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REALITY BITES: The Limits of Intellectual Property Protection for Reality Television Shows

Matthew Bunker, Ph.D.*

ABSTRACT

Reality television is an incredibly successful genre of entertainment. Reality TV has had enormous ratings success beginning in the early 2000s, and its influence (and revenues) are only likely to increase. Given the value of these properties, an important issue for reality TV creators and producers is the degree to which intellectual property protection is available to stop competitors from appropriating the content of reality programming. This Article first documents the rise of the reality genre. It then explores both copyright and trademark jurisprudence affecting reality plaintiffs and offers original analysis of this important aspect of intellectual property law.

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INTRODUCTION

Reality television is an incredibly successful genre of entertainment. Reality TV has had enormous ratings success beginning in the early 2000s and its influence and revenues are only likely to increase. One huge advantage reality shows offer content providers over scripted comedies or dramas is that reality shows are much less expensive to produce. One recent article on the phenomenon pointed out that “at between \$350,000 and \$500,000 per hour of

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programming, the average unscripted series costs about one-fourth as much as a high-end drama, for which networks can pay up to \$2 million per episode.”¹

Reality TV also provides unique opportunities for marketers not present in scripted fare. As one scholar put it, “[i]n an age of soaring production costs, commercial-zapping technologies, digital convergence, and increased audience fragmentation, reality television has also lent itself to experiments in integrated branding, global franchising, and interactive marketing.”²

Given the value of these properties, a key issue for reality TV producers is the scope of intellectual property protection provided by U.S. law. Although courts have generally been unresponsive to copyright infringement claims based on reality show formats—as they have been of television formats generally—some recent cases suggest that protection via copyright, while difficult, may not be impossible. Meanwhile, trademark claims regarding reality programs have for the most part been rejected.

Although a number of legal analyses of copyright issues in the reality genre appeared in the early 2000s,³ after the first rush of reality litigation, few commentators have analyzed the more recent cases, particularly those more favorable to plaintiffs. This Article thus makes an original contribution to the literature by analyzing more recent decisions that, at the very least, clarify that under the proper circumstances, copyright protection is not out of reach for reality TV creators. The Article also explores trademark issues that many previous scholars have not touched upon.

This Article first documents the appearance of reality TV in the United States and explores its continued importance. Next, the Article briefly discusses the history of the genre. It then elucidates particular copyright doctrines that lie at the heart of most reality copyright litigation and explores early cases in which defendants were inevitably victorious. Next, the Article analyzes more recent cases that cast some doubt upon the claimed inability to copyright reality TV formats. The Article then briefly articulates trademark issues that have arisen in the reality context. Finally, the Article offers concluding perspectives on these important intellectual property issues.

1 Josef Adalian, *The Boom Days of Reality TV Are Over*, VULTURE (Sept. 23, 2015), <http://www.vulture.com/2015/09/reality-tv-boom-days-are-over.html> [<https://perma.cc/V4U4-H4A4>].

2 LAURIE OUELLETTE, *A COMPANION TO REALITY TELEVISION* 3 (2017).

3 See, e.g., Jesse Stalnaker, *Has Reality Programming Been Voted Off the Island of Copyright Protection? Finding Protection as a Compilation*, 16 SEATON HALL J. SPORTS & ENT. L. 162 (2006); Daniel Fox, *Harsh Realities: Substantial Similarity in the Reality Television Context*, 13 UCLA ENT. L. REV. 223 (2006); 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-AUG L.A. LAW. 34 (2005).

I. THE RISE OF REALITY TELEVISION

The reality TV genre extends far back into the history of broadcasting. As one perceptive observer explained, proto-reality shows began some sixty years ago and included such fare as *Candid Camera* and *Queen for a Day*, the latter of which “began as a radio program, was shown on Los Angeles local television beginning in 1948, and was later picked up by NBC and subsequently, by ABC.”⁴

Although elements of reality TV have been present in television programming since the beginning of the medium, unscripted shows did not truly hit their stride until 2000. These shows “became a phenomenon around the turn of the millennium. In the United States, *Survivor*, *Big Brother*, and other high-profile primetime reality programs (many adapted from existing European formats) arrived in 2000, setting the stage for a reconfiguration of television schedules that continues to this day.”⁵

The genre continued to grow in subsequent years, with a mind-bending array of different subgenres. “By the mid-2000s, major broadcast and specialized cable channels alike were awash with makeover shows, dating shows, every manner of lifestyle and self-help program, reality sitcoms, talent contests and game shows, charitable interventions, adventure competitions, docu-soaps, and more.”⁶ Reality TV also began to influence existing television genres by, for example, steering nature and science programming to reflect the conventions of the reality format.⁷ For example, programming on the Animal Planet channel, such as *Meerkat Manor*, eschewed the traditional style of “slow moving and subdued nature programming” and instead often sought to “mimic outright the conventions of docusoaps and reality competitions.”⁸

Television ratings in 2016 demonstrate the enduring popularity of reality fare. For example, in the week of June 27–July 3, in broadcast and cable reality shows captured seven of the top ten positions: *America’s Got Talent*, *The Bachelorette*, *American Ninja Warrior*, *Big Brother* (3 episodes), and *Love and Hip Hop Atlanta*.⁹ During that same week, the top three cable series were reality shows: *Love and Hip Hop Atlanta*, *Keeping Up with the Kardashians*, and *Black Ink Crew*.¹⁰ This is a truly remarkable dominance for a genre that barely existed sixteen years earlier.

4 Katie Hopkins, *Unique Legal Considerations in Reality Television*, 13 PITT. J. TECH. L. & POL’Y 1, 2 (2012).

5 OUELLETTE, *supra* note 2, at 1.

6 *Id.* at 1–2.

7 *Id.* at 2.

8 *Id.*

9 Andy Dehnart, *Reality TV is Dominating Broadcast and Cable Ratings This Summer*, REALITY BLURRED (July 13, 2016 8:00 AM), <https://www.realityblurred.com/realitytv/2016/07/reality-summer-ratings-domination> [<https://perma.cc/8R8T-MQAD>].

10 *Id.*

Given the enormous importance of ratings in the television business, the urge to copy others' successes is, of course, ever present. One industry observer explained the rationale thus:

If *Ice Road Truckers* is a hit on one network you can be sure that a rival channel will be seeking a meeting with the producers to get trucking with them. The fear factor in programming means that even as they search for the next big thing, networks will be bringing in the clones and avoiding things that have never been done. There's just too much money riding on every decision.¹¹

It is this urge to appropriate the successful programming of others that drives the litigation explored herein.

II. COPYRIGHT DOCTRINE AND TELEVISION FORMATS

Producers and television executives seeking to protect programs from close appropriators have long faced significant difficulties in copyright infringement litigation. In one early format battle, *Richards v. Columbia Broadcasting System*,¹² the plaintiff claimed that his script for a television quiz show about movies, *Name the Star*, was infringed by CBS's own quiz show, *Bank on the Stars*. A federal district court concluded that both shows contained a number of similar elements, including "an introduction, a description of the contest, a conversational interview with each contestant, the asking of questions related to motion pictures, a final 'jackpot' type of question, and a conclusion."¹³ Despite these similarities, the court granted summary judgment to CBS, stating that "it seems quite clear to the court that these two programs are basically dissimilar expressions in the broadcasting medium of the broad idea of a 'quiz show based on motion pictures.'"¹⁴

As illustrated by *Richards*, infringement cases based largely on format typically run aground on one (or a combination) of two key copyright doctrines. First, the idea/expression dichotomy makes clear that copyright protection extends only to the actual expression of the plaintiff, not to ideas, which are unprotectable and remain in the public domain. As the Copyright Act states, protection does not "extend to any idea, procedure, process, system, method of operation, concept, principle or discovery."¹⁵ Thus, for example, the famous and almost inevitable romantic comedy structure of "boy meets girl,

11 Michael Rose, *The Unreal Rise of Reality Television*, HUFFINGTON POST (Sept. 23, 2013, 4:23 PM), http://www.huffingtonpost.com/michael-rose/the-unreal-rise-of-reality_b_3976751.html [<https://perma.cc/3KXB-HZEH>]. See also, e.g., OUELLETTE, *supra* note 2, at 2 (writing that the "success of the prime-time network reality shows begat imitations and variations on themes pitched to specialized cable audiences.").

12 *Richards v. Columbia Broad. Sys.*, 161 F. Supp. 516, 517 (D.D.C. 1958).

13 *Id.* at 518.

14 *Id.* at 519.

15 17 U.S.C. § 102(b) (2016).

boy loses girl, boy and girl reunite and live happily ever after” is not protectable since it functions at a high level of abstraction and is simply an idea for a screenplay. This plot structure is in the public domain and is available to all creators. With the addition of sufficient particulars, including developing the boy and girl characters, providing a setting and a more detailed plot, creating dialogue, and the like, the “boy meets girl” idea can morph into protectable expression in the form of a “rom-com” screenplay.

However, the line between idea and expression in the law has always been a blurry one.¹⁶ Famed appellate judge Learned Hand provided what has become the iconic statement of this problem in 1930 in his noted opinion in *Nichols v. Universal Pictures*.¹⁷ In *Nichols*, an infringement action involving a stage play, Hand formulated his famous “abstractions” approach to the idea/expression dichotomy:

Upon any work, and especially upon a play, 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 play 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 playwright could prevent the use of his “ideas,” to which, apart from their expression, his property is never extended.¹⁸

In a later case, emphasizing the inescapable imprecision of this formulation, Hand made clear that applications of the abstractions test “must . . . inevitably be ad hoc.”¹⁹

The developmental stage of some reality plaintiffs’ works may make them particularly susceptible to dismissal by courts as mere ideas. This is because plaintiffs often come armed only with “treatments,” brief summaries of a program’s concept that run only a few pages. These purely conceptual synopses are rarely able to generate much of what of what a federal court would regard as developed expression. Of course, some reality plaintiffs come to court with fully fledged and produced programs, which are more likely to contain protectable expression.

A second consistent legal stumbling block for reality TV plaintiffs is the doctrine of *scenes a faire*, or stock scenes that naturally occur in a given genre.

Scenes a faire (literally, “scenes that must be done”) include stock plot elements, characters, and other literary devices that are so standard as to be almost obligatory in connection with a particular theme or setting. As one commentator put it, “a car chase, the kiss in a love scene, and the all-knowing butler are examples of hackneyed narrative devices that fall within the

16 For a critique of the doctrine, see, e.g., Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321 (1989).

17 *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

18 *Id.* at 121.

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

doctrine.”²⁰ Similarly, pickup trucks, cheating on one’s romantic partner, inebriation, and honky-tonks would almost certainly constitute *scenes a faire* in the country music genre. Considered a subcategory of unprotectable ideas, the *scenes a faire* doctrine ensures that “expressions which are indispensable to a common theme will remain in the public domain to the benefit of all, and the author will not possess the exclusive right to ideas which are also necessary to that theme.”²¹

Despite the formidable barriers posed by the idea/expression dichotomy and the *scenes a faire* doctrine, a glimmer of hope for plaintiffs does exist: Some level of protection is available to a reality TV plaintiff who simply deploys a variety of unprotectable ideas or stock scenes. The trick here is that the selection or arrangement of those elements must be original overall. The U.S. Supreme Court’s seminal decision in *Feist Publications, v. Rural Telephone Service*²² held that even elements that cannot be protected could find copyright protection through the particular selection and arrangement imposed by a creator. As the Court expressed it, public domain elements (specifically, compilations of facts in *Feist*) are protected to the extent they are “selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”²³ According to *Feist*, the selection or arrangement must be original, although that requirement is “not particularly stringent”²⁴—the selection or arrangement simply “cannot be so mechanical or routine as to require no creativity whatsoever.”²⁵ Still, the *Feist* court noted that the protection accorded to factual compilations based on selection and arrangement is “thin,”²⁶ meaning that any protection only applies to the particular selection and arrangement and not to the raw facts themselves, which are always available for all to use.

The logic of *Feist* has since been extended by some lower courts from the context of factual compilations to other public domain elements, such as ideas. For example, in *Metcalf v. Bochco*,²⁷ the Ninth Circuit found that a large group of similar elements in a TV premise—which could not be protected on their own—created substantial similarity under that circuit’s “extrinsic test” sufficient to avoid summary judgment. The case arose when writers Jerome and Laurie Metcalf offered several iterations of a treatment involving “a

20 MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 88 (5th ed. 2010). For a deeper treatment, see Leslie Kurtz, *Copyright: The Scenes A Faire Doctrine*, 41 FLA. L. REV. 79 (1989).

21 Andrew B. Hebl, *A Heavy Burden: Proper Application of Copyright’s Merger and Scenes a Faire Doctrines*, 8 WAKE FOREST INTELL. PROP. L.J. 128, 142 (2007).

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

23 *Id.* at 356 (quoting 17 U.S.C. § 101).

24 *Id.* at 358.

25 *Id.* at 362.

26 *Id.* at 349.

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

story about a county hospital in inner-city Los Angeles and the struggles of its predominantly black staff” to producer Steven Bochco.²⁸ Bochco read the treatments but declined to become involved. Later, Bochco wrote and produced the CBS television series *City of Angels*, also about the black staff at an inner-city L.A. hospital, which the Metcalfs claimed infringed their work.²⁹

The panel in *Metcalfe* applied the Ninth Circuit’s “extrinsic test” for substantial similarity, a test that analyzes objective features of works and is the only test applied on summary judgment.³⁰ (An intrinsic test—a purely subjective analysis by the fact finder, typically a jury, of “whether the total concept and feel of the two works are substantially similar”³¹—is also applied by courts in the Ninth Circuit at trial, if the extrinsic test is met.) The extrinsic test focuses on “articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events”³² in the two works. The court found the similarities between the two works to be “striking”:

Both the *Metcalfe* and Bochco works are set in overburdened county hospitals in inner-city Los Angeles with mostly black staffs. Both deal with issues of poverty, race relations and urban blight. The works’ main characters are both young, good-looking, muscular black surgeons who grew up in the neighborhood where the hospital is located. Both surgeons struggle to choose between the financial benefits of private practice and the emotional rewards of working in the inner city. Both are romantically involved with young professional women when they arrive at the hospital, but develop strong attractions to hospital administrators. Both new relationships flourish and culminate in a kiss, but are later strained when the administrator observes a display of physical intimacy between the main character and his original love interest.³³

Although the court found these and other similarities to be cumulatively remarkable, it did acknowledge that they were largely either ideas or *scenes a faire* and thus not protectable individually. Nonetheless, the combination of these elements satisfied the extrinsic test: “The particular sequence in which an author strings a significant number of unprotectable elements can itself be a protectable element.”³⁴ Thus, in *Metcalfe*, the defendant was able to essentially bootstrap unprotectable ideas and stock scenes into protectable expression through selection and arrangement, just as the *Feist* Court had acknowledged was possible for facts in compilations. As the *Metcalfe* court expressed it,

28 *Id.* at 1071.

29 *Id.* at 1072.

30 *Swirsky v. Carey*, 376 F.3d 841, 845, 848 (9th Cir. 2004).

31 ROBERT C. OSTERBERG & ERIC C. OSTERBERG, *SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW* 3–21 (2008).

32 *Metcalfe*, 294 F.3d at 1073 (citation omitted).

33 *Id.*

34 *Id.* at 1074. *See also, e.g.*, 1 NIMMER ON COPYRIGHT § 2.09 (2016) (discussing possible copyrightability of television formats based on *Feist*).

“[e]ach note in a scale, for example, is not protectable, but a pattern of notes in a tune may earn copyright protection.”³⁵

The result in *Metcalf* was also seemingly influenced by the so-called “inverse ratio” rule applied in the Ninth Circuit³⁶—the fact that the defendant acknowledged a high level of access to the plaintiffs’ work essentially lowered the bar for similarity under the extrinsic test. As the court noted, not only had Bochco conceded access, but there were claims that Bochco and *City of Angels* star Michael Warren had both read and liked three different versions of the plaintiffs’ script. “If the trier of fact were to believe that Warren and Bochco actually read the scripts, as alleged by the Metcalfs,” the court wrote, “it could easily infer that the many similarities between plaintiffs’ scripts and defendants’ work were the result of copying, not mere coincidence.”³⁷

Although *Metcalf* concerned a scripted dramatic series, the implications for reality TV jurisprudence are clear. To the extent a reality producer can arrange stock elements into some original pattern, that arrangement itself can be protected via copyright doctrine. Even though the Ninth Circuit has found ways to limit the precedential force of *Metcalf* in ensuing years,³⁸ the case is still good law and certainly seems to have solid doctrinal backing as a result of *Feist*.

III. REALITY SHOW PROTECTION VIA COPYRIGHT—THE EARLY YEARS

Early reality copyright jurisprudence protected defendants in almost every reported case,³⁹ generally on the theory that the claimed infringement consisted of ideas or *scenes a faire*. Consider, for example, *CBS Broadcasting v. ABC.*, a 2003 district court opinion that analyzed claims by CBS that its hit reality show *Survivor* was infringed by ABC’s *I’m a Celebrity, Get Me Out of*

35 *Metcalf*, 294 F.3d at 1074.

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

37 *Metcalf*, 294 F.3d at 1075.

38 Jenny Small, *The Illusion of Copyright Infringement Protection*, 12 CHI.-KENT J. INTEL. PROP. 217, 220–21 (2013) (writing that “courts have interpreted *Metcalf* narrowly and determined that a pattern of similarity alone may not suffice to show substantial similarity.”).

39 In addition to the cases discussed in the text, *see, e.g.*, *Rice v. Fox Broad. Co.*, 330 F.3d 1170 (9th Cir. 2003) (upholding summary judgment on copyright claim against show revealing secrets of magicians since similarities were generic); *CBS Broad., Inc. v. Am. Broad. Co., Inc.*, No. CV 12-04073 GAF (JEMx), 2012 U.S. Dist. WL 13013027 (C.D. Cal. June 21, 2012) (denying injunctive relief on behalf of *Big Brother* owner against owners of *The Glass House*); *Milano v. NBC Universal, Inc.*, 584 F. Supp. 2d 1288 (C.D. Cal. 2008) (granting summary judgment on copyright claims against owners of *The Biggest Loser*); *Zella v. E.W. Scripps Co.*, 529 F. Supp.2d 1124 (C.D. Cal. 2007) (granting motion to dismiss over copyright claims alleged against owners of cooking show *Rachel Ray*); *Bethea v. Burnett*, No. CV 04-7690-JFW (PLAx), 2005 U.S. Dist. LEXIS 46944 (C.D. Cal. June 28, 2005) (granting summary judgment motion on copyright claim against owners of *The Apprentice*).

Here (*Celebrity*).⁴⁰ CBS sought a preliminary injunction against the broadcast of *Celebrity*. Both shows involved stranding a group of contestants (ordinary people in *Survivor*, celebrities in *Celebrity*) in a hostile landscape where they are asked to perform tasks. The court easily determined that *Celebrity* was not infringing, basing a large part of its analysis on the idea/expression dichotomy and the *scenes a faire* doctrine.⁴¹ The *CBS* court acknowledged, in the abstract, that unprotected elements could potentially be combined in an original manner such that the combination itself was protectable. The court quoted a district court in the Second Circuit for the proposition that “even [where] a television game show is made up of entirely stock devices, an original selection, organization and presentation of such devices can nevertheless be protected.”⁴² Nonetheless, the *CBS* court found that the precise selection or arrangement of such elements were not present in both works. For example, the court noted that “*Celebrity* . . . adds significant elements not found in *Survivor*, including elements of the *Celebrity* tabloid genre and the audience participation element of the game show genre. Thus the combination of elements . . . is not congruent.”⁴³

As to the protectable expression contained in the two shows, the court also found significant differences, including a comedic tone in *Celebrity* in contrast to the “unalterable seriousness” of *Survivor*.⁴⁴ The court also distinguished the production values of the two shows, finding *Survivor*’s look to consist of “lush, artful photography,” while *Celebrity* had the feel of “home video.”⁴⁵ These and other differences (including the demeanor of the hosts, the conduct of the contestants, the music, and other elements) led the court to conclude that CBS was not likely to succeed in demonstrating substantial similarity.

Yet another decisive early-stage victory for a reality TV defendant came in an unpublished decision by a New Jersey district court in 2008, *Pino v. Viacom*.⁴⁶ In *Pino*, the plaintiff had created a treatment and a screenplay titled *Under Pressure* for a “sports reality show featuring contests between

40 *CBS Broad., Inc. v. ABC*, No. 02-Civ-8813 (LAP), 2003 U.S. Dist. LEXIS 20258 (S.D.N.Y. Jan. 13, 2003); *Williams v. A&E Television Networks*, 122 F. Supp. 3d 157 (S.D.N.Y. 2015) (granting motion to dismiss on copyright claim against owners of *Married at First Sight*); *Castorina v. Spike Cable Networks, Inc.*, 784 F. Supp. 2d 107 (E.D.N.Y. 2011) (granting motion to dismiss on copyright claim against owners of *Pros v. Joes*).

41 *CBS Broad.*, 2003 U.S. Dist. LEXIS 20258, at *5–8.

42 *Id.* at *8–9 (quoting *Barris/Fraser Enters. v. Goodson-Todman Enters., Ltd.*, No. 86-Civ-5037 (EW), 1988 U.S. Dist. LEXIS 146, 5 U.S. P.Q. 2d 1887, 1891 (S.D.N.Y. January 4, 1988)).

43 *CBS Broad.*, 2003 U.S. Dist. LEXIS 20258, at *21–22 (italics added).

44 *Id.* at *25–26.

45 *Id.* at *29.

46 *Pino v. Viacom, Inc.*, No. 07-3313 (AET), 2008 U.S. Dist. LEXIS 24453 (D.N.J. Feb. 29, 2008).

professional athletes and amateur athletes.”⁴⁷ *Under Pressure* consisted of, among other elements, two announcers, a female interviewer, various “pressure situations” in which the amateurs competed against professionals, and commentary on the amateurs by the professionals.⁴⁸

The plaintiff contended that the Spike TV reality program *Pros vs. Joes* infringed *Under Pressure*. *Pros vs. Joes* was also premised on amateur contestants competing against professional athletes. Among the consistent elements were “trash-talking” among the competitors, a host, and various “Match-Ups” in which the “Joes” took on the “Pros”—sometimes in the professional’s sport, sometimes not.⁴⁹

The court, on an alternate motion to either dismiss or grant summary judgment, easily granted the motion. The court found the programs’ commonalities non-infringing:

[E]lements common to both works, including . . . the presence of hosts who provide witty commentary on the contestants and competition, introductory sequences that feature highlights of sporting events and sounds associated with various sports, spotlights on professional athletes and amateur contestants, camera shots of athletic fields or arenas, trash-talking exchanges, and sports contests are *scenes a faire* that flow necessarily from the idea of a sports-themed reality show that pits amateurs against professional athletes.⁵⁰

As to the protectable elements of *Under Pressure*, the court found that the plot, dialogue, mood, setting, pace, and sequence of events were sufficiently different from those elements in *Pros vs. Joes* that the two works were not substantially similar.⁵¹ For example, as to the “plot,” the court found that *Pros vs. Joes* provided an objective scoring system whereby the Joes could win by outperforming other Joes. On the other hand, *Under Pressure* required that the amateur actually outperform the professional, and that performance was not rated objectively, but rather by a panel of judges.⁵²

The *Pino* court also rejected *Metcalf*-style substantial similarity based on the selection or arrangement of unprotectable elements.⁵³ The court noted the plaintiff did not “allege or identify any sequence of uncopyrightable elements in *Pros vs. Joes* that is similar to any in *Under Pressure* so as to approach the extent of similarity and identity in *Metcalf*. At best, Plaintiff lists random similarities between elements of the shows in support of his argument.”⁵⁴ As a result of this less-than-striking similarity, the court found that the plaintiff had not satisfied the extrinsic test and granted summary judgment to Viacom.

47 *Id.* at *2.

48 *Id.* at *4–5.

49 *Id.* at *6–8.

50 *Id.* at *14.

51 *Id.* at *15–20.

52 *Pino*, 2008 U.S. Dist. LEXIS 24453 at *15–16.

53 *Id.* at *20–24.

54 *Id.* at *22.

IV. PLAINTIFFS MAKE A COMEBACK OF SORTS

Although early reality doctrine was essentially a shutout of plaintiffs (as indeed are some cases up to the time of this writing),⁵⁵ a few recent decisions suggest that format cases may not be completely unwinnable from the plaintiff's side. At the very least, plaintiffs have been able to ward off early dismissals in opinions that recognize potentially protectable elements in the shows. This is by no means a sea change in reality show jurisprudence, but it is nonetheless legally significant since it suggests that the door may be opening a crack for copyright plaintiffs in reality cases. Consider, for example, *Dillon v. NBCUniversal Media*, a 2013 case decided by a California federal district court, heard on a motion to dismiss.⁵⁶ In *Dillon*, the plaintiff, Richard Dillon, a former police officer, wrote a treatment for *Celebrity Seals*, "a reality show that pits celebrity contestants against one another in competitive events designed to mimic the training received by Navy SEALs."⁵⁷ In the treatment, the celebrities would each have a personal ex-military coach and have their performance on various military skills challenges judged by experts. The treatment also called for the celebrities to "live together in a military barracks" and "behave 'in a regimented manner as well as do menial tasks, all under the supervision of their tough coaches.'"⁵⁸

Dillon met with David A. Hurwitz, a producer, who praised the treatment but declined further involvement. Later, Hurwitz, along with producers Mark Burnett and Dick Wolf, created *Stars Earn Stripes*, a reality show that aired for one season. Dillon claimed the show infringed his treatment. Because of the procedural posture of the case, the court construed the allegations in the petition in favor of the plaintiff.

On the issue of substantial similarity, the court, applying the Ninth Circuit's extrinsic test,⁵⁹ found enough similarities between the two works to overcome the motion to dismiss. The court expressly stated that it was overlooking stock elements "such as a host, celebrity contestants, contestants living in close proximity with one another, contestant interviews, competitions between contestants, . . . the elimination of contestants," and the like.⁶⁰ Nonetheless, even overlooking these *scenes a faire*, the district court found protectable similar elements in theme and mood—both works were reverent toward the military and the service performed by military personnel. The plots of the two works also contained significant similarities, the court reasoned, including the specific

55 See recent cases cited in note 39.

56 *Dillon v. NBC Universal Media, LLC*, CV 12-09728, 2013 U.S. Dist. LEXIS 100733 (C.D. Cal. June 18, 2013).

57 *Id.* at *2.

58 *Id.* at *3.

59 See *Funky Films, Inc. v. Time Warner Entm't Co., L.P.*, 462 F.3d 1072, 1077 (9th Cir. 2006) (explaining elements of extrinsic test).

60 *Dillon*, 2013 U.S. Dist. LEXIS 100733, at *13.

tasks the contestants were called upon to carry out. Dillon's treatment featured "'heavy weapons qualification,' 'over-the-beach scenarios and ambush techniques,' and 'sniper lessons,'" while *Stars Earn Stripes* had episodes with very similar tasks.⁶¹ Although one might argue that such archetypical martial activities should constitute *scenes a faire* in a military-based reality show, the court considered them protectable.

The court found little protectable similarity in either dialogue or setting, the former because of the unscripted nature of the works and the latter because *Stars Earn Stripes* did not, unlike the treatment, depict the contestants living together in barracks or performing menial tasks. However, the court did find the treatment's "list of proposed celebrity contestants [to be] uncannily similar to the contestants chosen to participate in the Program."⁶² For instance, Dillon had proposed Drew Lachey from the boy band 98 Degrees as a possible contestant, while *Stars Earn Stripes* featured Drew's brother and fellow 98 Degrees member, Nick Lachey, on the show. Other similarities in casting between the two works included former professional wrestlers, former *Dancing with the Stars* contestants, and, as hosts, former members of the military who had subsequently entered politics. As the court put it, "other similarities abound."⁶³ One might question the analysis here—the "characters" in question are not fictional creations, but actual flesh-and-blood human beings. Are they subject to copyright protection when their names and attributes arise as possible casting choices? As a doctrinal matter, is it an "idea" if a casting director says, "get me a 'boy band' type"? Nonetheless, the court seemed to feel, with little explicit analysis, that these kinds of choices were protectable elements of the treatment, at least in the context of a motion to dismiss.

Given the similarities in theme and mood, plot, and characters—all elements of the extrinsic test—the court reasoned that it could not "conclude that [the works] are not substantially similar on the pleadings. This is especially true in light of the high degree of access alleged by Plaintiff."⁶⁴ The latter statement is consistent with the Ninth Circuit's "inverse ratio" principle mentioned earlier. In essence, a high degree of access—in this case, Dillon had personally provided the treatment to an individual who went on to become a creator of the allegedly infringing work—permits "a lower standard of proof of substantial similarity."⁶⁵

Another recent case from a Texas federal district court rejected a defendant's summary judgment motion in a case involving a fishing reality show. In *Parker v. Outdoor Channel Holdings*,⁶⁶ the plaintiff, Ewell Parker, created

61 *Id.* at *16.

62 *Id.* at *17.

63 *Id.* at *18.

64 *Id.* at *19.

65 *Swirsky v. Carey*, 376 F.3d 841, 844 (9th Cir. 2004).

66 *Parker v. Outdoor Channel Holdings*, No. 2-11-CV-00159-J, 2012 U.S. Dist. LEXIS 175879 (N.D. Tex. Dec. 12, 2012).

Match Fishing, a competitive bass-fishing series, and registered copyrights in both competition rules and nine specific episodes, four of which he produced on video.⁶⁷ Parker alleged that Outdoor Channel infringed his copyrights through a program called *Ultimate Match Fishing*.⁶⁸

Parker claimed sixteen protectable elements derived from his rules and the shows (including both produced shows and treatments for unproduced shows) that he asserted Outdoor Channel had infringed. These included: “[t]wo competitors in a one-on-one competition fishing out of the same boat”; “[e]ach round of the competition, a match, being divided into four periods”; selection of the competitor controlling the boat via coin toss; the winner of the match determined by the weight of fish caught; putting microphones on the competitors; and “[e]ncouraging talk and banter between the competitors to draw viewers into the drama of the competition.”⁶⁹ The court engaged in an exhaustive analysis of all sixteen elements claimed by the plaintiff to determine if there were sufficient protectable elements to defeat summary judgment. Moreover, the court also noted that—in line with, but without citing *Metcalf*—“[e]ven if all divisible elements of a work are filtered out as unprotected, the copyrighter’s selection and arrangement of otherwise unprotected elements can be protectable, if original.”⁷⁰

The court concluded that a number of the claimed elements, such as dividing the match into four periods or placing microphones on the competitors, were not original to the plaintiff’s program.⁷¹ Additionally, some elements, such as weight penalties against competitors for rules violations, were common enough in fishing competitions to constitute *scenes a faire*, in the court’s view.⁷² Nonetheless, the court ultimately concluded that the protectable elements, along with the element of selection and arrangement itself, were sufficient for the plaintiff to avoid summary judgment: “Without saying that substantial similarity *does* exist, a reasonable jury could determine that it does,” the court wrote.⁷³

Unquestionably, the *Parker* court could be criticized for some of its analysis. For instance, in evaluating *scenes a faire* arguments by the defendant, the court reasoned that the “topic” of the analysis should be “televised bass fishing competitions” rather than “sports competitions.”⁷⁴ This significant narrowing of the topic area meant in practice that an element such as alternating control of the boat by competitors was analyzed thus in terms of *scenes a faire*:

67 *Id.* at *2.

68 *Id.* at *3.

69 *Id.* at *3–5.

70 *Id.* at *9.

71 *Id.* at *14–15.

72 *Id.* at *14–15.

73 *Id.* at *17.

74 *Id.* at *11–13.

“[A]lternation of control is common to sports competitions generally; it is apparently uncommon to televised bass fishing competitions.”⁷⁵ Similarly, the court reasoned that using a coin toss to determine which competitor is in control at the beginning of the match or having a uniformed referee were common elements in sporting competitions generally, but not necessarily in televised bass fishing competitions.⁷⁶ This approach seems to be slicing things quite thinly indeed and might not stand up on appeal.

Moreover, protection for Parker’s competition rules (as opposed to the expression contained in the shows) might potentially transgress the rule in *Baker v. Seldon*,⁷⁷ a seminal 1879 Supreme Court copyright case in which the Court held that a copyright in instructions in a book did not forbid practicing the process the book described. Thus, one might argue, Parker’s competition regime might not be protected if an infringer carried out a competition using those rules. The *Parker* court did not cite *Baker*, however, so that issue was not addressed in the opinion. Despite potential problems in parts of the analysis, *Parker* is a decidedly plaintiff-friendly decision that, like *Dillon*, may herald a somewhat less skeptical judicial attitude toward reality-based copyright claims.

V. TRADEMARK AND TRADE DRESS CLAIMS

Attempts by reality TV plaintiffs to deploy trademark and trade dress claims to protect their work have largely failed in the reported cases. Trademark law, unlike copyright’s protection of literary and artistic works, “is concerned with protection of the symbols, elements or devices used to identify a product in the marketplace and to prevent confusion as to its source.”⁷⁸ Trademark infringement is premised on a “likelihood of confusion” by consumers, which is determined by a complex, multifactor test that varies somewhat by federal circuit.⁷⁹ The Lanham Act, which governs federal trademark law, also provides a cause of action for trademark dilution.⁸⁰

One reality TV case in which a trademark theory failed is *RDF Media v. Fox Broadcasting*,⁸¹ decided in 2005 by a California district court. RDF owned rights to *Wife Swap US* and *Wife Swap UK*, both reality programs in which spouses from different families traded places and, presumably, hilarity ensued.

75 *Id.* at *14.

76 *Id.*

77 *Baker v. Selden*, 101 U.S. 99 (1880). The case is now codified at Copyright Act, 17 U.S.C.S. § 102 (2016), the statutory section that includes the idea/expression dichotomy.

78 *EMI Catalogue P’ship v. Hill, Holliday, Connors, Cosmopolos Inc.*, 228 F.3d 56, 63 (2d Cir. 2000).

79 RICHARD L. KIRKPATRICK, *LIKELIHOOD OF CONFUSION IN TRADEMARK LAW* (2001); Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581 (2006).

80 15 U.S.C. § 1125 (2016). See also DAVID S. WELKOWITZ, *TRADEMARK DILUTION: FEDERAL, STATE, AND INTERNATIONAL LAW* (2002).

81 *RDF Media Ltd. v. Fox. Broad. Co.*, 372 F. Supp. 2d 556 (C.D. Cal. 2005).

Fox began broadcasting *Trading Spouses*, the alleged knockoff, in 2004. In addition to the predictable copyright claims, RDF added two counts of trade dress infringement under the Lanham Act. Trade dress has been defined as “the total image of a product and may include features such as size, shape, color or color combinations, texture, [or] graphics.”⁸² Standard examples of trade dress claims include the distinctive shapes of certain liquor bottles, the famous Tiffany blue box, and even the overall design of highly distinctive restaurants.⁸³ Although trade dress claims are conceptually distinct from standard trademark infringement, both are grounded in protecting consumers from confusion in the marketplace, and, as the *RDF Media* court put it, “the legal significance of the difference is limited.”⁸⁴

The court easily dispensed with the trade dress claims on a motion to dismiss. The court summarized RDF’s claim:

The total image and appearance of “Wife Swap US,” as defined by the selection, compilation, arrangement, sequence, and combination of the cast of characters, . . . the sequence of events, the plot, the tone, the theme, the pace, . . . the topics explored, the dramatic and comedic effect created by music, and the introductory segment, constitutes the trade dress of “Wife Swap US.”⁸⁵

This claim was a bridge too far for the court, which reasoned that “[i]n effect, RDF is asking this Court to recognize the reality show itself as the trade dress subject to protection.”⁸⁶ This it could not do since the actual content of the work was the province of copyright law, not the Lanham Act. The *RDF Media* court quoted famed trademark scholar J. Thomas McCarthy for the proposition that the “collection of words in a novel are not a ‘trademark’ indicating the origin of that novel. Rather, the story is a ‘product,’ not a symbol of origin.”⁸⁷

RDF argued that a 2001 Ninth Circuit case involving rival billiards establishments, *Clicks Billiards v. Sixshooters*,⁸⁸ supported its trade dress claim. In the billiards case, which concerned the visual design of the two businesses, the Ninth Circuit had held that “[t]rade dress is the composite tapestry of visual effects.”⁸⁹ The *RDF Media* court rejected the analogy to reality programs, reasoning that the billiards case involved simply the overall *look* of the billiard

82 *LeSportsac, Inc. v. K mart Corp.*, 754 F.2d 71, 75 (2d Cir. 1985).

83 Naomi Straus, Trade Dress Protection for Cuisine: Monetizing Creativity in a Low-IP Industry, 60 UCLA L. REV. 182, 196–97 (2012).

84 *RDF Media*, 372 F. Supp. 2d at 562 n.2 (citing *Score, Inc. v. Cap Cities/ABC Inc.*, 724 F. Supp. 194, 197 (S.D.N.Y. 1989)).

85 *Id.* at 562–63.

86 *Id.* at 563.

87 *Id.* (citing J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 6:5 (4th ed. 2004)).

88 *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252 (9th Cir. 2001).

89 *Id.* at 1259.

halls rather than the totality of what they provided to customers.⁹⁰ Moreover, if the plaintiff in the billiards case had been denied a trade dress claim, it would have had no remedy, since copyright would not have protected the relevant elements. RDF, however, already had a remedy since “the ‘composite tapestry of visual effects’ is the program, that is, the product itself, which is protectable, if at all, under copyright law.”⁹¹ Although the court did not say this, a reasonable Lanham Act argument could be made that trade dress doctrine might support a claim involving an iconic set on which a reality program was filmed, since that could indeed function as an indicator of source (that is, function as a trademark) for the audience. However, it seems a clear overreach, as the court concluded, for a plaintiff to claim that the entirety of the program acts as an indicator of source.

Any reality TV claim couched in terms of trademark that occurs at the intersection with copyright law must, in any event, overcome the Supreme Court’s decision in *Dastar v. Twentieth Century Fox Film*,⁹² an important precedent distinguishing the domain of copyright from that of trademark. In *Dastar*, the Court rejected Lanham Act claims in the case of a defendant who marketed as its own footage from a television series that had fallen into the public domain.⁹³ The defendant did not indicate the original source of the material, now uncopyrighted, and drew claims for “reverse passing off” under the Lanham Act since the original creators of the underlying work had not been credited.⁹⁴ The court rejected the application of the Lanham Act to these facts:

[T]he phrase “origin of goods” in the Lanham Act . . . refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods. To hold otherwise would be akin to finding that [the Lanham Act] created a species of perpetual patent and copyright, which Congress may not do.⁹⁵

The implication of *Dastar* is that owners of creative works—even those still under copyright—cannot use trademark doctrine to protect the *content* of various expressive works. As one court summarized, “the clear import of *Dastar* is that any protection for the misappropriation of [e.g., a television show’s] content comes from the Copyright Act, not from the Lanham Act.”⁹⁶ Thus *Dastar* seems to erect a formidable barrier against trademark claims masquerading as copyright claims in the reality TV context.

90 *RDF Media*, 372 F. Supp. 2d at 565.

91 *Id.*

92 *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

93 *Id.* at 38.

94 *Id.* at 27.

95 *Id.* at 37.

96 *A Slice of Pie Prods., LLC v. Wayans Bros. Entm’t*, 392 F. Supp. 2d 297, 313 (D. Conn. 2005).

More quotidian uses of trademark law in reality contexts have tended to fail as well. For example, the band Survivor, of “Eye of the Tiger” fame, could not prove a likelihood of confusion against the reality show *Survivor* in the sale of CDs and merchandise.⁹⁷ In *Sullivan*, the Seventh Circuit conducted a lengthy analysis of a multifactor likelihood of confusion test and determined that the band had not met its evidentiary burden to demonstrate likely confusion. Among the factors examined, the court found that CBS had devoted considerable effort to distinguishing its brand from that of the band. For example, on all of the CBS merchandise, the mark “Survivor” was accompanied by “an oval background containing a drawing relevant to the season’s location, and the words, ‘Outplay, Outlast, Outwit.’”⁹⁸ On the CDs, CBS had included language linking the music thereon to “the Hit CBS TV Series.”⁹⁹ As the Seventh Circuit put it, “CBS has taken extra steps to assure that their products are readily differentiated,”¹⁰⁰ thus reducing the possibility of confusion among consumers. Moreover, the merchandise was not sold or advertised through similar outlets, and CBS offered a survey that showed no actual confusion between the two marks.¹⁰¹ Given the complete analysis, the court ruled that CBS’s mark did not infringe the band’s mark.

Although the reported case law is sparse in this area, it appears that trademark doctrine will not serve as a particularly fruitful avenue for reality TV plaintiffs. While they certainly may be able to protect program names and logos against direct competitors, within the sort of limits suggested by *Sullivan* concerning likely confusion, more ambitious use of trademark law does not appear promising. Thus far, there appear to have been few attempts to deploy the trademark dilution cause of action, which can have a broader reach than a classic infringement or trade dress claim, but dilution is also subject to the limitations of *Dastar*, which means its use will be barred when attempting to protect content in any significant way.

CONCLUSION

As this Article has suggested, intellectual property law has thus far offered limited aid to reality TV creators in their quest to protect their works. In trademark law, the few reported cases suggest that the Lanham Act will not offer tools of robust power to fend off appropriations, short of perhaps very close borrowing of a program’s name, slogan, or other indicia of source.

97 *Sullivan v. CBS Corp.*, 385 F.3d 772, 777–79 (7th Cir. 2004); Stefan Bechtold, *The Fashion of TV Show Formats*, 2013 MICH. ST. L. REV. 451, 466 (2014). See also *Survivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625 (9th Cir. 2005).

98 *Sullivan v. CBS*, 385 F.3d at 777.

99 *Id.* at 778.

100 *Id.*

101 *Id.* at 779.

In the domain of copyright, the idea/expression dichotomy and *scenes a faire* doctrine continue to function as effective bars to most attempts to protect reality show format or content. While the earliest reported cases led to consistent early dismissals on these grounds, a few more recent cases—in particular, *Dillon* and *Parker*—suggest a route to protection through the use of a *Metcalf*-style “compilation” of unprotectable ideas that achieves at least thin protection. The influence of these two cases must of course be placed into context: They are trial court decisions with little precedential force. Moreover, while successfully fending off an early dismissal can be the point at which settlement talks turn serious, these cases are not total victories by any means. Thus, while their perceived influence must be carefully circumscribed, the reasoning underlying these cases nonetheless provides some measure of hope that copyright protection may be available for reality TV plaintiffs. This is particularly true in cases that involve high levels of appropriation rather than random similarities. The overall picture is thus predominantly negative, although with some modest hope for protection in the right circumstances.