

Reality Check

by Daniel A. Fiore
and Samuel E. Rogoway

A recent court decision indicates that traditional copyright analysis may be used to protect reality TV shows from infringement

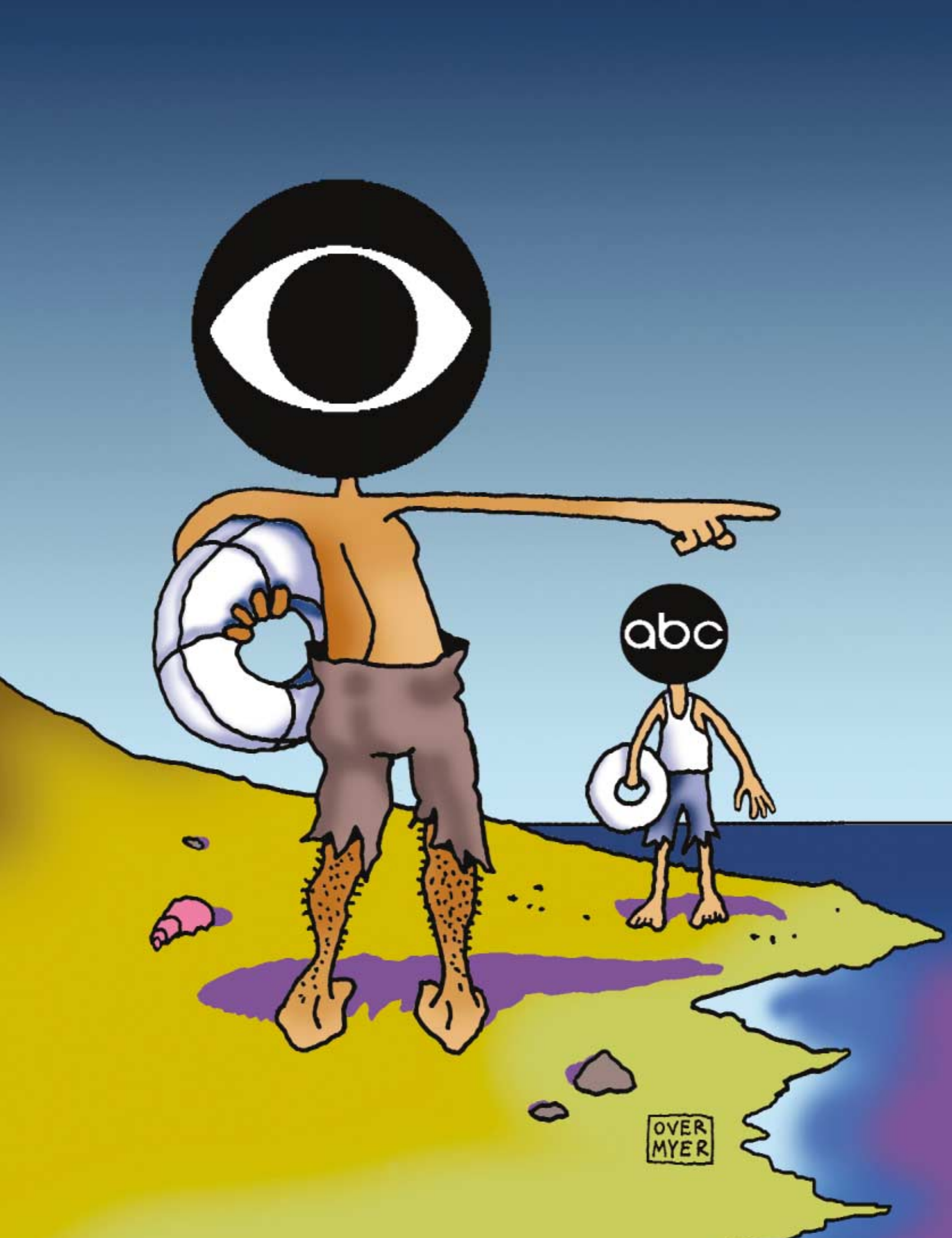
When, almost 200 years ago, Charles Colton called imitation the “sincerest of flattery,”¹ he could hardly have envisioned the recent glut of copycat reality television programming. From *Wife Swap* to *Trading Spouses*, *The Amazing Race* to *Race around the World*, *Survivor* to *Boot Camp*, as the popularity of so-called reality television has risen meteorically over the past several years, more and more producers have opted to “flatter” their competitors by airing nearly identical knockoffs of the latest hit, in lieu of conceiving their own original programs. Although flattery is supposed to get you nowhere, in this instance it has landed the producers of conspicuously similar reality fare in federal court to answer claims of copyright infringement.

In only one case, *CBS Broadcasting Inc. v. ABC, Inc.*,² has a court had occasion to discuss in any detail the applicability of the Copyright Act to reality television. Many commentators misinterpret *CBS v. ABC* as precluding meaningful copyright protection

for reality television programs.³ In fact, that case confirmed that “reality” may constitute protectable expression, the infringement of which is actionable under the Copyright Act.

In *CBS v. ABC*, CBS and the producers of *Survivor* filed suit to enjoin ABC from airing *I’m a Celebrity—Get Me out of Here* on the grounds that *Celebrity* was substantially similar to CBS’s highly successful *Survivor* and thus infringed the plaintiffs’ copyright in that program. Although the New York federal court, in a fact-specific opinion, denied the plaintiffs’ motion for a preliminary injunction, the court did not intimate that reality television, simply because of its unscripted nature, is devoid of protectable expression. Indeed, the significance of *CBS v. ABC* is that the court applied to the plaintiffs’ reality program the same copyright analysis applicable to

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shows in all other genres of scripted or quasi-scripted television programming, including concepts like “plot” and “characters” not intuitively associated with reality television.

A plaintiff attempting to establish copyright infringement of a reality television program must tread familiar ground. The plaintiff must prove ownership of a copyrightable work and copying of the work’s protected elements amounting to improper appropriation.⁴ Because direct evidence of actual copying is frequently unavailable, the plaintiff may demonstrate copying by showing that the defendant had access to the plaintiff’s work and that the defendant’s work bears substantial similarities to protected expression in the plaintiff’s work.⁵ “Not all copying, however, is copyright infringement” since copyright protection extends only to the components of a work that are “original.”⁶ Nor are the facts and ideas within a work protected by copyright.⁷ Because ideas are “as free as the air,” only an original expression of an idea is entitled to copyright protection.⁸

Courts in the Ninth Circuit apply a two-part test in determining whether two dramatic works are substantially similar. For the first test, the court examines the “extrinsic” similarities between “the plot, theme, dialogue, mood, setting, pace, characters, and sequence of events” of the two works.⁹ In applying the extrinsic test, the court must distinguish between the protectable and unprotectable material in a work because a party claiming copyright infringement may place “no reliance upon any similarity in expression resulting from unprotectable elements.”¹⁰ The Ninth Circuit has held that “[t]he 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.”¹¹ That comparison “should not include unoriginal elements of the plaintiff’s work; rather, the comparison should take place after filtering out of the analysis elements of plaintiff’s work that are not protectable.”¹²

“Filtration” involves three steps. The court begins by “analytically dissecting” the work to separate unprotectable facts and ideas from protectable expression. The court then applies “the relevant limiting doctrines in the context of the particular medium involved,” including the scenes a faire and merger doctrines.¹³ Scenes, situations, incidents, characters, or events that flow naturally from an unprotectable theme, setting, or basic plot premise are scenes a faire.¹⁴ The merger doctrine is implicated when there are so few ways of expressing an idea that the expression and the corresponding idea have merged to become one and the same.¹⁵ In the third step, “having dissected the alleged sim-

ilarities and considered the range of possible expression, the court must define the scope of the plaintiff’s copyright.”¹⁶ That scope will fall somewhere along the “‘continuum’ between highly original works entitled to the most ‘broad’ protection offered under copyright, at one end, and works of a primarily factual or functional nature, to which only ‘thin’ protection is afforded, at the other.”¹⁷

For the second test, once the court has concluded that the works are extrinsically similar, the trier of fact must determine whether the two works are also “intrinsicly” similar, in other words, whether “the ordinary, reasonable person would find the total concept and feel of the works” to be substantially similar to support a finding of improper appropriation.¹⁸ Whether any similarity is sufficiently “substantial” is dictated by the scope of protection—broad or thin—that was defined as part of the extrinsic test.¹⁹ The “thinner” the protection, the greater the similarities must be before the works will be deemed “substantially” similar.²⁰

Reality TV Sets In

The application of copyright law to reality television, like the genre itself, is a phenomenon of relatively recent vintage. Before the reality television craze, scripted programming dominated network television for over 50 years. Sitcoms and dramas were the heart and soul of the primetime lineup. From *I Love Lucy* and *Gunsmoke* to *Friends* and *E.R.*, networks historically relied upon scripted shows to draw audiences. 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.

The television landscape has changed dramatically during the past five years. Unscripted programming is now at the forefront of television, with networks competing to create—or, failing that, copy—and air provocative reality-based shows. Not surprisingly, the ratings success of groundbreaking reality programming has engendered the development of patently similar programs by producers attempting to cash in on the popularity of those pioneering reality television shows. In addition, copying in the reality genre may run more rampant than in scripted programming because the relatively low production costs and unscripted formats of reality television facilitate the quick and inexpensive development of knockoff shows. Whatever the motive for this seemingly unchecked cloning, a handful of producers and their networks have turned to the federal courts to call a halt to the practice through copyright infringement lawsuits. Unfortunately for anyone seeking broad guidance

as to the courts’ receptiveness to such claims, all but one of those cases have been resolved, by settlement or otherwise, without a reported court decision.

In 2000, for instance, Fox Family, the producer of *Race around the World*, sued CBS for copyright infringement and sought to enjoin the production of CBS’s *The Amazing Race*.²¹ Both series featured teams traveling to multiple countries in a competition to be the first to return to New York City. The court acknowledged the “serious questions” raised by Fox Family’s copyright claims, but denied Fox Family’s request for a preliminary injunction as unwarranted by the balance of hardships.²² Ultimately, the case was voluntarily dismissed.²³

CBS turned around and sued Fox in 2001, claiming that Fox’s *Boot Camp* infringed CBS’s copyright in *Survivor*. CBS alleged that *Boot Camp* copied the premise and format of *Survivor*, including the concepts of placing nonactor contestants in severe conditions, requiring them to work together as a team to accomplish difficult physical tasks or face possible elimination, ending each show with an elimination ceremony, and offering one contestant per episode a reprieve.²⁴ Fox responded that CBS sought “a monopoly over reality television game shows/contests of elimination.”²⁵ The parties settled before the court considered the merits of the case.²⁶

In a third such case, a court finally had occasion to consider the merits of protecting reality television programs under the Copyright Act. In *CBS v. ABC*, CBS attempted to enjoin ABC from broadcasting the reality series *I’m a Celebrity—Get Me out of Here*. CBS claimed that ABC’s series infringed CBS’s copyright in *Survivor*.

In *Celebrity*, eight B-list celebrities are dropped by helicopter into a remote part of Australia, where they are forced to fend for themselves with few amenities. The celebrities are provided basic rations, but better food is available if a celebrity accomplishes a physical challenge involving a humorous or repulsive task. Through call-in voting, the at-home audience determines which celebrities are voted out of the jungle. The celebrities receive prize money for designated charities based upon the number of votes they receive and the length of time they remain in the jungle. The last surviving celebrity is crowned king or queen of the jungle, and his or her charity receives the largest sum of prize money.

CBS sued, alleging that *Celebrity* “imitates the distinctive style and the look and feel” of *Survivor*, including the use of overhead shots of fireside chats and elimination ceremonies, panoramic shots of jungle landscapes, and scenes of participants discussing upcoming votes.²⁷ According to CBS, *Celebrity* infringed

CBS's copyright in *Survivor* by copying *Survivor*'s format of stranding a group of strangers in a remote and uncivilized location, requiring the contestants to provide for themselves, subjecting the contestants to challenges to win immunity or luxuries, and eliminating them one by one in a ritualized ceremony at the end of each episode. CBS argued that *Celebrity* should be enjoined from airing because *Survivor* was the first show to combine the elements of its unique format.²⁸

In an opinion delivered from the bench on January 13, 2003, District Judge Loretta Preska of the Southern District of New York denied CBS's motion to preliminarily enjoin the broadcast of ABC's *Celebrity*.²⁹ The court held that CBS had failed to demonstrate a likelihood of success on the merits of its copyright infringement claim because the protectable expression of the two series was not substantially similar. In assessing the merits of CBS's application for a preliminary injunction, the court emphasized that it was "crucial to consider each program series as a whole."³⁰ After doing so, the court concluded that the two programs shared a nonprotectable idea (the "*Survivor* concept"), but found that they presented that idea via "different expressions."³¹ After the court denied CBS's motion for a preliminary injunction, CBS dismissed its complaint with prejudice.

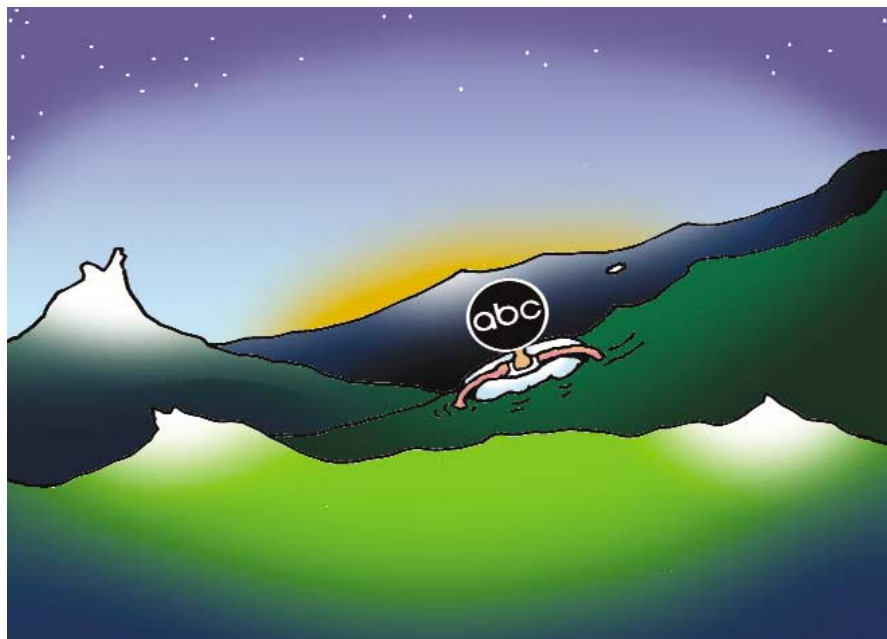
What is often overlooked in *CBS v. ABC* is the court's analysis in reaching its conclusion. Faced with a dearth of precedent in the context of reality television, the New York federal court turned to cases applying copyright law to scripted and quasi-scripted programs and other literary works. From these cases, the court extracted a list of show elements to be compared, some of which, at first blush, might seem inapplicable to an unscripted, reality program. Specifically, the court identified the "total concept and feel, theme, characters, plot, sequence, pace and setting" of each program and, without discussing possible differences between scripted and unscripted television, assumed the existence of corollary elements in reality television programs.³²

The court distilled the "total concept and feel" of the two programs into two components equally applicable to scripted and unscripted television, namely, the overall "tone" and "production values" of each series. The court contrasted the "unalterable seriousness" of *Survivor* against the "comedic" tone of *Celebrity*, citing the differences in the elimination sequence in each show as especially illustrative of the contrasting tones. The court observed that the elimination ceremony in *Survivor* was a "highly ritualized sequence" occurring in the dark, with torches, and accompanied by dra-

matic tribal-sounding music. *Celebrity*, on the other hand, had no comparable ritual. The departing contestant was announced in the morning while the contestants were standing around drinking coffee and escorted onto a "completely silly-looking party barge with fireworks, waiters, and glasses of champagne."³³

With respect to the production values, the court compared the "lush, artful photography and painstaking etiquette" of

identified as the hosts and the contestants. The court made no mention of the fact that the dialogue was unscripted or that the interactions of the "characters," unlike those in a scripted program, were not concocted by a staff of writers. First, the court held that the two shows expressed the "generic element" of a host in a different fashion. The host of *Survivor*, according to the court, appears relatively infrequently in the program, is "nothing but serious," and plays the dual role of



Survivor and the "home video look" of *Celebrity*. Of "less importance," but also contributing to the total concept and feel, were *Celebrity*'s live action and audience participation elements. The *Celebrity* audience is "constantly reminded by the hosts" that they are watching live action (or footage less than 24 hours old) from around the world and that they have the opportunity to vote to influence what happens next, whereas the *Survivor* audience is watching "an adventure in the past" with "more drama and more of what passes for character development...because of the [producer's] opportunity to edit while in some measure already knowing the outcome." The court concluded that the two series were "substantially different in concept and feel."³⁴

The court next considered the "setting" of each show and concluded that the mere concept of a remote, inhospitable locale was too "generic" to be protectable on its own. Focusing on the "visual expression" of that generic concept, the court contrasted the "dry Outback bush area" featured in *Survivor* with the "dense vegetation" that provided the backdrop in *Celebrity* and found that the inhospitable settings were expressed differently.³⁵

The "characters" of each series were the next element to be examined, which the court

"judge" and "group therapist." By contrast, the hosts of *Celebrity* appear frequently and perform as comic entertainers. Second, the court observed that the contestants in *Survivor* are "regular folks about whom the audience knows nothing" who are competing to win a million dollars, while the participants in *Celebrity* are celebrities competing for the honorific of being king or queen of the jungle and prize money for a favorite charity. The "cut-throat competition" evident on *Survivor* is thus entirely absent from *Celebrity*. The court concluded that the characters and their interactions are expressed differently.³⁶

The court also found that the "plot" of each series was expressed differently. The court defined the "plot" by reference to the "game show" rules of each program, rather than the sequence of events as they unfold on the screen. The court noted that, in *Survivor*, the contestants are required to participate in challenges, the challenges are physically difficult, and the "immunity challenges" are particularly serious and result in a "life or death decision." In *Celebrity*, on the other hand, the challenges are voluntary, they are "silly or gross" rather than physically difficult, and only the loss of "upscale rations" is at stake. In addition, while the contestants vote each other off at the end of each episode

of *Survivor*, the contestants on *Celebrity* are ousted based upon the results of voting by the at-home audience.³⁷

Finally, in passing, the court held that the music in each series was very different (“deep, chanting, tribal” versus “upbeat and kicky”), the interstitial shots of wildlife were expressed differently (emphasizing the “serious, dangerous nature of the animal” versus the “pretty or comic features of the wildlife”), and the panoramic landscape photography was expressed differently (“fabulously beautiful shots” versus “one step up from home video”).³⁸

In sum, based upon all of these differences, the court concluded that CBS was “not likely to prove that a lay observer would consider the works as substantially similar to one another.”³⁹

The court conducted its analysis without acknowledging the novelty of reality television or suggesting that the unscripted nature of the genre might complicate the application of traditional copyright principles. It is clear from the court’s opinion, however, that some adaptation of conventional concepts of scripted expression, like “plot” and “characters,” was necessary before those concepts could be applied to *Survivor* and *Celebrity*. What is less clear is whether, as the reality genre continues to expand, any of the elements that the court in *CBS v. ABC* deemed “expressive”—or additional elements not yet identified—ultimately will come to be viewed as unprotectable scenes a faire or as merged with a noncopyrightable idea. (The court in *CBS v. ABC* identified only “worm-eating” as part of the scenes a faire of expressing a remote, hostile environment.⁴⁰) In a burgeoning genre that has been the subject of only a single court opinion, it is likely premature to determine what “flows naturally” from any “basic plot premise” of any reality program.

In any event, a finding that a particular element (or even every element) of a reality television series is scenes a faire does not preclude a finding of copyright infringement. As the court noted in *CBS v. ABC*, it is not dispositive that “both shows combine well-known and frequently used generic elements of earlier works.”⁴¹ “Although certain similarities may not be protectable when considered individually because they are too generic or constitute scenes a faire, . . . the presence of so many generic similarities, and the common patterns in which they arise, may help a party ‘satisfy the extrinsic test’ for substantial similarity.” Notably, under *CBS v. ABC*, if a copyright infringement claim is based upon the alleged replication of a compilation of expressive but unprotectable elements (i.e., scenes a faire), those individual elements still must be expressed in each program in a sub-

stantially similar fashion. The court rejected CBS’s compilation argument on the grounds that the elements identified by CBS were “nonprotectable generic ideas,” rather than expressive content.⁴²

Switching Channels

The court in *CBS v. ABC* cited *Barris/Fraser Enterprises v. Goodson-Todman Enterprises, Ltd.*,⁴³ litigation in which the producers of the pilot of a new game show, *Bamboozle*, filed a declaratory judgment action for a decree that their program did not infringe the copyright in the game show *To Tell the Truth*. The producers of *To Tell the Truth* counterclaimed, alleging that *Bamboozle* did in fact infringe their copyright. Both shows featured a panel of three contestants, two of whom were liars, who claimed to be telling the truth about an incident, talent, or identity, and a panel of celebrities who had to determine which contestant was telling the truth. The court held that the idea of a game show in which contestants lie and a panel guesses who is telling the truth is not protected by copyright. Moreover, many of the similarities between the two shows “flow[ed] from the logic and necessities of television game shows and as such [were] not protectible.”⁴⁴

Nevertheless, the court denied both parties’ summary judgment motions on the ground that there remained an issue of fact as to whether the overall composition of *Bamboozle* infringed *To Tell the Truth*. The court held that “even though a television game show is made up entirely of stock devices, an original selection, organization, and presentation of such devices can . . . be protected, just as it is the original combination of words or notes that leads to a protectible book or song.”⁴⁵

The Ninth Circuit likewise has recognized that a copyright infringement claim may be based on an “original selection and arrangement of unprotected elements.”⁴⁶ In *Metcalf v. Bochco*,⁴⁷ the Ninth Circuit held that the “particular sequence in which an author strings a significant number of unprotectable elements can itself be a protectable element.”⁴⁸ Thus, even if one reality television program infringes only the expression of individually unprotectable “stock devices” of another reality television program (whatever those stock devices may be), a copyright infringement claim should remain viable.

Producers of reality television programs should also be aware that, given the right set of factual circumstances, the actual format (as distinct from the expressive content) of a program may be protectable under other legal doctrines. The “implied-in-fact contract” theory, for example, may protect a format idea if a plaintiff submits the idea to

a defendant and the defendant produces a program based upon the idea without compensating the plaintiff.⁴⁹ Other theories of idea protection include quasi-contract, express contract, and a confidential relationship theory.⁵⁰ The applicability of each theory obviously depends upon the circumstances of the alleged idea appropriation and the viability of a copyright preemption defense.

Despite speculation that *CBS v. ABC* raises the bar for demonstrating infringement of a reality television show to insurmountable heights, it is clear from the court’s opinion that the expressive content of reality programs is entitled to and receives the same degree of protection as any other expressive content. Although the identification of the scenes a faire of reality television remains unresolved, the application of scenes a faire will at most thin, but not eliminate, protection in a case involving a compilation of exclusively stock devices.

Reality television is here to stay, certainly for the foreseeable future. So long as there is vigorous competition among rival networks, copyright infringement cases involving the reality genre undoubtedly will continue to be filed. Indeed, at least two such actions have recently been commenced involving disputes between the reality programs *Wife Swap* and *Trading Spouses*⁵¹ and between New Zealand-based *Dream Home* and Fox’s *The Block*.⁵² And with so many other suspiciously similar reality shows on network schedules, more infringement actions cannot be far behind. As the *Survivor* case suggests, producers of knockoff reality programs have no immunity from copyright infringement liability. ■

¹ CHARLES CALEB COLTON, LACON: OR, MANY THINGS IN FEW WORDS, ADDRESSED TO THOSE WHO THINK 127 (1822).

² *CBS Broadcasting Inc v. ABC, Inc.*, 2003 U.S. Dist. LEXIS 20258 (S.D. N.Y. Jan. 14, 2003).

³ See, e.g., Andrew M. White & Lee S. Brenner, *Reality TV Shows Difficult Concepts To Protect*, ENTMT L. & FIN., Nov. 2004, at 3.

⁴ See *Three Boys Music Corp. v. Bolton*, 212 F. 3d 477, 481 (9th Cir. 2000).

⁵ See *Walker v. Time Life Films, Inc.*, 784 F. 2d 44, 48 (2d Cir. 1986); see also *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F. 3d 132, 137 (2d Cir. 1998).

⁶ *Feist Publ’ns, Inc v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991).

⁷ *Shaw v. Lindheim*, 919 F. 2d 1353, 1356 (9th Cir. 1990).

⁸ *Desny v. Wilder*, 46 Cal. 2d 715, 731 (1956); see also *Metcalf v. Bochco*, 294 F. 3d 1069, 1074 (9th Cir. 2002) (“[C]opyright law protects a writer’s expression of ideas, but not the ideas themselves.”). For a further discussion of the issues raised by *Metcalf*, see Andrew J. Thomas, *Access Hollywood*, LOS ANGELES LAWYER, May 2005, at 29.

⁹ *Narell v. Freeman*, 872 F. 2d 907, 912 (9th Cir. 1989).

¹⁰ *Apple Computer, Inc v. Microsoft Corp.*, 35 F. 3d

1435, 1446 (9th Cir. 1994) (quoting *Aliotti v. R. Dakin & Co.*, 831 F. 2d 898, 901 (9th Cir. 1987)).

¹¹ *Berkic v. Crichton*, 761 F. 2d 1289, 1293 (9th Cir. 1985).

¹² 4 NIMMER ON COPYRIGHT §1303E[1][b], at 13-88.

¹³ See *Apple Computer*, 35 F. 3d at 1443 (“Because only those elements of a work that are protectable and used without the author’s permission can be compared when it comes to the ultimate question of illicit copying, [the Court uses] analytic dissection to determine the scope of copyright protection before works are considered ‘as a whole.’”).

¹⁴ *Berkic*, 761 F. 2d at 1293.

¹⁵ *Shaw v. Lindheim*, 919 F. 2d 1353, 1360 (9th Cir. 1990).

¹⁶ *Apple Computer*, 35 F. 3d at 1443.

¹⁷ *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1178 (C.D. Cal. 2001).

¹⁸ *Three Boys Music Corp. v. Bolton*, 212 F. 3d 477, 485 (9th Cir. 2000).

¹⁹ *Sony Pictures Entm’t, Inc. v. Fireworks Entm’t Group, Inc.*, 156 F. Supp. 2d 1148, 1158 (C.D. Cal. 2001).

²⁰ *Idema*, 162 F. Supp. 2d at 1178.

²¹ *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,’* THE HOLLYWOOD REPORTER, Nov. 27, 2000.

²² Janet Shprintz, *Federal Judge Denies Fox Motion on ‘Race,’* VARIETY, Nov. 27, 2000, at 38.

²³ *Fox Family Prop. Inc. v. CBS Inc.*, No. 00-CV-11482 (Civil Docket).

²⁴ *Survivor Prods. LLC v. Fox Broad. Co.*, No. 01-CV-03234 (C.D. Cal. April 9, 2001); *Fox Suffers First Blow in Reality TV War*, ANDREWS ENTMT’ INDUS. LITIGATION REP., July 2001.

²⁵ *Survivor Prods. LLC v. Fox Broad. Co.*, 2001 U.S. Dist. LEXIS 25511, *16 n.5 (C.D. Cal. June 14, 2001).

²⁶ Cynthia Littleton, *CBS Drops Suit vs ‘Boot Camp,’* THE HOLLYWOOD REPORTER, Sept. 10, 2001.

²⁷ *ABC Show Survives CBS Challenge*, LOS ANGELES TIMES, Jan. 14, 2003, at 3-8.

²⁸ *CBS v. ABC*, 2003 U.S. Dist. LEXIS 20258, at *21 (CBS offered expert testimony identifying the following elements as essential to *Survivor* and opining that such elements had never been found in such combination in any other show: “voyeur verite,” hostile environment, building of social alliances, challenges, and serial elimination).

²⁹ As a transcription of the court’s decision delivered from the bench, the opinion in *CBS v. ABC* is not a model of clarity. By way of example, the court concluded relatively early in the opinion that CBS sought protection for a “combination of nonprotectable generic ideas” (*id.* at *11), but then proceeded to identify and compare expressive content in the two programs (*id.* at *25-42).

³⁰ *Id.* at *19.

³¹ *Id.* at *43.

³² *Id.* at *14.

³³ *Id.* at *26-28.

³⁴ *Id.* at *28-30.

³⁵ *Id.* at *30-31. Because the court focused on the *Survivor* edition filmed in the Australian Outback, rather than one of the other editions filmed in a jungle environment, the contours of the court’s copyright infringement analysis of the “setting” element are unclear. It is unknown, for example, whether the court would find substantial similarity if two series both expressed a “remote, inhospitable setting” by filming in a jungle, but two different jungles in different parts of the world.

³⁶ *Id.* at *32-34.

³⁷ *Id.* at *34-37.

³⁸ *Id.* at *38-39.

³⁹ *Id.* at *42.

⁴⁰ *Id.* at *40.

⁴¹ *Id.* at *19.

⁴² *Id.* at *8-11, 22-25 (quoting *Metcalf v. Bochco*, 294 F. 3d 1069, 1074 (9th Cir. 2002)).

⁴³ *Barris/Fraser Enters. v. Goodson-Todman Enters., Ltd.*, 1988 U.S. Dist. LEXIS 146 (S.D. N.Y. Jan. 4, 1988).

⁴⁴ *Id.* at *15-16.

⁴⁵ *Id.* at *17; see also *Sheehan v. MTV Networks*, 1992 U.S. Dist. LEXIS 3028, at *8-10 (S.D. N.Y. Mar. 13, 1992) (holding that game show proposal was entitled to copyright protection because it was an original work of authorship that included a distinctive selection and arrangement of stock game show devices).

⁴⁶ *Apple Computer, Inc v. Microsoft Corp.*, 35 F. 3d 1435, 1446 (9th Cir. 1994).

⁴⁷ *Metcalf v Bochco*, 294 F. 3d 1069 (9th Cir. 2002).

⁴⁸ *Id.* at 1074; see also *Apple Computer*, 35 F. 3d at 1445-46; *Satava v. Lowry*, 323 F. 3d 805, 811 (9th Cir.

2003).

⁴⁹ See *Desny v. Wilder*, 46 Cal. 2d 715, 739 (1956). In order to state a claim to enforce an implied-in-fact contract, the following elements must be satisfied: 1) the idea purveyor must have “clearly conditioned his offer to convey the idea upon an obligation to pay for it if it is used” by the person to whom the idea was communicated, 2) the idea recipient must have known the condition before he or she knew the idea, and 3) the idea recipient must have voluntarily accepted the disclosure of the idea on that condition. *Id.*

⁵⁰ For a discussion of the theories of idea protection see David M. McGovern, *What Is Your Pitch?: Idea Protection Is Nothing But Curveballs*, 15 LOY. L.A. ENT. L. REV. 475 (1995).

⁵¹ *RDF Media Ltd. v. Fox Broad. Co.*, 04-CV-10227 (C.D. Cal. Dec. 15, 2004).

⁵² *Ninox Television Ltd. v. Fox Entm’t Group, Inc.*, 04 Civ. 7891 (S.D. N.Y. Oct. 5, 2004).

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