The Reality of Reality Television: 
Understanding the Unique Nature of 
the Reality Genre in Copyright 
Infringement Cases

I. A BRIEF BACKGROUND ON COPYRIGHT INFRINGEMENT .......... 180
   A. Protecting a Compilation of Ideas................................. 181
   B. Substantial Similarity and the Tests for Infringement .... 184

II. RECENT CASES INVOLVING REALITY SHOWS AND 
    INFRINGEMENT ...................................................................... 186

III. THE PROBLEM: THE UNIQUENESS OF THE REALITY GENRE ...... 193
   A. The Differences in Expression Between Reality and 
      Scripted Script .................................................................. 193
      1. Plot ............................................................................. 193
      2. Theme ........................................................................... 196
      3. Dialogue ......................................................................... 197
      4. Sequence ......................................................................... 198
   B. The Failure of the Tests to Protect the Uniqueness of 
      Reality Shows ..................................................................... 199

IV. RESHAPING OUR UNDERSTANDING OF THE REALITY GENRE..... 201
   A. Isolating Elements which can be Controlled ................. 202
   B. Reality Show as a Compilation of Ideas and Expressions. 203
   C. Analyzing the Unique Fingerprint Under the Tests for 
      Substantial Similarity ....................................................... 205

V. CONCLUSION ............................................................................... 206

   In a classic episode of “The Simpsons,” the family finds itself in 
   yet another peculiar situation.1 After its house becomes infested by no- 
   wood-nick termites, the family is forced to find another place to stay 
   temporarily while the house is debugged. They first attempt to move 
   in with friends, but to no avail. As a last resort, they agree to

---

1. The Simpsons: Helter Shelter (FOX television broadcast Dec. 1, 2002). The 
description of this episode is based entirely upon multiple viewings because it has not yet 
been released on DVD. The quotes are as accurate as possible.
participate in a new reality television show: “1895 House.” The show places the Simpson family in a historic house from the year 1895. They must live as a family would from that period in history; absolutely no modern conveniences. At first, the Simpson family has trouble adapting to the restrictive lifestyle of the late 19th century. This of course leads to great ratings for the network that created the show. But eventually the family adapted to its new surroundings. Life became enjoyable for the Simpsons as they relished the simplicity of their new life.

But the Simpsons’ happiness does not lead to ratings in the world of reality television. A room full of network executives huddled around a table looking for a solution to boost the flailing show. “Okay everyone,” lamented the head of the network, “this is going to require some original thinking. Everyone, take out your TVs.” Simultaneously, every executive in the room took out a portable TV and began flipping through the channels trying to find an “original idea.” “Quick, turn to channel 78!” exclaimed one of the young executives. The group all tuned in to see what “original idea” would add a new spark to “1895 House.”

The joke, of course, was the widespread perception that television networks have no original ideas but rather blatantly copy the successes of rival networks. This joke had particular poignancy because the “network” in this episode looked conspicuously like the Fox Network. For years, Fox had been thought of as a cheap imitation of the “Big Three” networks. Its shows were knock-offs of what the other networks had to offer. But little did the writers of this episode of “The Simpsons” know that their jab at Fox would become reality in only a couple of years.

One need not be a reality TV junkie to notice the seemingly endless copycat shows among networks as they compete to be the first to broadcast the latest reality concept in a vain hope to create some sort of brand loyalty to their show before another network broadcasts its own take on the concept. What other explanation is there for the overnight appearance of such conceptually similar shows as “Nanny 9-1-1” and “Supernanny,” or “The Apprentice” and “The Rebel

2. Id.
3. Id.
4. Id.
5. Id.
6. The “Big Three” networks are ABC, CBS, and NBC.
7. See Gene Edward Veith, TV Review: Nanny 911 and Supernanny, WORLD MAG., Jan. 22, 2005, available at LEXIS, WLDMAG File (“Nanny 911 and Supernanny feature ordinary parents at the end of their ropes. The nannies drop in for just a week. They work
Networks have come to realize that in the competitive world of reality television, there is only room enough for one successful show based on each concept. The only hope of creating a profitable franchise from a reality show is to be the first to air a new concept and hopefully create a fan base. A reality show which accomplishes this is practically guaranteed a long life in prime-time television.

But this push to be the first has a dark side. Networks will do anything to be first—including blatantly copying another network’s idea. Yet the creators of a reality show are left with no legal recourse for such infringement. The creators of reality shows have repeatedly tried to get some measure of protection for their shows, but so far their efforts have proven futile. Surely there must be some security the legal system can offer to the innovators of a new concept to protect their creation from being endlessly copied such that it loses the value it once possessed.

You are probably saying to yourself: “television is full of shows which are all based on the same concept.” For example, just think of the number of situational family comedies that are on TV. Networks are able to take the same concept and create decidedly different and equally successful shows. This type of copying goes far beyond simply building off a base concept. An analogy will provide clarification. Shows based on the concept of a situational family comedy are like currency from different nations. The currency from the United States looks and feels different from the currency of Romania. While they are both money and useful as a store of value and for exchange for goods, there is enough difference between the two currencies that a person is easily able to tell the difference between them. Also, currency from the United States has a different value than does that of currency from Romania. Such is the case with situational family comedies. While they are all based on the same concept, each show has a very different look and feel. Furthermore, some shows are decidedly more valuable than others.

with the kids, but they also work with the adults, teaching them parenting skills. . . . The shows open with whining, screaming, disobedient kids running wild. The parents are either too indulgent or too angry, often exhibiting the same lack of self-control as their kids. Then a nanny comes in, imposes rules and discipline, and teaches the parents how to exercise a loving authority over their children.

8. See Bill Carter, The Ratings Teach Some New Rules, N.Y. TIMES, Dec. 26, 2004, § 2, at 34 (“After five years of dominating prime time, reality programming -- particularly rip-off reality shows that were more than slightly like others already on -- generated mostly flopping noises this fall. Best example: ABC's 'The Benefactor' and Fox's 'Rebel Billionaire,' two shows remarkably like NBC's 'The Apprentice,' suffered near instant rejection.”).

9. See infra notes 64-94 and accompanying text.
But the copying among reality shows is like counterfeiting currency. A single valuable bill is copied tens and even hundreds of times. This process has the effect of decreasing the value of the original bill to a point where the original bill becomes practically worthless. Such is the case with a reality show whose core concept has been copied. The value a reality show might have had due to its innovative concept is reduced by a slew of conceptually similar reality shows. Just like a single authentic twenty dollar bill in a stack of counterfeit twenties is worth less due to the undermining effect of the counterfeits, so an original concept for a reality show loses its worth when placed in a television landscape of copycats.

Because copyright law is meant to protect creativity, there must be a means by which the U.S. government can offer some guarantee to the creators of a reality show that their creative output will be guarded against copying which diminishes the show’s value. Therefore, this note seeks to answer the question: “what can we do to provide a reasonable level of protection against infringement to the creators of a new concept for a reality show?” Part I of this note provides a brief overview of the law regarding copyright infringement with particular emphasis on the unique protection afforded a compilation of ideas. Also discussed is the concept of substantial similarity and the test used to determine copyright infringement. Part II focuses on recent cases involving copyright infringement and reality shows and how the substantial similarity test has been applied to the genre. Part III explains why the unique nature of reality shows causes the courts to apply the substantial similarity test improperly. Part IV sets forth a process by which the unique fingerprint of a reality show—in essence a compilation of ideas and expressions—is identified and applied to the tests for substantial similarity.

I. A BRIEF BACKGROUND ON COPYRIGHT INFRINGEMENT

The Supreme Court has ruled that “[t]o establish [copyright] infringement, two elements must be proved: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are

11. See id. at 548.
original.”13 While the first element is generally easy to show, the second element has been the bane of many judges as they have struggled to set forth a test to determine if one television show copies another. The “constituent elements” are those things which are original to the creator14 of the show; things that would not exist unless the creator’s own innovation had brought them into existence.15 The Copyright Act describes these things as the expressions of an idea.16 It is not the idea behind a show that is protected; rather, it is the expression of the idea.17

For example, the idea of a story about two young lovers who remain together despite the rivalry between their families is not protected and can be copied indefinitely.18 But Shakespeare’s expression of that idea in “Romeo and Juliet” is protected.19 The expression of the idea is composed of elements such as the setting (Verona), the characters and their individual traits, the dialogue, etc.20 Similarly, the idea of a reality television show about a competition amongst a group of people for a cash prize could not be protected. But the expression of that idea in a reality show like “Survivor” can be protected. The expressive elements for Survivor include the premise (contestants cast away in a remote location), the competitive elements (immunity challenges, the tribal council), and the twist (merging the tribes, the return of contestants who have been kicked off).

A. Protecting a Compilation of Ideas

Although ideas themselves cannot be protected by a copyright, a compilation of ideas can. In Feist Publications v. Rural Telephone Service Co., Rural Telephone Company (Rural) alleged Feist had infringed upon Rural’s telephone directory by copying the numbers from Rural’s directory and placing them in Feist’s directory.21 The

14. This Note refers to the “creator” of a show as a generic term (rather than specifying producer, director, or writer) to refer to all those who directly influence the creation, development, and promulgation of the show.
15. Feist, 499 U.S. at 361.
18. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A][1][b] (Matthew Bender & Co. ed., 2004).
19. Id. (assuming that Shakespeare’s works were not part of the public domain and thus not protected).
20. Id.
21. 499 U.S. at 342-44.
Court first acknowledged that while facts themselves cannot be protected, a factual compilation can be protected. Two factual compilations are eligible for copyright if they feature an original selection or arrangement of facts, but the copyright is limited to the particular selection or arrangement.

Furthermore, the factual compilation can only be protected if the "selection, coordination, and arrangement are sufficiently original." Thus, if Rural’s directory was an original arrangement of the names, numbers, and addresses of the residents, then it was protected. The Court determined that Rural’s directory was not sufficiently original because there was no creativity involved in the manner which Rural presented the information. Although Feist had obviously copied facts from Rural’s directory, Rural’s directory was not protected and thus Feist’s copying was permitted.

If an original compilation of facts can be protected, then an original compilation of ideas must also be worthy of protection. This extension of the ruling in Feist led to Sheehan v. MTV Networks. The plaintiffs created a game show called “Lazer Blitz,” where a player shoots a laser gun at a screen and answers questions about music videos. A few months after the plaintiffs presented the show to MTV, the plaintiffs were informed that MTV was developing its own game.
show called “Remote Control.” Remote Control used similar plot devices but used a remote control in lieu of the laser and the questions were generally about television shows. The plaintiffs subsequently sued MTV for copyright infringement. The plaintiffs realized that certain game show concepts and ideas (known as “stock devices”) could not be protected. Instead, the plaintiffs argued that the unique structure, sequence, and organization of their show as well as their arrangement of the game show concepts could be protected. The court agreed that because the plaintiffs’ use of the stock devices was unique, it could be protected. Nonetheless, MTV had not infringed upon the plaintiffs’ show. Although “Lazer Blitz” and “Remote Control” both employed certain stock devices, the essential elements of the two shows were not substantially similar. In other words, because there were sufficient differences between certain expressive elements of the shows (laser gun vs. remote control), the common use and arrangement of stock devices between the shows was not enough to support a finding of infringement.

These cases show the judiciary’s willingness to apply a more lenient standard to works which are composed primarily of concepts and ideas rather than the expression of those ideas. Though the court is willing to give protection to those works, it is hesitant to find infringement when another work copies those concepts and ideas. The integral factor is the manner in which the ideas are arranged. Only a substantially similar copy of the arrangement of the ideas will constitute infringement.

29. Id. at *3.
30. Id. at *3-5.
31. Id. at *6.
32. Id. at *7.
33. Id. at *9-10.
34. Id. at *11.
35. Id.
B. Substantial Similarity and the Tests for Infringement

The term “substantial similarity” has come to define the fuzzy line between permissible and impermissible copying of expression. While most courts have agreed that a television show that is substantially similar to another show violates the Copyright Act, they have been widely divergent on the methodology for determining substantial similarity. As Judge Learned Hand noted, “[o]bviously, no principle can be stated as to when an imitator has gone beyond copying the ‘idea,’ and has borrowed its ‘expression.’ Decisions must therefore inevitably be ad hoc.” Nonetheless, four tests have emerged as the most popular methods for delineating between permissible and impermissible copying: abstraction; pattern; dissection; and total concept and feel.

The abstraction test states that the television show should be broken apart into increasingly general levels of abstraction. Applied to the show “Survivor,” on one end of the spectrum is the complete expression of the show including all of the expressive elements, on the other is the general idea of contestants competing for money. An abstraction in the middle of the spectrum might be a theoretical show about contestants divided into teams who must compete in challenges for money. While the theoretical show bears a resemblance to “Survivor” (divided into teams, competitive elements), it probably does not infringe upon “Survivor” because it lacks other elements specific to “Survivor” (remote location, tribal council) and is thus more generalized. The problem still remains of determining the point in the spectrum where a show would be substantially similar to “Survivor.”

36. NIMMER, supra note 18, § 13.03[A].
39. Mohler, supra note 37, at 980-81. This Note’s review of substantial similarity only skims the surface of its history. Mohler’s article as well as NIMMER, supra note 18, § 13.03[A][1], provides a more in-depth analysis of the history of the various substantial similarity tests.
40. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).
41. Survivor (CBS); see also CBS.com, Survivor, http://www.cbs.com/primetime/survivor/ (last visited Nov. 16, 2005). The show “Survivor” is used to illustrate how each of the tests would be applied. “Survivor” was chosen because of its general familiarity among most people and also because “Survivor” was involved in two disputes over copyright infringement. See infra notes 64-94 and accompanying text.
42. See NIMMER, supra note 18, at § 13.03[A][1][a].
The pattern test seeks to divide the show into a list of expressive elements. From those elements, a pattern is discerned. Any show where this pattern is too similar to another will have infringed upon the expression of the original show. Each season of “Survivor” follows a particular pattern. Two tribes, isolated in an exotic locale, compete against each other for the first half of the season. The tribes then merge and the individual contestants compete against each other to determine the winner. Furthermore, each episode follows a pattern. There is a competition for a luxury item. Then there is a competition for immunity followed by discussion of who to vote off. Finally, the contestants vote someone off the show. Any show which follows this pattern too closely will be determined to be substantially similar. The drawback of the pattern test is that its applicability is limited to works which contain a plot-like sequence of events.

The dissection test seeks to separate the protected from the unprotected elements, the expression from the idea. There can only be infringement where the protected elements have been copied. In “Survivor,” protected elements might include contestants having their torches extinguished when they are voted off, and competing for items that will make “survival” on the island easier. Unprotected elements would include placing contestants in a remote location, having contestants vote off one person each week, and awarding protection against being voted off. The drawback to the dissection test is that almost anything can be dissected to an unprotected element thus leaving a television show with no protection whatsoever.

The total concept and feel test does not seek to distinguish between protected and unprotected elements. Rather, it looks at both

43. See id. at §13.03[A][1][b].
44. See id.
45. See id.
46. See generally CBS.com, supra note 41.
47. See generally id.
48. See generally id.
49. See generally id.
50. See generally id.
51. See NIMMER, supra note 18, at § 13.03[A][1][b].
52. See id.
53. See id.
54. Mohler, supra note 37, at 987.
55. Id. at 988.
56. Id. at 988.
57. NIMMER, supra note 18, at §13.03[A][1][c].
the underlying idea and the manner in which that idea is expressed to determine if one show is substantially similar to another.\textsuperscript{58} The test provides room for a judge to consider his or her gut reaction as to whether infringement has occurred.\textsuperscript{59} A court examining “Survivor” would consider the interplay between the concept of a show about contestants competing for money and the expression of that idea via the tribal theme of the show and other expressive elements. A show which has a similar interplay between ideas and expression would be substantially similar. The test’s greatest weakness is its arbitrary nature.\textsuperscript{60} Different judges will interpret “feel” in light of their own reaction to the show.\textsuperscript{61} It lacks the objectivity the other tests provide.\textsuperscript{62} Furthermore, the test blurs the bright line created in the Copyright Act between ideas and expressions.\textsuperscript{63} The total concept and feel test would offer some protection to ideas in contravention to the purpose of the Act.

None of these tests have come to dominate substantial similarity jurisprudence. Each test has its strengths and weaknesses and some are more applicable to certain types of works than they are to others. As a result, most courts mix and match the tests based on the facts of each case. The pattern test might be more suitable to complex works while the total concept and feel test works well with simpler works. Nonetheless, the four tests provide the basis by which most copyright infringement cases are analyzed.

II. RECENT CASES INVOLVING REALITY SHOWS AND INFRINGEMENT

Since reality television is in its infancy in America, there has not been much discussion within academia concerning the application of substantial similarity to the genre. Surprisingly, however, there have been a number of lawsuits filed on infringement grounds. This is due to the uniqueness of reality television in comparison to other television genres. CBS’s “Survivor” has been at the forefront of two of the major cases. The show’s popularity, as well as its role in birthing the rise of the reality genre in America, has led to many shows seeking to copy its success.

In \textit{Survivor Productions LLC v. Fox Broadcasting Co. (Survivor 1)}, CBS claimed that Fox’s reality show “Boot Camp” infringed upon
CBS's copyrighted material in “Survivor.” The show “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.

CBS claimed that “Boot Camp” was substantially similar because it “places its contestants in harsh and unfamiliar conditions, requires them to work together in teams, and then forces them to vote off one contestant at the end of each episode in a ritualized ceremony.” “Boot Camp” also contained “additional similarities in landscape photography, music, editing techniques, and overall ‘look and feel’ of the program” as those used in “Survivor.”

Part of Fox’s argument centered on disputes over whether or not “Survivor” is actually part of the reality genre. It relied on a faulty assumption that if the shows were in two different genres, there could not be substantial similarity. The court was quick to point out that infringement focuses on the expressive elements of a show and not its genre. Although CBS and Fox later agreed to dismiss the case in an undisclosed agreement, the judge noted that the total concept and feel test was the appropriate method for determining substantial similarity.

---

64. Survivor Prods. LLC v. Fox Broad. Co., CV 01-3234 LGB, 2001 U.S. Dist. LEXIS 25512 (Cent. D. Cal. June 11, 2001) (granting defendant's motion to strike portions of CBS's complaint). On that same day, the court had also granted a motion by CBS to strike portions of Fox's answer. Survivor Prods. LLC v. Fox Broad. Co., CV 01-3234 LGB, 2001 U.S. Dist. LEXIS 25511 (Cent. D. Cal. June 11, 2001). Any references to “Survivor 1” are meant to encompass both of these rulings.


66. Id. at *3 (citations omitted).

67. Id. (citations omitted).

68. Survivor, 2001 U.S. Dist. LEXIS 25511, at *19. Fox claimed that allegations by a former contestant of Survivor that parts of the show were rigged removed Survivor from the reality genre. Id. at *18.

69. Id.

70. Id.


A few years later, CBS was in court again after the debut of ABC's “I'm a Celebrity, Get Me Out of Here” (Celebrity). In *CBS Broadcasting Inc., v. ABC, Inc.* (Survivor 2), CBS claimed that the similarities between “Survivor” and “Celebrity” were sufficient to warrant a preliminary injunction. Judge Loretta Preska disagreed and declined to grant the injunction.

Judge Preska began her opinion by providing an in-depth analysis of copyright infringement. Much of this analysis focused on whether the dissection test or the total concept and feel test governed the case. She ultimately decided in favor of the total concept and feel test because “in considering substantial similarity[,] it is crucial to consider each program series as a whole.” Applying the test, Judge Preska ruled the two shows to be “substantially different in concept and feel.” Important factors in her analysis included the tone and the production values of each show: “Survivor’s” tone was serious; “Celebrity’s” tone was comedic. “Survivor’s” production value was very professional, “like National Geographic;” “Celebrity’s” production value was “closer to the home video look.” The added element of audience participation in “Celebrity” also evidenced differences in concept and feel.

Nonetheless, Judge Preska couldn’t resist incorporating some elements of the dissection test into her analysis. “It is, only when the similarities between protected elements of plaintiff’s work and the allegedly infringing work are of ‘small import qualitatively or quantitatively’ that the defendant would be found innocent of infringement.” She broke the two shows down into their protected expressive elements and performed a comparison to prove there was no substantial similarity.

---

74. *See generally id.* (requiring CBS to show indirect evidence of substantially similarity to infer unlawful copying).
75. *See id.* at *46.
76. *See id.* at *2-11.
77. *See id.* at *13-19.
78. *Id.* at *19.
79. *Id.* at *30.
80. *Id.* at *26-27.
81. *Id.* at *29.
82. *Id.* at *29-30.
83. *Id.* at *25 (emphasis added) (quoting Williams v. Crichton, 84 F.3d 581, 588 (2d Cir. 1996) (citing Rogers v. Koons, 960 F.2d 301, 308 (2d Cir. 1992)) and Nimmer, *supra* note 18, § 13.03 [B][1][a]).
84. *Id.* at *30-39.
<table>
<thead>
<tr>
<th><strong>Expressive Element</strong></th>
<th><strong>Survivor</strong></th>
<th><strong>Celebrity</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Setting</td>
<td>Filmed in the dry Outback of Australia.</td>
<td>Filmed in the rain forest of Australia.</td>
</tr>
<tr>
<td>Host</td>
<td>One host (Jeff Propst). Very serious nature. Only appears twice in the show (for the challenge and the vote). Plays role of judge of the competitions and interviewer during the vote.</td>
<td>Two hosts (Ann and Deck). Very humorous. Appear frequently during the show primarily for comedic relief.</td>
</tr>
<tr>
<td>Characters</td>
<td>Regular folk.</td>
<td>Celebrities.</td>
</tr>
<tr>
<td>Teams</td>
<td>Contestants divided into competing teams for first half. Teams then merge and it is every man for himself.</td>
<td>No teams.</td>
</tr>
<tr>
<td>Prize</td>
<td>$1 million to last person left.</td>
<td>Donation to the winning celebrity’s charity of choice.</td>
</tr>
<tr>
<td>Competition Participation</td>
<td>Participation is required.</td>
<td>Participation is voluntary.</td>
</tr>
<tr>
<td>Difficulty of the Competitions</td>
<td>Competitions are physically demanding.</td>
<td>Competitions are less physically demanding.</td>
</tr>
<tr>
<td>Food Provisions</td>
<td>Contestants must not be given food. They must fend for themselves. Any food that is provided is limited in quantity.</td>
<td>Food is provided as desired. Contestants only compete for higher quality food.</td>
</tr>
<tr>
<td>Voting Procedure</td>
<td>Contestants vote one contestant off at the end of each episode. The voting ceremony is a serious ritual.</td>
<td>Contestants voted off by the audience. It is a light-hearted, comedic event.</td>
</tr>
<tr>
<td>Music</td>
<td>“[D]eep, chanting, tribal music.”&lt;sup&gt;85&lt;/sup&gt;</td>
<td>Not deep, not chanting, not tribal. “Upbeat and kicky.”&lt;sup&gt;86&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

---

<sup>85</sup> *Id.* at *38.*

<sup>86</sup> *Id.*
Expressive Element | Survivor | Celebrity
--- | --- | ---
Wildlife Shots | Shots focus on deadly, dangerous nature of animals. | Shots focus on “the pretty or comic features of the wildlife.”
Landscape Shots | Shots are beautiful and lush and of high quality. They often employ speedframe photography. | Shots are of plain landscape with low quality in the shots.

Judge Preska also compared two clips taken from each show. Both clips involved a worm eating competition. She dissected the clips into elements such as the color of the worms, the tableware used, and the tone. Despite similarities between the two scenes, Judge Preska determined that “that context and tone of the two worm eating scenes are entirely different.”

Based upon this analysis, Judge Preska ruled that CBS “is not likely to prove that a lay observer would consider the works as substantially similar to one another.” Judge Preska did acknowledge that a compilation of stock ideas can be protected. Nonetheless, that protection was not sufficient to warrant a preliminary injunction against “Celebrity.”

While most readers will probably agree that Survivor 1 and Survivor 2 were not strong cases for a finding of copyright infringement, two recent network disputes present much more difficult scenarios. These cases provided the inspiration for this note and are the problem this note seeks to remedy.

In the fall of 2004, ABC debuted “Wife Swap,” a reality show in which the wives in two families trade families for two weeks. ABC

87. Id.
88. See id. at *40-42.
89. See id.
90. Id.
91. Id. at *42.
92. Id.
93. Id. (“[C]opyright protection in a factual compilation is thin, and by analogy, [] copyright protection in a compilation of ideas must also be thin.”).
94. Id. at *43, 45 (concluding that CBS is not likely to succeed on the element of proving substantial similarity or irreparable harm and hardship).

In the first week of the swap, the wives move in with their new family and adopt their very different lifestyle. They agree to follow a manual written by the
bought the show from RDF Media, a British production company that created the show for television in England.\textsuperscript{96} Fox had also bid for the rights to “Wife Swap.”\textsuperscript{97} Soon after the failed bid, Fox announced a new show entitled “Trading Spouses: Meet Your New Mommy” (“Trading Spouses”).\textsuperscript{98} Fox decided to release “Trading Spouses” in the summer of 2004 to preempt “Wife Swap.”\textsuperscript{99}

The producers of “Wife Swap” immediately cried foul.\textsuperscript{100} Both programs involve the switching of wives from opposite ends of the social spectrum.\textsuperscript{101} Furthermore, the rules are identical.\textsuperscript{102} For the first week, the “traded wife” must abide by the rules set forth by the household she joins.\textsuperscript{103} In the second week, the traded wife sets the rules for the household.\textsuperscript{104} The only difference is that “Trading Spouses” offers a $50,000 cash prize to both families in the end.\textsuperscript{105} In late 2004, RDF filed suit against Fox for infringement.\textsuperscript{106} “Trading Spouses” was decried as a “blatant and wholesale copycat” of “Wife Swap.”\textsuperscript{107} ABC initially declined to bring infringement claims against Fox.\textsuperscript{108} The network believed that the superior production values of “Wife Swap” will cause it to triumph over Fox’s copy.\textsuperscript{109}

Things are not so civil between NBC and Fox. Once again, Fox was

---

departing wife that sets out the rules of their new household – how they parent, shop, do the house work, manage their budgets and their social life. But then, in the second week, everything changes. The new wives take charge. They introduce their own set of rules and get to run the new household their way. It’s a radical shock to both families. The results are explosive, enlightening and often very funny. This is a show about the things that really matter to families across America.

At the end of the show, the two couples meet for the first time. In a highly-charged exchange of views, both couples make a frank assessment of each other and talk about what they’ve learned from the experience.

\textit{Id.}


\textsuperscript{97} \textit{Id.}
\textsuperscript{98} \textit{Id.}
\textsuperscript{99} \textit{Id.}
\textsuperscript{100} \textit{See id.}
\textsuperscript{101} \textit{Id.}
\textsuperscript{102} \textit{Id.}
\textsuperscript{103} \textit{Id.}
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.}

\textsuperscript{107} \textit{Id.}
\textsuperscript{108} Carter, \textit{supra} note 96.
\textsuperscript{109} \textit{Id.}
outbid by NBC for the rights to “The Contender,” a reality show focused on a boxing competition. The Contender follows sixteen young competitors placed under the tutelage of Sylvester Stallone and Sugar Ray Leonard. The boxers will compete in weekly elimination matches until only one contestant is left. Soon after losing to NBC, Fox picked up a similar show entitled “The Next Great Champ.” The show follows twelve young competitors under the tutelage of Oscar De La Hoya. The boxers will also be eliminated via weekly matches. Again, the significant difference is the prize. “The Contender” winner will receive $1 million; “The Next Great Champ” will receive a boxing contract with De La Hoya’s promotion company.

Contender Partners (the production company producing The Contender) brought suit seeking a preliminary injunction against Fox to stop “The Next Great Champ” from being aired. Perhaps realizing that a claim of copyright infringement would be futile in light of the record of failure of such claims, the plaintiffs alleged that Fox violated California boxing regulations in its effort to beat NBC in airing the show. Fox rebutted that NBC was merely attempting to stifle competition for viewers.

On August 27, 2004, a judge for the California Superior Court of Los Angeles County denied the preliminary injunction. “The Next Great Champ” aired, but was quickly dropped by Fox and switched to Fox Sports Net because of low ratings. “The Contender” aired beginning in March of 2005.

112. Id.
113. Horiuchi, supra note 110.
115. Id.
116. Id.
117. Id.
118. Id.
119. Id.
120. Id.
121. Id.
122. Id.
123. The Contender, supra note 111.
III. THE PROBLEM: THE UNIQUENESS OF THE REALITY GENRE

Reading Judge Preska’s opinion, it is easy to see why there has been so little litigation between networks over copyright infringement. Despite countless newspaper and magazine articles decrying the latest reality show as a blatant rip-off of something already on the air, networks 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. The easiest solution to this problem would be to claim that the various tests for substantial similarity are bunk and that they do not provide the proper analysis in light of the unique nature of reality television shows. The problem, however, is not with the test. Rather, the problem lies with a failure to realize that the framework of a reality show does not directly correspond to the framework of a scripted show. When identifying the protected expressive elements of a scripted show, we look to “plot, theme, dialogue, mood, setting, pace and sequence.” But a reality show does not employ these same elements, nor do these elements take the same form in a reality show as they do in a scripted show. Applying the substantial similarity test to reality shows in the same way it is applied to scripted shows leaves the true expressive elements of a reality show unprotected.

A. The Differences in Expression Between Reality and Scripted Script

Before we can determine how to properly apply the substantial similarity test to reality television shows, it is first necessary to understand how the expressive elements are used in a reality show as compared to how a scripted show uses them. An in-depth look reveals the true extent of the differences between the two.

1. Plot

Plot is best defined as “the series of events providing conflict within a story.” Every reality show is in essence about conflict. A real person (not an actor) is placed in a situation where he or she is exposed to conflict. The plot of a reality show is thus composed of the

---


125. Litchfield v. Spielberg, 736 F.2d 1352, 1356 (9th Cir. 1984) (citing Jason v. Fonda, 698 F.2d 966 (9th Cir. 1982)).

series of conflict creating devices weaved together by the creator to provide the maximum level of entertainment. There are two categories of devices that reality show creators use to create the conflict: character conflicts and situational conflicts. Most reality shows employ a combination of both types of conflict.

Character conflicts are those created as a result of the interactions of persons with incompatible character traits. 127 An ideal example of this is MTV’s “Real World.” Each season, the creators cast participants who are most likely to result in conflict as a result of differences in their character traits. 128 It is the conflict between the characters that has become the show’s main draw: the intolerant Southerner versus the out-spoken homosexual; the bimbo party-girl versus the artsy social outcast. Through these conflicts, the true character of the participant is revealed much to the delight of the viewing audience. Through these conflicts, the audience can relate to the characters and ideally empathize with them.

Situational conflicts result from the interaction between the person and the circumstances into which he is placed. 129 One popular archetype is placing a person into an unfamiliar and perhaps even hostile environment. “Survivor” employs this technique by dropping the contestants into the middle of a desert, 130 a tropical island, 131 or some other remote location. Because the contestants are not given food, shelter, or other basic necessities, they are placed into conflict with Mother Nature as they attempt to “survive” the dangers they face. “Wife Swap” also uses this conflict device by placing the female spouse into a household with different norms than those in which she lives. 132 The conflict between her habits and the new family’s habits drives the show.

A second archetype is the conflict created as a result of the competitive environment in which the person is placed. Most reality shows dangle a prize in front of the participants in order to bring out the worst in them. It creates conflict not only between the participant and the other competitors, but also an internal conflict within the

127. This is probably best described as a Man vs. Man conflict. See id.
128. See Kelly McClure, ‘Real World’ for real people?, UNIVERSITY WIRE, Jan. 25, 2002 available at LEXIS, UWIRE File (arguing that individuals are chosen to participate on reality shows based on their likelihood of causing conflict).
129. This is probably best described as a Man vs. Nature conflict. See Tameri Guide for Writers, supra note 126.
132. See Wife Swap, supra note 95.
participant as he struggles to push himself to the limit in order to emerge triumphant. “The Contender” and “The Next Great Champ” take the conflict created by a competitive environment to a new extreme since the participants are competing in boxing matches against each other.\textsuperscript{133} The conflict takes on a physical form rarely seen in any other reality show.

The creator of a reality show is limited in his ability to control the development of conflict via the plot. For example, the creator exerts a substantial amount of control over certain situational conflicts—he determines the rules of the competition, where the competition will take place, and controls other environmental factors. But his control over what conflicts will arise, who they will arise between, and when they will arise is restricted by the unpredictability of human nature.\textsuperscript{134} Although the creator can foster circumstances in which conflict is likely to occur, he can never be sure if it will occur in the manner he so desires. The reality show creator is similar to the general of an army. The general can direct the movement of the troops. He can arm them and determine where they go and what tactics they will use. When the battle begins, however, his planning may prove triumphant or it may prove futile. “The best laid plans of mice and men oft go awry.”\textsuperscript{135}

Contrast the limited control over the plot exerted by the creator of a reality show to the absolute control of the creator of a scripted show. The creator carefully lays out all aspects of the plot in order to generate a perfect level of conflict between his characters. He controls what conflicts the characters will face and how they will respond to the conflict. Whether the character will face character conflict or situation conflict is left to the craft and cleverness of the creator. There is no chance that the characters’ response to the conflict will deviate from his plan. In this regard, the creator truly is the god of the scripted show. Nothing happens apart from his intervention. So in

\textsuperscript{133} See White & Brenner, supra note 114; The Contender, supra note 111.

\textsuperscript{134} Psychologists often play an important part in the selection of the cast for reality shows in an effort to produce combinations of individuals that are most likely to result in conflict. See Benjamin Wallace, Will they fly on TV? THE TORONTO STAR, Nov. 20, 2004, at H18 (discussing the cast selection process for reality shows). But the short history of reality television is plagued by individuals who, though anticipated as would-be creators of conflict, turned out to be arguably mundane. Ultimately, apart from actually observing the interactions between those selected for the cast to determine how the different personalities will clash, it is impossible to accurately predict the conflicts which will arise between participants.

\textsuperscript{135} Robert Burns, To A Mouse, On Turning Her Up In Her Nest With A Plough (1785), available at http://www.robertburns.org/works/75.shtml (translated into modern English); see also THE NEW DICTIONARY OF CULTURAL LITERACY (E.D. Hirsch et al. eds., Houghton Mifflin Co. 3d ed. 2002) (providing a modern English translation).
comparing the use of plot between reality and scripted shows, we are left with a “gods and generals” dichotomy—a sovereign versus a schemer. Yet when looking for substantial similarity, we treat the two as equals—applying the standards of the god to the actions of the general.

2. Theme

Theme is the recurring element of a work that provides unity and flow.\(^1\) In the realm of television, the theme is the purpose of the show—the reason it continues to come on week after week. For example, in the third season of “The Apprentice,” the theme was “Book Smarts vs. Street Smarts.”\(^2\) The season was dedicated to the determination of who is the better business person: someone with an impressive business degree or someone who learned about business from the school of hard knocks.\(^3\) Similarly, the recurring theme on “Survivor” is “Outwit. Outplay. Outlast.”\(^4\) These three words recur throughout the series, and all of the obstacles the contestants face are based upon the contestants’ ability to outperform their competitors.

The theme plays an important role in the ever-changing cast of characters in reality television. A typical season of a reality show is five to ten episodes shorter than a typical season of a scripted show.\(^5\) For most of the shows, the cast of characters is there for the entire season.\(^6\) Each new season brings a new cast. For other shows, the cast of characters changes every week.\(^7\) Regardless of which format the show uses, there is a limit to the extent which the viewing audience can form an attachment to the characters.\(^8\)

---

\(^3\) See id.
\(^6\) See, e.g., The Contender, supra note 111 (describing that the same contestant boxers compete with each other during the season).
\(^7\) See, e.g., Wife Swap, supra note 95 (describing that new families switch members each episode).
\(^8\) This is strongly evidenced by the vast number of villains from reality shows in comparison to the number of “good guys” people remember from the shows. Villains are easier to create. They are typically one-dimensional characters that immediately repulse people. “Good guys” take much longer to develop and can very rarely be accomplished
world of television, creating a character loved by the audience is one of the few ways to guarantee the success of a show. Thus, the theme takes on a heightened importance in the reality show because it creates the continuity needed in a genre where the cast of characters can change from episode to episode.

In contrast, although the theme is important to scripted shows, it is less necessary due to the stronger continuity of the shows. Each week, we know that we are going to see the same characters responding in predictable ways to the situations they face. The theme plays a supporting role as character development takes the forefront.\textsuperscript{144} Because of the creator’s absolute control, he is able to weave the theme throughout the life of the show. It is there and the audience knows about it, but the audience does not have to be constantly reminded about it. The reality show creator is not so fortunate. The theme must be central to the show. Otherwise, the audience will not be willing to watch the next season of the show.

3. Dialogue

Dialogue is the “conversational element” of a television show.\textsuperscript{145} In reality shows, the dialogue is naturally unscripted. It is the spoken response of the characters’ interaction with the plot. It is through the dialogue that the audience understands and relates to the characters. In reality shows, the creators are limited in their ability to control the dialogue. While they can control the situations the characters are placed in, they are unable to control the verbal response to those situations. The creator can only edit that dialogue given to him by the cast of the show. He exerts even less control over the dialogue than he does the plot. He is left to craft an intriguing story based upon the wit and whimsy uttered by over-eager participants in a game of chance.

---

\textsuperscript{144} The Cosby Show is a prime example of this. The theme of the show was ground-breaking: to portray a loveable, middle-class African-American family rather than African-Americans that were sterile reproductions of whites, trapped in criminality, or immersed in abject poverty performing odd jobs for survival. Rather than forcing this idea on an America that was perhaps not ready to accept an all African American cast in primetime television, the creators focused on creating characters who Americans couldn’t help but love. By doing so, they were able to subtly convey their theme and have a dramatic impact on America’s view of race. See Bishetta D. Merrit, \textit{Cosby, Bill}, The Museum of Broadcast Communications, http://www.museum.tv/archives/etv/C/htmlC/cosbybill/cosbybill.htm (last visited Nov. 22, 2005).

He is like the creator of a picture mosaic taking the work of others and arranging it into a coherent and interesting piece of art.

Once again, in the realm of scripted shows, the creator is a god. Dialogue is the primary tool he uses to fulfill his vision of the show. Not one word is uttered which has not been carefully planned out in advance. There is no surplus, nor is there a void. He is the master painter who uses the exact tools and colors he desires in order to create his work of art.

4. Sequence

Sequence is merely the order in which the events of the show occur. Like dialogue, the creator of a reality show is limited in his ability to control the sequence of events in the show. Certain aspects of the sequence, such as the timing of competitions, plot twists, and changes of environment are fully under the control of the creator. For example, on “The Amazing Race,” the creator controls what location the contestants must go to next in order to stay in the race. He also controls the competitions which the contestants must compete in during each episode. But the creator has little or no control over some of the more important aspects of the show. Most critical is the lack of control over character development. Although the creator can create conflict, he cannot control the character’s response to the conflict. The creator cannot control when a character will lose his temper or if/when the character will interact with another character. It is this aspect of the sequence of events that is out of the creator’s control and is basically left to chance. The creator’s ability to craft the sequence of events is limited by the sequence in which the characters actually experience the events.

With scripted shows, the creator determines the exact point at which all of the events happen—when a person leaves or enters the room, when a plot twist occurs, etc. He lays out the order in which the events will occur and controls their timing and occurrence. There is no element of chaos—unless specifically intended—to the sequence of events in the show.

This same pattern of absolute control versus limited control is evident throughout the other elements of a television show—setting,

---

146. By which I mean the art of arranging smaller photographs taken by other individuals into a larger picture of something entirely different; for example, the movie poster for The Truman Show used hundreds of frames from the film to create the picture of Jim Carrey.

pace, and mood. In each case, the creator of a reality show is limited to the facts presented to him by the characters in the show while the scripted show creator has unlimited potential to craft the show as he sees fit.

B. The Failure of the Tests to Protect the Uniqueness of Reality Shows

When courts apply the various tests for substantial similarity to a reality show, no distinction is made between it and a scripted show. This will inevitably result in a near total lack of protection against infringement for the creators of a reality show because similarity is determined by looking at a series of elements over which the creator has no control and will thus always be sufficiently different from another show.

To illustrate this, imagine a show called “Castaway.” It is a near exact copy of “Survivor.” Sixteen people are placed in a remote location and compete for one million dollars. The rules are the same and the cinematographic and visual styles are the same. There are a few slight differences. “Castaway” will be filmed on an island in the Caribbean while “Survivor” is being filmed on an island in the East Indies. Also, where “Survivor” merges the tribes to create conflict, “Castaway” divides the tribes to make conflict. Finally, the theme of the show will be “No man is an island unto himself.”

Applying the substantial similarity tests under the same framework used for scripted shows leaves “Survivor” unprotected against the blatant copying of “Castaway.” This is because most of the expressive elements of “Castaway” will be different from “Survivor” due to the unpredictability of reality television. Naturally, the plot will be different because the conflicts experienced by the cast of each show will be unique to that cast. Although in both shows there are sixteen people trapped together on an island, the interaction of the characters will be vastly different between the shows. Both the character and situational conflicts in the shows will vary depending on the unique interaction of personalities and chance circumstances that occur during filming.


149. This principle is best evidenced by the differences from season to season on Survivor. Each season is completely different from the rest simply because of the interplay of characters on each new season and the filming location. Scott D. Pierce, Boring ‘Survivor’ revives, DESERET MORNING NEWS (Salt Lake City), Dec. 9, 2004, available at LEXIS DESNWS File.
In the same respect, the dialogue and sequence of events will differ between the two shows. The creator of the show is unable to control who makes alliances and when those alliances are made. The order in which people are voted off is also beyond my control. The topics discussed by the cast will be dramatically different between the two shows because no two conversations are the same. Mood and pace are also factors left to chance. Furthermore, because the setting and the theme of “Castaway” are different than those of “Survivor,” those expressive elements are not being copied and thus cannot be infringed upon.

The problem is that many of the similarities between “Castaway” and “Survivor” are merely stock devices employed in nearly every reality show in the genre. Such stock devices include a million dollar prize, dividing contestants into teams, competitions where the contestants are required to use both their mental and physical resources, highlighting the surroundings where the competition is taking place, depriving contestants of certain human needs, etc. Stock devices are typically included under the umbrella of ideas and thus are not protected by copyright law.150

The abstraction test provides no protection for “Survivor.” While the two shows are identical on the general end of the spectrum (the ideas and stock devices underlying the show), they will undoubtedly be very different on the other end of the spectrum because the specific expressive elements of “Castaway” will always be different from those of “Survivor” due to the randomness and unpredictability inherent in a reality show.151

The pattern test also fails because of its strong focus on the pattern of expressive elements.152 The creator of “Castaway,” for instance, would have to know in advance the pattern of the plot and dialogue used in “Survivor” and then instruct the cast of “Castaway” to copy that pattern in order for there to be substantial similarity. This of course would be nearly impossible and would remove the “reality” element of the show. Since only the expressive elements are protected, “Castaway’s” copying of the pattern of stock devices is not

150. CBS Broad., Inc. v. ABC, Inc., No. 02 Civ. 8813 (LAP), 2003 U.S. Dist. LEXIS 20258, at *7 (S.D.N.Y. 2003) (“[C]opyright does not protect facts, generalized themes and ideas, subthemes, stock themes, general imagery, literary formulas, actual, true or historical events, episode or scenes a faire, scenes that necessarily result from the choice of a setting situation.” (quoting Attia v. Soc’y of the New York Hosp., 201 F.3d 50, 54 (2d Cir. 1999); Walker v. Time Life Films, Inc., 784 F.2d 44, 49-50 (2d Cir. 1986); Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 976, 978 (2d Cir. 1980); Reyher v. Children’s Television Workshop, 533 F.2d 87, 91 (2d Cir. 1976))).

151. See supra notes 40-42 and accompanying text.

152. See supra notes 43-53 and accompanying text.
infringement as a result of stock devices not being protectible under copyright law.153

The dissection test is flawed on its face when applied to reality shows. By only giving consideration to the protected elements when looking for similarity, the test is forced to focus only on the unpredictable aspects of reality television.154 Since the protected elements of a show are its plot, dialogue, etc. and because in reality shows these elements are random and are not under the control of the creator, the chances of one show infringing upon another would be highly unlikely.

The total concept and feel test might provide a level of protection to “Survivor” from infringement by “Castaway” due to its limited inclusion of consideration of the ideas underlying the show.155 Not only would the expressive elements of each show be included in the determination of similarity, but also the use of ideas and stock devices by each show would be included. But even here, the unique nature of reality shows could leave “Survivor” unprotected. For example, if females dominated the competition in “Castaway” and males dominated in “Survivor,” the feel of the two shows would be completely opposite. “Castaway” would not only have a more feminine quality (and thus feminine draw) to it, but the entire focus of the show would center on the unique hierarchal structure of females.156 Furthermore, the stock devices available to the creator of “Castaway” would be different in a female dominated competition than one dominated by males. The competitions might have to be less physically demanding than those for men. Even such things as the music and cinematography would change. Thus, the entire concept and feel of two identical shows can changed based upon the unique features of the characters involved.

IV. RESHAPING OUR UNDERSTANDING OF THE REALITY GENRE

All four tests for substantial similarity analyze the works in a different manner, and, as traditionally applied, all four fail to provide even a modicum of protection for the phenomenon of the reality show. This is not a consequence of the flawed tests for substantial similarity.

153. See supra note 31 and accompanying text.
154. See supra notes 54-55 and accompanying text.
155. See supra notes 57-59 and accompanying text.
156. The ninth season of Survivor was strong proof of this as a result of the women forming an alliance early in the game and systematically voting off the men one-by-one. See Ray Routhier, ’Survivor’ Watch; And then there were seven, PORTLAND PRESS HERALD, Nov. 22, 2004, at B10, available at LEXIS, PORTPS File.
The tests have proven themselves to be useful in highlighting the distinction between idea and expression. Rather, the problem is trying to fit reality shows into the mold used for scripted shows. Only by realizing that reality shows have more in common with phone books than “The Cosby Show” can we provide an acceptable level of protection to reality shows from copyright infringement.

Reshaping our understanding of reality television in order for it to fit under the framework of the substantial similarity test requires three steps: 1) isolating that which the creator can control from that which he cannot, 2) recognizing those things the creator can control as the unique “fingerprint” of the show, a.k.a. a compilation of ideas, and 3) applying the “fingerprint” into the pre-existing framework for substantial similarity.

A. Isolating Elements which can be Controlled

The essence of copyright law is to protect those elements of a work which the creator poured himself into and out of which something new and unique was born.\(^\text{157}\) Logically, only something the creator has control over can actually be protected. Those things beyond his control—the facts upon which his creativity is built—are not protected and are thus in the public domain.\(^\text{158}\) This presents no problem for the creator of a scripted show since nearly every element of the show is under the creator’s control and can be protected. But for a reality show, the elements over which the creator has control are much more limited. Therefore, the focal point of protection for the creator’s work should be those elements which can be controlled.

As discussed above, the creator has limited control over the plot of a reality show. He is able to control certain situational conflicts and little else. For example, the creator of “Survivor” controls such conflict creating devices as the weekly competitions, the use and timing of tribe splits and mergers, and the pairing of incompatible cast members. Although the creator has no control over the success or failure of these devices in creating conflict, he is able to control the pattern and sequence of their use. Thus, if the creator of a reality show uses the same type of plot devices week after week and season after season, his arrangement and use of those devices must be acknowledged as unique to him.

A reality show is really nothing more than the creator’s interpretation and arrangement of the facts created by placing the

\(^{158}\) See NIMMER, supra note 18, § 2.11[A].
characters into a particular situation. The creator takes the facts given to him and edits them to create an entertaining television show. It is the creator’s presentation of the facts that we are seeking to protect, not the facts themselves. Every element of the show over which the creator exhibits some measure of control—from the theme and setting to the use of stock devices to create mood—must be singled out from the facts which are beyond the creator’s control, such as character conflicts and dialogue.

B. Reality Show as a Compilation of Ideas and Expressions

Once the controlled elements are isolated, we begin to get a picture of the unique fingerprint of the reality show. The analogy of the picture mosaic from above is helpful here. The mosaic is both the smaller pictures and the larger image created by the arrangement of the smaller pictures. Both the small pictures and the larger image are integral to the beauty and creativity of the picture mosaic. While any individual image in the mosaic is probably not protected, the selection and arrangement of those pictures in the larger image is protected. Similarly, the fingerprint of a reality show is both the ideas (the smaller pictures) and the expression of those ideas (the larger image created by the arrangement of the pictures). This unique fingerprint forms a compilation of ideas and expressions that deserves protection.

While the jump from a unique fingerprint to copyright protection may seem like a bold leap, the Supreme Court anticipated such a situation in *Feist*:

> Factual compilations . . . may possess the requisite originality [for copyright protection]. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws. Thus, even a directory that *contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection* if it features an original selection or arrangement.160

Although the Court was discussing a telephone directory in *Feist*, it described the exact process involved in the creation of a reality show. The creator’s originality is not evidenced in the dialogue and actions of the participants of the show; rather, his creativity is found in his unique compilation of stock devices used to create facts

---

159. See supra note 146.
160. *Feist*, 499 U.S. at 348 (emphasis added and citations omitted).
and the subsequent presentation of those facts. In other words, all of the creator’s preparation prior to filming (i.e. laying out the sequence of stock plot devices) is protectible. Additionally, his work after filming (i.e. editing, adding music and scenery shots) is also protectible. It is these elements over which the creator has control and which as a whole form a compilation of facts and expressions protected by copyright law.161

The Court emphasized the limits of protection afforded to a compilation. “Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another’s [work] to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement.”162 Thus, in theory, it would be permissible for a competing network to videotape the events happening to the contestants on “Survivor” and create a show from the footage as long as the creator of the competing show did so in a sufficiently original manner.163

Nonetheless, as the Sheehan court noted, there is a definite limit to the ability of a show to use a similar arrangement and sequence of stock devices without infringement upon the protected use of those devices by another show.164 Of particular importance to the Sheehan court in identifying the plaintiff’s show as unique from MTV’s show was that there was no evidence of any other game show using a laser as an important part of the show.165 The originality of the use of a laser in “Lazer Blitz”—regardless of the fact that a laser is a stock device that cannot be protected—was so unique that its use in a game show was worthy of protection.166 If the first-time use of a single stock device in a genre of television is worthy of protection, the

161. A difficult question is raised here. What level of originality is required in the arrangement of the facts in order for it to receive protection? The Court in Feist only requires a minimal degree of creativity. But what starting point does the Court use in determining whether minimal creativity exists? For example, in examining the level of creativity used in “Survivor,” do we measure how much the creator built upon the basic idea of a competition for money? If so, then a large amount of creativity was involved. But what if it is measured by how much the creator built upon the idea of isolating competitors and having them compete in physical and mental challenges and vote each other off until only one is left? This idea still seems basic enough that a number of sufficiently different shows could be based upon it without infringing upon “Survivor.” Yet the amount of creativity used in creating Survivor from this base idea is much less than the amount necessary from the simpler idea of a competition for money.

162. Feist, 499 U.S. at 349.

163. It is questionable whether such creativity could be achieved absent editing the sequence of events to a point where all coherency is lost.


165. Id. at *9.

166. Id. at *10.
first-time use of a unique arrangement of stock devices in a genre should also be protectible.

C. Analyzing the Unique Fingerprint Under the Tests for Substantial Similarity

Now that we have singled out the elements of a reality show that are controlled and identified them as a protectible compilation of ideas and expressions, the traditional tests for substantial similarity can be easily applied to determine whether infringement has occurred. To illustrate this, let us return once again to the competing shows of “Survivor” and “Castaway” using the same facts that were set out above.

Under the abstraction test, “Survivor’s” compilation would be placed on one end of the spectrum as the complete protected expression (a.k.a. fingerprint) of the show. On the other end would be the underlying facts and ideas of “Survivor” used by the creator but not arranged into their unique fingerprint. The closer “Castaway” gets to matching the unique arrangement of “Survivor,” the more likely it is to be substantially similar. Based on this scenario, it seems likely that “Castaway” has crossed the threshold and is infringing upon “Survivor.” The pattern test results in a similar outcome. Viewing “Survivor’s” expression as a unique fingerprint is particularly helpful with the pattern test since it looks to the unique pattern of each show. “Castaway’s” pattern of the expressive elements of the show (those elements which can be controlled by the creator) is nearly identical to that of “Survivor.” Thus, infringement has likely occurred.

Under the dissection test, because we have singled out protected elements in creating the fingerprint of the show (although we have redefined those elements that can be protected), much of the work involved in the test has already been accomplished. A simple comparison of the fingerprint of “Survivor” to the fingerprint of “Castaway” is all that is needed to determine substantial similarity.

Finally, under the total concept and feel test, a court would analyze the interplay between a show’s fingerprint and the facts upon which that fingerprint is based. Surprisingly, under this test

167. See supra notes 40-42 and accompanying text.
168. See id.
169. See supra notes 43-53 and accompanying text.
170. See id.
171. See supra notes 54-55 and accompanying text.
172. See supra notes 57-59 and accompanying text.
“Survivor” would receive its least amount of protection against “Castaway.” This is due to the inevitability of the differing underlying facts (i.e., the interactions between the characters) on each show. If a court determined that the facts were sufficiently different regardless of a nearly identical fingerprint, then “Castaway” would not be infringing upon “Survivor.” Nonetheless, recognizing “Survivor’s” unique fingerprint provides far greater protection than traditionally provided under the total concept and feel test.

V. CONCLUSION

Reality television shows are different from scripted shows. The success of a scripted show is derived from the ability of the creator to craft characters from nothing and create a connection between the audience and the characters. The success of a reality show is derived from the ability of the creator to take the reactions of real people to situations engineered by the creator and present those reactions in a manner that creates a connection between the audience and the characters. The problem does not lie with the various tests for substantial similarity. While each test has its pros and cons, none is able to provide a level of protection to reality shows equal to that given scripted shows.

Rather, the problem lies with a failure to properly recognize the expressive elements of a reality show. While such elements are easily discernible in scripted shows, they take a different form in reality shows and thus are not immediately recognizable. The expressive elements in a reality show are those things over which the creator of the show has direct control. Traditional expressive elements such as dialogue, plot, and sequence are not expressive elements in a reality show because each of these elements is beyond the control of the creators. They are actually the product of chance (and perhaps luck). The creator of a reality show can never predict what types of conflict will arise between the participants of a reality show or what conversations will take place. Thus, the creator is left with only a few things over which he has absolute control. These include the arrangement and use of plot devices. Primarily, the protectable expression of the creator is his unique arrangement and presentation of the facts of the show. The creator arranges the plot devices in an effort to maximize conflict. He then records the “facts” which are created by the participants’ interaction with the plot devices. Finally, he presents the recorded facts in an interesting manner. Thus, the elements of expression of a reality show are composed of the unique
fingerprint of the arrangement of plot devices and resulting facts of
the show.

Once we recognize this unique fingerprint, we can easily apply
it to the various tests for substantial similarity. Regardless of which
test a particular court chooses to employ, the creator of a reality show
is guaranteed a reasonable level of protection from infringement. A
reasonable level of protection actually promotes rather than restricts
innovation by forcing networks and creators to develop their own
unique fingerprints for a new reality show rather than copying the
fingerprint of another show. This innovation will ultimately benefit
the viewing audience, who will be given a broader range of options to
fill the void of prime-time television in their lives.

J. Matthew Sharp

J. Matthew Sharp, J.D. Candidate, 2006, Vanderbilt University Law School; B.S.,
Lee University. The author dedicates this Note to the memory of his mother, Linda S.
Sharp, for instilling a passion for learning in her children. He thanks his family, Prof.
Michael Scaperlanda and Dr. Mike Hayes for their guidance and advice. Soli Deo Gloria.