity suggests that the network conceded to prior precedent and accepted that the format of *Wife Swap* was not subject to copyright protection.

### 2. NBC's Alternative Approach

Following ABC's passive response to Fox's alleged copying of its family swapping show, NBC was faced with a similar predicament. NBC outbid Fox for rights to *The Contender*, a reality show about boxing that divided contestants into two teams led by boxing professionals Sylvester Stallone and Sugar Ray Leonard.<sup>99</sup> The show had opposing team members duke it out in weekly competitions, under the guidance of the professionals, and ultimately a winner, "the contender," was awarded a cash prize.<sup>100</sup> As they had done in the past, Fox created an analogous show. Although Fox's version had fewer contestants, only one professional, Oscar De La Hoya, and a boxing contract as the grand prize, the show was otherwise comparable to NBC's *The Contender*.

Analogous elements aside, NBC did not file a copyright infringement suit. Likely recognizing the failed attempts of its contemporaries, NBC instead claimed unlawful, fraudulent and unfair business practices under California's Business and Professions Code.<sup>101</sup> Fox retaliated and claimed that NBC was merely trying to eliminate a competing reality television program about boxing.<sup>102</sup> Ultimately, a

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<sup>95</sup> In each episode of *Wife Swap*, the wives from two families trade families for two weeks. See ABC.com, *Wife Swap*, <http://www.abc.go.com/primetime/wifewap/show.html> (last visited Feb. 21, 2010). In the first week, the wives must follow the lifestyle of their adopted families. See *id.* However, during the second week, the wives take charge of their adopted families and lay out a list of new rules for the families to abide by. See *id.* Viewers tune in to see how the families adapt and to watch the drama that ensues along the way. See *id.*

<sup>96</sup> See Sharp, *supra* note 4, at 190-91.

<sup>97</sup> See *id.* at 191.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 191-92; see also Bill Carter, *In Reality TV, Is It Thievery or Flattery?*, N.Y. TIMES, Aug. 2, 2004, at C1.

<sup>100</sup> See NBC.com, *The Contender*, [http://nbc.com/nbc/The\\_Contender/about/](http://nbc.com/nbc/The_Contender/about/) (last visited Feb. 21, 2010).

<sup>101</sup> See *Contender Partners LLC v. Fox Broad. Co.*, No. SC 082599 (Cal. Super. Ct. 2004) (dismissed on December 27, 2004). The plaintiff in this case claimed to be bringing this action as a "representative of the general public of the state of California." See White, *supra* note 7. The defendants in this case alleged that the plaintiffs did not really care about remedying a violation of the California Business and Profession Code. *Id.*

<sup>102</sup> See White, *supra* note 7.

California judge ruled in favor of Fox, observing that NBC's choice of claims appeared to be more about money and regulating the market in terms of potential competition.<sup>103</sup> Calling NBC's bluff, the judge's holding reaffirmed judicial support for the underlying goal of copyright to foster the production of creative output.

### 3. *The Future of Format Disputes*

These holdings suggest several significant legal ramifications for the future of reality format disputes. First, producers and networks are becoming more accepting of the fact that copyright law is not applicable to reality television formats. More specifically, the Copyright Act will not provide producers and networks with a means for preventing copycat reality programs from hitting the airwaves. Secondly, courts are becoming increasingly wary of plaintiffs who seek out alternate outlets to monopolize on the success of their formats.

## IV. NO MORE COPYRIGHT PROTECTION FOR REALITY FORMATS – THE PUBLIC POLICY DEBATE

According to Joseph Campbell and his influential book *The Hero with a Thousand Faces*,<sup>104</sup> all storytelling, by all people, across all cultures, whether it is conscious or not, follows the basic structure of the hero myth.<sup>105</sup> Essentially, authors are constantly retelling the same story in infinite variation.<sup>106</sup> Each story begins with the same elementary idea – a hero on a particular journey – and the author is then responsible for detailing that story to suit his own purpose, thereby creating one of the “thousand faces” of the hero.<sup>107</sup> The success of the infinite variations that result reflect the fact that the basic hero myth is a model of the workings of the human mind, the collective unconscious as Campbell explained, conveying universal truths that are felt and understood by everyone.<sup>108</sup>

Campbell's analysis of the basic hero myth is applicable even in the reality television context. Today's reality television producer is analogous to the author

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<sup>103</sup> *Id.* The judge expressed her disdain for the plaintiff's claim and suggested that NBC was concerned with “being aced out of a concept being broadcasted” rather than with unfair business practices. *Id.*

<sup>104</sup> See generally JOSEPH CAMPBELL, *THE HERO WITH A THOUSAND FACES* (3d ed. 2008). Campbell's theory on universal myths was influenced by James Frazer, Sigmund Freud, and Carl Jung, among others. Jung's analysis of human psychology and dream interpretation particularly influenced Campbell's work.

<sup>105</sup> *Id.* Campbell suggests that myths from around the world share a fundamental structure whereby: “A hero ventures forth from the world of common day into a region of supernatural wonder: fabulous forces are there encountered and a decisive victory is won: the hero comes back from this mysterious adventure with the power to bestow boons on his fellow man.” *Id.*

<sup>106</sup> Ruth Anne Robbins, *Harry Potter, Ruby Slippers And Merlin: Telling The Client's Story Using The Characters And Paradigm Of The Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767, 774 (2006).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* The significance of Campbell's work lives on in modern day culture. George Lucas, for example, suggested that Campbell's book directly influenced *Star Wars*. Of even more recent note, Campbell's work is said to have impacted *Indiana Jones*, *The Matrix*, and the *Harry Potter* series.

of Campbell's day. Moreover, it can be argued that a reality television "format" is akin to the basic hero myth model, serving as the elementary idea that drives reality content. A reality producer begins with the basic components of a "format" (including such elements as premise, theme, setting, plot, and characters) and then creates a detailed story by developing that format to meet a particular purpose. The result is an endless amount of variation of weight-loss challenges, boxing competitions, and outdoor survival shows.

However, Campbell's theory of "infinite variation" may be more controversial than it first appears. When reality television first surged onto the airwaves in 2000 with *Survivor*, it was unknown at that time the abundance of reality content that would soon emerge.<sup>109</sup> Reality television producers quickly realized the potential for success in this low cost, high return market.<sup>110</sup> The amount of content expanded, evidenced by the fact that networks devoted an increasing number of hours to reality programming and to development of new concepts.<sup>111</sup> At the same time, however, the substance of these programs became increasingly thin. Programs began to look more and more similar and reality producers struggled to find a way to stay afloat in this burgeoning market.<sup>112</sup>

Ultimately, producers of reality content have turned to the legal system to assert their rights and to protect their properties. What has emerged is a flood of litigation in the form of copyright infringement suits,<sup>113</sup> whereby reality producers try to protect their formats as expressive "works of authorship" under the law of copyright in order to eliminate the potential success of competitors who offer strikingly similar content. Since affording protection to reality formats will essentially allow reality producers to remove the most basic elements of the reality genre from the public domain, resolution of these format rights disputes has the potential to drastically change the look of the television industry specifically, as well as to shape the general progression of the arts and sciences.<sup>114</sup> Given the widespread ramifications of such a result, it becomes clear that Congress likely did not intend for reality formats to be defined as protectable expression under the law

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<sup>109</sup> White, *supra* note 7. Though the most significant claims that have emerged since the new wave of reality television exploded on to the airwaves with *Survivor* come in the form of intellectual property rights, a variety of other claims have been asserted, including injury suits and lawsuits alleging that a program was rigged or people were cheated out of prizes. *Id.*

<sup>110</sup> Stalnaker, *supra* note 2, at 163-64. "The success of shows such as *Survivor* have allowed networks to realize a large monetary gain. The relatively low cost of production, coupled with the ability to charge high rates for advertising on successful shows, explains why these programs are popular with networks." *Id.*

<sup>111</sup> *Id.* at 163. Seven and a half hours of reality programming were on the schedule in 2003 and an additional ten hours of content were committed to and developed to air outside of the regular season. *Id.*

<sup>112</sup> *Id.* at 164. Some argue that it is the combination of the low cost/high return ratio of reality programs coupled with the rapid increase in scheduling commitments by networks that led to imitation of content amongst the networks. *Id.*

<sup>113</sup> See *supra* notes 77-103 and accompanying text. For example, ABC's *I'm A Celebrity, Get Me Out Of Here* spurred such a suit by CBS. Similarly, NBC turned to the legal sector to assert its rights over a boxing concept when Fox began to air *The Next Great Champ*.

<sup>114</sup> Remember that the primary objective of copyright is to "[t]o promote the Progress of Science and useful Arts." U.S. CONST. art. I, § 8, cl. 8. Removing reality formats from the public domain would hinder this purpose. See generally NIMMER, *supra* note 21, at § 13.03(3)(B)(2)(a).

of copyright.

Format disputes in the reality television context are a phenomenon of the past decade. Thus far, courts have failed to provide specific guidelines in terms of how much reality shows can legally borrow from one another. Without such standards, it is likely that litigation of format disputes will continue in the future, as networks attempt to exploit their rights over competitors and limit the production of knockoff programs. Most recently, for example, Tokyo Broadcasting System (“TBS”) brought suit against ABC, claiming that ABC’s *Wipeout* infringed TBS’s rights in various Japanese competition shows.<sup>115</sup> With the case pending in the U.S. District Court in California’s Central District, the uncertainty surrounding reality format protection remains palpable.

### *Three Policy Reasons For Eliminating Protection of Reality Formats*

In order to put a stop to this trend of litigation, courts should remove reality formats from the arena of copyrightable expression. Three policy reasons support this proposal. First, the legal system is currently overburdened with legal precedent, and expanding protection to reality formats is only going to have a chilling effect on the creation of new content. Secondly, by eliminating the fear of impending lawsuits, producers and networks will be able to more freely welcome pitches and submissions from various outlets, thereby fostering a congenial relationship among content creators and those responsible for deciding which content is ultimately developed. Finally, a creator of a reality program already receives adequate copyright protection in terms of the specific expression he produces (i.e. the specific reality program involved in the format dispute).

#### *1. Promote the Innovation of New Content*

Congress’ goal in enacting the Copyright Act of 1976 was to strike a balance between protecting artists’ creative labor while simultaneously stimulating the development of additional creative output for the general public.<sup>116</sup> The grant of a limited monopoly to the individual is justified by the notion that after the copyright expires, that individual’s creative output is in the public domain for other artists to expand upon, thereby motivating the creation of new, original works.<sup>117</sup> Providing copyright protection to overly broad subject matter, such as reality television formats, is at odds with this most basic premise of copyright law.

Since the codification of the Copyright Act of 1909, Congress has made several revisions to the original language in order to more accurately convey the scope of copyright protection.<sup>118</sup> Specifically, pursuant to a 1990 amendment to the 1976 Copyright Act, eight categories of works of authorship qualify as

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<sup>115</sup> Farabee, *supra* note 51.

<sup>116</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>117</sup> NIMMER, *supra* note 21, at § 1.03(A) (suggesting that a copyright monopoly is a necessary condition to the realization of creative endeavors).

<sup>118</sup> 17 U.S.C. § 102(a) (2000).

protectable expression.<sup>119</sup> Although it is clear that this list is meant to be “illustrative” rather than “limitative,”<sup>120</sup> the creation of such specific categories is suggestive of a narrowing, rather than a broadening, of the notion of copyright protection.<sup>121</sup>

The legal precedent that has emerged over the past decade, particularly with respect to reality television, is consistent with this notion. Applying this rationale to reality television formats, if protection is expanded such that producers can secure a monopoly over their creative labor, progress and development that has shaped the television industry will be stifled. Namely, by removing reality “formats” from the public domain, and thereby eliminating specific elements that comprise a “format” from the material that individuals are free to draw upon, new content will be very limited.

The reality genre is a product of game shows, soap operas, talk shows, documentaries and variety shows.<sup>122</sup> Different elements from each of these genres of television have been adapted and reworked to fit the reality framework.<sup>123</sup> It can be argued that reality television borrows aspects from these earlier genres in order to create a new niche market of programming. For example, the dramatic, complicated relationships of soap operas are one of the touchstone characteristics of reality shows.<sup>124</sup> Similarly, the use of the one-on-one interview, where participants of reality programs divulge their concerns and anger towards one another, are reminiscent of documentaries.

Just as Congress intended, by affording copyright protection only to the individual expressive creations of each of these genres,<sup>125</sup> the public maintains access to the underlying material, and are motivated to develop additional creative output.<sup>126</sup> If Congress had strayed from its goals of promoting the arts and science by granting broad copyright protection to the game show genre or documentary

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<sup>119</sup> *Id.* The eight categories of protectable works of authorship per the most recent 1990 amendment to the 1976 Copyright Act include the following: “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.” *Id.*; see also NIMMER, *supra* note 21, at § 2.20(A).

<sup>120</sup> The House Report that accompanied the 1990 amendment to the 1976 Copyright Act explicitly stated that the eight categories were “illustrative” rather than “limitative” to the scope of original works of authorship that warrant copyright protection. NIMMER, *supra* note 21, at § 2.03(A) (quoting H.R. REP. NO. 94-1476 1, at 53 (1976)).

<sup>121</sup> *Id.*

<sup>122</sup> Smart, *supra* note 11, at 15.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Copyright protection is provided to *The Johnny Carson Show* (not to the talk show genre). Similarly, the producers of *Law & Order* are afforded with copyright protection in terms of their specific show, however the elements of a crime scene drama remain in the public domain for others to build upon, such as was done by the producers of *NYPD Blue*. *Id.* at 19. “If the creative process that has resulted in this transformation were to constitute copyright infringement, television production would long ago have stagnated into a few generic monopolies and audience choice would have been severely limited.” *Id.*

<sup>126</sup> See *id.* “The reason that television continues to thrive is that there are endless reworkings of many basic generic elements applied in novel ways, in different proportions, in different combinations and with different styles and production values.” *Id.* at 19.

genre, perhaps reality television would never have come into existence.

Such reasoning supports the notion that if Congress is to extend protection to reality formats, producers will be able to prevent the dissemination of reality elements, thereby eliminating the opportunity for future creative development. Offering protection to reality formats will allow reality producers to monopolize content that Congress did not intend for them to control.

Consistent with the Writers Guild of America's understanding of "format," offering copyright protection to reality producers will be akin to giving these people a property right over a particular setting, theme, or a general story line, a result that will have serious repercussions for the future development of new content.<sup>127</sup> Rather, just as has been done in the past, reality formats and, as a result, the elements that comprise reality formats, must remain in the public domain so that the arts and science continue to be promoted through the development of new content.

## 2. *Eliminate Fear of the Impending Lawsuit*

Imagine the following scenario. You are a big time network executive responsible for choosing your network's next big hit reality program. You sit down for a day of pitches. A man walks in with a very generic idea revolving around a weight loss competition show. He provides no details in terms of the participants, the location, the challenges or the reward. Later that afternoon, a woman walks in and pitches a concept for a weight loss show. She explains that the show will feature mother-daughter teams of various ethnic backgrounds, the location will be an isolated ranch, the competition will pit the teams against one another in various endurance challenges, and the reward will be one million dollars for the team that loses the most weight.

Though you may feel confident that the woman has pitched a unique concept, your stomach tightens. You fear that a network with a successful weight loss show will come forward with a claim to copyright in the underlying format. Moreover, you dread the time and financial ramifications of a potential lawsuit or settlement. Given the current inconsistency with which courts assess copyright infringement suits, networks and producers must remain very guarded in welcoming the submission of an idea for a "new" reality format.<sup>128</sup>

In light of the success of the reality genre, it is not surprising that producers and networks are overwhelmed with an endless flow of pitches for new reality programs.<sup>129</sup> Some compare the reality television business to the national lottery because of the fact that there is a large amount of money available and everyone wants to take a pull of the lever by pitching an idea for a show in hopes of hitting the jackpot.<sup>130</sup>

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<sup>127</sup> See Writers Guild of America, *supra* note 6 and accompanying text.

<sup>128</sup> Steve Brennan, *Reality Trend: Lawsuits; Rush of Pitches Raises Copyright Concerns*, HOLLYWOOD REP., Mar. 4, 2003.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* The success of reality television programs can also be attributed to the fact that there is a relatively low cost of production coupled with a high rate for advertising on successful shows, features that make this genre extremely appealing with networks. See Stalnaker, *supra* note 2, at 163-64.

Given all the recent format-disputes that have worked their way through the legal system, however, it should come as no surprise that producers and networks have responded by “building stronger fire walls to protect them against unsolicited pitches.”<sup>131</sup> Whereas in the past any person with a good idea and a passion to make it in the industry had a shot at impressing a reality show producer, today it is unlikely that an outsider will be given the opportunity to make an impression.

Fear of impending lawsuits has led some producers and networks to take a “judicious” approach to accepting reality show pitches.<sup>132</sup> Some reality producers have gone so far as to restrict pitches from “all but agents.”<sup>133</sup> Correspondingly, many well known producers and networks have reworked the traditional pitch scenario such that all new content is developed “in-house” in a “legally sterile environment” where there is no threat of getting slapped with a lawsuit.<sup>134</sup>

If one takes into account the fact that the success of the reality genre is likely due to the creative offerings of everyday people, the litigious nature of reality programs is going to have a debilitating effect on the breadth of content that shows up on television sets. Specifically, if current practice continues and reality producers refuse to take unsolicited pitches and rely solely on in-house development, originality in terms of reality television content will suffer. Likewise, when doors are closed in terms of creative outlets, the amount of innovation that is offered into the public domain will also decline. Ultimately, this trend will have a negative impact on the promotion of the arts and science, the underlying goal of copyright law.<sup>135</sup>

In order to facilitate rather than hinder the promotion of the arts and sciences as elucidated by the Copyright Act, it is essential to eliminate the fear of the impending lawsuit. Since reality formats are the essence of these disputes, courts should specify that reality formats are not the proper subject of copyrights. By creating a clear guideline with respect to reality formats, producers will be able to accept pitches from a variety of outlets, more individuals will have an opportunity to have their creative ideas recognized, and society will ultimately profit from a wealth of potential new content.

### 3. *Afford Copyright Protection Only Where It Is Due*

According to the Copyright Act of 1976, copyright protection subsists in “original works of authorship.”<sup>136</sup> The generality of this statement has led to a great deal of debate in terms of defining the appropriate scope of the works that

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<sup>131</sup> Brennan, *supra* note 128. Since there are no requirements in pitching an idea for a reality program, and given the trend of lookalike content that is currently available, people feel as though any slight take on an already successful show has a legitimate shot of becoming the next big hit. As Brennan jokes, even barbers, dentists, and candlestick makers are pitching new show ideas. *Id.*

<sup>132</sup> *Id.* For emphasis, remember that CBS sued both Fox and ABC over its concept for *Survivor*. Additionally, ABC sued Fox over its concept for *Wife Swap*. To further reemphasize the litigious nature of reality programs, NBC sued Fox over its boxing concept called *The Contender*.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>136</sup> 17 U.S.C. § 102(a) (2000).

warrant copyright protection.<sup>137</sup> Based on the House Report that accompanied the Copyright Act of 1976, the phrase “works of authorship” is purposefully left undefined in order to promote a flexible definition that neither “freeze[s] the scope of copyrightable subject matter at the present stage of communications technology or . . . allow[s] unlimited expansion into areas completely outside the present congressional intent.”<sup>138</sup>

The House Report suggests that there are two types of work that are intended to be included in the expanding scope of copyrightable subject matter: (1) works that involve scientific discoveries and technological developments that make possible new forms of creative expression that did not exist in the past; and (2) works that have been in existence for an extended period of time, but have only gradually become recognized as creative and worthy of copyright protection.<sup>139</sup> With regards to the second category, works that have been in existence for an extended period of time, copyright protection is not warranted unless “explicitly described either in categories of Section 102(a), or by further statutory amendment.”<sup>140</sup> It is arguable that reality television formats fit into this second category.

A reality format results when a creator combines elements of various already existing genres of television, including game shows, talk shows, documentaries, soap operas, and scripted dramas.<sup>141</sup> Therefore, it can be said that a reality format has essentially been in existence for an extended period of time. Moreover, over the past decade, the television landscape has changed drastically.<sup>142</sup> Whereas scripted shows dominated in the past, reality programming is now at the forefront of television.<sup>143</sup> Finally, recognizing the success of the reality genre and hoping to eliminate the competition of similar programs, producers and networks of reality shows have only recently started to assert their rights to protection of their reality formats through copyright infringement suits.

Based on these factors, reality formats are exactly the types of works that Congress intended to limit from coming within the flexible definition of “works of authorship.” Furthermore, since Section 102(a) does not have a category that specifically identifies “format” as copyrightable subject matter, this serves as further evidence that Congress did not intend to extend protection to reality formats.

Though reality formats are not the proper subject of copyright protection, producers of reality content are not left without recourse. What is warranted under the law of copyright is protection for the specific, concrete expression that characterizes a particular reality show. For example, the producers of *Survivor* maintain rights in the specific sequence and arrangement of their program, just as the producers of *Bootcamp* and *I’m A Celebrity, Get Me Out Of Here* are granted

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<sup>137</sup> NIMMER, *supra* note 21, at § 2.03(A).

<sup>138</sup> H.R. REP. NO. 94-1476, at § 102 (1976).

<sup>139</sup> *Id.*

<sup>140</sup> NIMMER, *supra* note 21, at § 2.03(A).

<sup>141</sup> *See Smart, supra* note 11, at 19.

<sup>142</sup> *See Fiore, supra* note 5, at 36.

<sup>143</sup> *Id.*

copyright protection in each of their specific sequences and arrangements.<sup>144</sup>

Though this framework may seem like it essentially eliminates any rights over one's creative output, it actually comports with the underlying goals of copyright law. For example, if one were to copy the specific expressive elements of a show like *Survivor*, the producers of *Survivor* can protect their specific work, assert a viable claim for copyright infringement, and prevent the infringing work from profiting off the success of its original content. At the same time, by enforcing a narrow standard, reality producers are prevented from effectively appropriating entire subject matters of content for themselves, leaving the public domain replete with material that will stimulate creativity and promote the progress of the arts and sciences.

## V. CONCLUSION

Looking back on reality television jurisprudence of the past decade, a fuzzy picture emerges with respect to the applicability of copyright principles to reality formats. First, the scarce amount of legal precedent surrounding this topic suggests a general unwillingness by courts to extend protection to reality formats.<sup>145</sup> Though courts have not explicitly said that reality formats are improper subjects of copyright protection, a general hesitation to inquire into most claims for infringement supports such a notion.<sup>146</sup> Moreover, in the few cases where courts have applied traditional copyright infringement analysis to claims of reality format misappropriation, a plaintiff has never emerged victorious.<sup>147</sup>

The cases analyzed above also evidence a general lack of consistency in terms of application of the substantial similarity standard. Given that the judiciary's role is to offer sound interpretations and understandings of the law, this inconsistency serves to further distance reality formats from the realm of protectable expression. Moreover, since a variety of these claims end in undisclosed and confidential settlement agreements, where plaintiffs accept a sum of money and allow alleged infringers to continue airing their programs, it seems as though reality producers themselves are unsure whether copyright protection is the appropriate remedy in the reality programming context.<sup>148</sup>

Legal arguments aside, significant policy reasons support elimination of copyright protection of reality formats. Namely, a restricted approach to copyright

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<sup>144</sup> Fox, *supra* note 26, at 255.

<sup>145</sup> Farabee, *supra* note 51 ("Yet despite a flurry of early to mid-2000s litigation . . . little more has been settled, *legally speaking*.") (emphasis added).

<sup>146</sup> Belloni, *supra* note 5 (recognizing the litigious nature of reality television programs by explaining that "every other new case hinges on an unscripted TV show").

<sup>147</sup> CBS Broad. Inc. v. ABC, Inc., 2003 U.S. Dist. LEXIS 20258, at \*1, \*4 (S.D.N.Y. Jan 14, 2003) (holding that CBS failed to demonstrate a likelihood of success on the merits of its copyright infringement claim because the protectable expression of the two series at issue in the case were not substantially similar). See Contender Partners LLC, No. SC 082599 (denying a request for a preliminary injunction based on a claim for unfair business practices under the California Business and Professions Code).

<sup>148</sup> See Contender Partners LLC, No. SC 082599. The parties in this case settled pursuant to a confidential settlement agreement before the court considered the merits of the copyright infringement claim. *Id.*

principles assures that reality formats (and the elements that comprise reality formats) remain in the public domain for use by future producers of reality content. Such an approach is consistent with the underlying policy goal of copyright law, which encourages creative expression.<sup>149</sup> Only in the case of true improper appropriation, where the unique and specific expressive elements of a reality program are taken without permission, should courts need to step in and remedy appropriately.

Joseph Campbell's message about the extensive reach of the basic hero myth continues to ring true today. According to the famous filmmaker George Lucas, Campbell's hero myth served as the blueprint for the development of *Star Wars*. It is reasonable to assert, therefore, that if Campbell had been able to claim copyright protection of his basic hero myth, the genius of *Star Wars* would never have come into existence. Thus, in order to promote the practice of unfettered creativity, reality television formats must remain in the public domain. Reality television formats are not the proper subject matter of copyright and to offer protection where it is not due will have a damaging effect on the continued promotion of the arts and sciences. That is something that society simply cannot afford.

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<sup>149</sup> U.S. CONST. art. I, § 8, cl. 8.