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# THE ILLUSION OF COPYRIGHT INFRINGEMENT PROTECTION

*Jenny Small\**

## INTRODUCTION

*The real point of magic . . . is 'telling a beautiful lie. It lets you see what the world would be like if cause and effect weren't bound by physics.' It's the collision between what you know and what you see that provides magic's greatest spark.*

—Teller<sup>1</sup>

The schism between knowing and seeing may be magic's allure, but when the magician sees a fellow entertainer perform his signature trick, he wants to know that the law affords him protection.<sup>2</sup> Law, like magic, revolves around expectations.<sup>3</sup> Magic defies one's expectations, but law secures them.<sup>4</sup> Yet, in the realm of copyright law, magicians' expectations for protection are unclear.<sup>5</sup>

As a teenager, Raymond Joseph Teller, of Penn & Teller, envisioned an illusion never before seen.<sup>6</sup> He perfected the trick, and it became known as his signature "Shadows."<sup>7</sup> In the trick, a vase with a rose rests upon a stool and its shadow projects onto a wall.<sup>8</sup> Teller, the "murderer," approaches the shadow

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\* Boston University School of Law, JD 2013. The author would like to thank her family for their continued support.

<sup>1</sup> Chris Jones, *The Honor System*, ESQUIRE, Oct. 2012, available at <http://www.esquire.com/features/teller-magician-interview-1012#ixzz2DqO555hk>.

<sup>2</sup> See generally *id.*

<sup>3</sup> See generally Bailey H. Kuklin, *The Plausibility of Legally Protecting Reasonable Expectations*, 32 VAL. U. L. REV. 19 (1997); Stephen L. Macknik et al., *Attention and Awareness in Stage Magic: Turning Tricks into Research*, 9 NATURE REVIEWS NEUROSCIENCE 871, 876 (2008).

<sup>4</sup> See generally Kuklin, *supra* note 3; Macknik, *supra* note 3.

<sup>5</sup> See discussion *infra* Part II.

<sup>6</sup> Jonah Lehrer, *Magic and the Brain: Teller Reveals the Neuroscience of Illusion*, WIRED MAG, Apr. 20, 2009, available at [http://www.wired.com/science/discoveries/magazine/17-05/ff\\_neuroscienceofmagic?currentPage=all](http://www.wired.com/science/discoveries/magazine/17-05/ff_neuroscienceofmagic?currentPage=all); Jones, *supra* note 1.

<sup>7</sup> Jones, *supra* note 1.

<sup>8</sup> Jonathan Stempel, *Teller Speaks Out, Sues Over Magic Trick*, REUTERS (Apr. 16, 2012, 12:22 PM), <http://www.reuters.com/article/2012/04/16/teller-lawsuit-idUSL2E8FG81L20120416>.

with a knife, and, as he cuts the petals of the shadow, the real rose petals fall.<sup>9</sup> In 1983, after performing the trick for about seven years, Teller submitted it for copyright registration, using a cartoon-like diagram with a description of the setting, characters, and action.<sup>10</sup> In copyrighting his illusion, he attempted to protect his labor without revealing the secret behind the act.<sup>11</sup>

Until 2012, Teller was the only person to have performed this trick.<sup>12</sup> In that year, however, the video “A Rose & Her Shadow” appeared on YouTube.<sup>13</sup> In the video, Gerard Dogge (alias Bakardy of Los Dos de Amberes) used a knife to cut a projected rose’s shadow.<sup>14</sup> Dogge allegedly figured out the secret behind Teller’s trick and either devised another way to create the illusion or used video editing to make an audience believe that he could perform the trick.<sup>15</sup> Dogge concluded the video with an offer to sell the trick’s secret for 2,450 Euros (\$3,050).<sup>16</sup> After a failed attempt to negotiate with Dogge, Teller sued him for copyright infringement.<sup>17</sup>

Teller’s case represents two emerging legal complexities—the struggle to protect the intellectual property of untraditional artistic creations, like magic and the growing difficulty of preventing artistic replication.<sup>18</sup> This case includes many interesting facets such as Dogge’s defamation countersuit in Belgium, issues related to moral and derivative rights, a failed negotiation, and a defendant who all but disappeared.<sup>19</sup> The primary focus of this paper, however, is Teller’s copyright infringement claim. Part I addresses the current law surrounding copyright protection of magic and the performance arts. Next, Part II lays out the facts of Teller’s case. Finally, Part III discusses Teller’s likelihood of success considering the case precedent he must overcome.

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<sup>9</sup> *Id.*

<sup>10</sup> Eriq Gardner, *Teller of Penn & Teller Breaks Silence to Sue Over Magic Trick*, HOLLYWOOD REP. (Apr. 15, 2012 11:41 PM), <http://www.hollywoodreporter.com/thr-esq/penn-teller-lawsuit-reveal-secrets-youtube-312296>; Exhibit 1 for Plaintiff, Teller v. Dogge, No. 2:12-cv-00591 (D. Nev. Apr. 11, 2012) [hereinafter *Exhibit 1 for Plaintiff*].

<sup>11</sup> Exhibit 1 for Plaintiff, *supra* note 10.

<sup>12</sup> See generally Complaint at ¶ 25, Teller v. Dogge, No. 2:12-cv-00591 (D. Nev. Apr. 11, 2012) [hereinafter *Complaint*].

<sup>13</sup> Jones, *supra* note 1.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Complaint, *supra* note 12.

<sup>18</sup> See generally *id.* See also Michael S. Sawyer, Note, *Filters, Fair Use & Feedback: User-Generated Content Principles and the DMCA*, 24 BERKELEY TECH. L.J. 363, 364 (2009).

<sup>19</sup> See generally Complaint, *supra* note 12.

## I. COPYRIGHT LAW

As great as Teller's shadow trick is, it may be an even larger feat to prevail on a copyright infringement claim to protect his magic illusion.<sup>20</sup> Traditionally, magicians have self-policed through a code of honor.<sup>21</sup> For example, another performer once stole Teller's "Turning coins into goldfish" illusion, but he was able to reach an arrangement with the performer and successfully keep the issue out of the court system.<sup>22</sup> Such a gentleman's remedy, however, is no longer strong enough due to the rapidly developing means of replication and dissemination. With over "thirteen hours of video . . . uploaded to YouTube every minute," performance entertainers face the possibility that infringement could reveal their secrets much more quickly than before, thereby diminishing the effectiveness of an honor code.<sup>23</sup> Magicians can instantly lose control over not only the secrets behind their magic tricks, but of their entire craft with just the click of an "upload" button.<sup>24</sup> Consequently, in addition to the traditional code of honor, stronger protection through copyright law is needed.<sup>25</sup>

Current copyright law, however, does not afford sufficient protection for magicians.<sup>26</sup> Because performance art did not receive full protection until the enactment of the Copyright Act of 1976 and litigation is costly, copyright case law offers little guidance on an infringement claim pertaining to magic tricks.<sup>27</sup> Accordingly, one legal scholar and magician, Sara J. Crasson, surveyed federal intellectual property rights laws as well as state laws and found them inadequate to protect magicians and other performance entertainers.<sup>28</sup> Another author, Michael Carroll, declared that "[p]erformance of illusions and magic tricks appears to be a borderline case for which copyright's role is evolving and rights of creative control are not yet fully specified."<sup>29</sup> Therefore, copyright law must evolve to include protection in accordance with the needs of performance entertainment.<sup>30</sup>

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<sup>20</sup> Gardner, *supra* note 10.

<sup>21</sup> Lehrer, *supra* note 6. *See generally* Sara J. Crasson, *The Limited Protections of Intellectual Property Law for the Variety Arts: Protecting Zacchini, Houdini, and Cirque du Soleil*, 19 VILL. SPORTS & ENT. L.J. 73, 111 (2012).

<sup>22</sup> Jones, *supra* note 1.

<sup>23</sup> Sawyer, *supra* note 18, at 364.

<sup>24</sup> *See id.*

<sup>25</sup> *See generally* Crasson, *supra* note 21.

<sup>26</sup> *See generally id.*

<sup>27</sup> *See id.* at 83. *See generally* Copyright Act, Pub. L. No. 94-553, § 102(a)(4), 90 Stat. 2541 (1976) (current version at 17 U.S.C. § 102(a)(4) (2012)).

<sup>28</sup> Crasson, *supra* note 21, at 125–26.

<sup>29</sup> Michael W. Carroll, *Copyright's Creative Hierarchy in the Performing Arts*, 14 VAND. J. ENT. & TECH. L. 797, 803 (2012).

<sup>30</sup> *See generally* Crasson, *supra* note 21.

### A. The Legal Standard and Analysis

Copyright law has largely developed independently of performance entertainment.<sup>31</sup> That generic standard requires that the plaintiff must first show that he has copyrighted the material.<sup>32</sup> Copyrighted material only includes the execution of an idea, rather than an idea alone.<sup>33</sup> The plaintiff must then show that the defendant copied his protected original work.<sup>34</sup> To prove this second element, he will need to demonstrate that the works are substantially similar and that the defendant had access to his protected work.<sup>35</sup> This test helps distinguish generic elements from actual imitation.<sup>36</sup> Much of the copyright case law turns on the plaintiff's burden to prove substantial similarity and access as well as the defendant's defenses.<sup>37</sup>

First, substantial similarity depends on the likeness of certain elements.<sup>38</sup> The Ninth Circuit, which includes the District of Nevada court presiding over Teller's lawsuit, adopted a two-part test for extrinsic and intrinsic similarity.<sup>39</sup> Under the extrinsic evaluation, the court compares elements like "setting, theme, character types, and plot structure."<sup>40</sup> In addition, the Ninth Circuit in *Metcalf v. Bochco* concluded that the sequence of the work could indicate substantial similarity.<sup>41</sup> The decision further established that the amount of similar elements indicates a "pattern."<sup>42</sup>

Subsequently, however, courts have interpreted *Metcalf* narrowly and determined that a pattern of similarity alone may not suffice to show substantial

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<sup>31</sup> *Id.*

<sup>32</sup> Andrew J. Thomas, *Access Hollywood In Subsequent Decisions, the Ninth Circuit Seems to Have Retreated from Its Interpretation of the Extrinsic Test in Metcalf v. Bochco*, L.A. Law. 29, 30 (May 2005), available at <http://www.lacba.org/showpage.cfm?pageid=5315>; Claudia Hong, Comment, *New Yorkers Have Got it Right: A Call for a Uniform Standard to Copyright Infringement Analysis*, 27 LOY. L.A. ENT. L. REV. 33, 36 (2006).

<sup>33</sup> Thomas, *supra* note 32, at 32; see also Joseph J. Siprut, *Are Ideas Really Free as the Air? Recent Developments in the Law of Ideas*, 51 IDEA 111, 119 (2011).

<sup>34</sup> Thomas, *supra* note 32, at 34 ("To meet the threshold requirement of originality, a claimant need only show that he or she is the author of a work that displays some minimal degree of creativity."); Hong, *supra* note 32, at 36 (articulating the standard as the "copying of constituent elements of the work that are original").

<sup>35</sup> Thomas, *supra* note 32, at 30.

<sup>36</sup> See *id.*

<sup>37</sup> See generally discussion *infra* notes 38–81 and accompanying text.

<sup>38</sup> Thomas, *supra* note 32, at 30.

<sup>39</sup> *Id.* at 32.

<sup>40</sup> *Id.* at 30, 32; see also Hong, *supra* note 32, at 44.

<sup>41</sup> *Metcalf v. Bochco*, 294 F.3d 1069, 1074–75 (9th Cir. 2002); see also Thomas, *supra* note 32, at 32.

<sup>42</sup> *Metcalf*, 294 F.3d at 1074; Siprut, *supra* note 33, at 120.

similarity.<sup>43</sup> For example, in *Rice v. Fox Broad. Co.*, Rice, a magician, accused Fox of infringing his home-video production that revealed the secrets behind well-known magic tricks.<sup>44</sup> In the 1980s and 1990s, Rice established a niche in the home-video market as the *Mystery Magician*, who revealed magic trick secrets in a series of videos.<sup>45</sup> Then, in the 1990s, Fox developed a show, *Specials*, in which a masked magician revealed secrets behind magic tricks.<sup>46</sup> Rice attempted to establish infringement based on the similarity that both shows revealed secrets.<sup>47</sup>

The Ninth Circuit evaluated “the stylistic elements,” such as a masked magician that Rice’s expert testified was unique.<sup>48</sup> Rice, however, did not prevail because the elements of a masked magician, a revelation of secrets, and a misty set were too generic: “there are only a finite number of ways to reveal the secrets behind magic tricks.”<sup>49</sup> Furthermore, the Ninth Circuit concluded that there were not enough similar elements in hand to meet the “totality of similarities” test in *Metcalf*.<sup>50</sup> In fact, the court’s rejection may indicate that it was not willing to construe a pattern of similarities as infringement and that the test, while it has not been expressly abrogated, is too uncertain to apply to other cases.<sup>51</sup> According to the *Los Angeles Lawyer* in 2005, “*Metcalf* has not been followed by a single published Ninth Circuit decision upholding a copyright infringement claim . . . based on an allegedly protectable arrangement or pattern of generic elements that were individually unprotectable.”<sup>52</sup> Thus, an argument that two works are substantially similar based on a similar sequence of elements is unlikely to prevail.<sup>53</sup>

The intrinsic test complements the extrinsic test by reframing the analysis based on an “ordinary reasonable audience[’s]” perception of the work.<sup>54</sup> While the Second Circuit is merely persuasive authority in Teller’s case, it offers an analogous analysis for a similar type of artistic work.<sup>55</sup> Similar to the Ninth Circuit, the Second Circuit applies the same tests to determine substantial similarity.<sup>56</sup> For example, in *Horgan v. MacMillan*, the estate of George Balanchine sued a company for publishing a book that allegedly infringed on

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<sup>43</sup> Thomas, *supra* note 32, at 36; *see also* *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1179 (9th Cir. 2003); Siprut, *supra* note 33, at 120. *See generally* *Metcalf*, 294 F.3d at 1069.

<sup>44</sup> *Rice*, 330 F.3d at 1170; *see also* Thomas, *supra* note 32, at 36.

<sup>45</sup> *Rice*, 330 F.3d at 1173.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1175.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*; Thomas, *supra* note 32, at 36; *see* *Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002) (citations omitted).

<sup>51</sup> *See generally* Thomas, *supra* note 32, at 36.

<sup>52</sup> *Id.* *See generally* *Metcalf*, 294 F.3d at 1069.

<sup>53</sup> *See generally* *supra* notes 50–52 and accompanying text.

<sup>54</sup> Thomas, *supra* note 32, at 32 (citations omitted).

<sup>55</sup> *See generally* *Horgan v. MacMillan*, 789 F.2d 157, 160 (2d Cir. 1986).

<sup>56</sup> *See* *Hong*, *supra* note 32, at 37.

copyrighted choreography.<sup>57</sup> This Second Circuit case followed the substantial changes to the 1976 Copyright Act that added choreography (and magic), and appears to be one of the few cases where the court specifically applied a substantial similarity inquiry to a performance entertainer's copyright claim.<sup>58</sup>

The copyright claim in *Horgan* focused on defendant's organized photographs of Balanchine's choreographic work.<sup>59</sup> Allegedly, these photos copied and conveyed the choreography in a "different medium."<sup>60</sup> Balanchine's estate claimed that the book infringed upon the copyright because it was substantially similar to Balanchine's choreography because it "portray[ed] the essence of the Balanchine Nutcracker."<sup>61</sup> The defendant, however, claimed that choreography entails a "flow of movement[s]" and that photographs cannot replicate the movement.<sup>62</sup> Furthermore, the defendant argued that many of the photographs were already in the "public domain" and, therefore, did not constitute infringement.<sup>63</sup> Without deciding the case on its merits, the Second Circuit remanded the case, indicating that infringement would be possible even through different mediums of expression if the "quantity [and] sequencing" of the photographs amounted to a substantially similar display as the dance.<sup>64</sup>

*Horgan's* analysis under the intrinsic analysis of the substantial similarity test was rather similar to the Ninth Circuit's extrinsic analysis of a pattern of similar elements in *Metcalf*.<sup>65</sup> Although from a different circuit than Teller's lawsuit, *Horgan* may show that in the case of choreography, pantomime, and magic, courts are willing to focus on a pattern of similarities.<sup>66</sup> Although *Rice* might appear to preclude this type of inquiry, *Rice* is distinct from a performance entertainer's case, such as Teller's, because *Rice* still constituted a copyright claim more similar to literature.<sup>67</sup> Rather than claiming that another entertainer stole his illusion, *Rice* sought protection from the courts about a scripted and traditional form of entertainment.<sup>68</sup> Thus, it appears that the Ninth Circuit has yet to address a copyright claim about magic or other pantomime.<sup>69</sup>

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<sup>57</sup> *Horgan*, 789 F.2d at 160; see also Anne K. Weinhardt, Note, *Copyright Infringement of Choreography: The Legal Aspects of Fixation*, 13 J. CORP. L. 839, 844 (1988).

<sup>58</sup> See generally *Horgan*, 789 F.2d at 157.

<sup>59</sup> See generally *id.*

<sup>60</sup> *Id.* at 158, 162.

<sup>61</sup> *Id.* at 161.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 162.

<sup>64</sup> See *id.* at 163.

<sup>65</sup> Compare *id.* with *Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002).

<sup>66</sup> See *Metcalf*, 294 F.3d at 1069; see also *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1170 (9th Cir. 2003). See generally *Horgan v. MacMillan*, 789 F.2d 157, 157 (2d Cir. 1986).

<sup>67</sup> See generally *Rice*, 330 F.3d at 1170.

<sup>68</sup> See generally *id.*

<sup>69</sup> See generally *id.*

Accordingly, *Horgan's* approach of reviewing the overall circumstances may be appropriate.<sup>70</sup>

Second, in addition to demonstrating substantial similarity between the plaintiff's work and the defendant's alleged copy, the plaintiff also must show that the defendant had access to his work.<sup>71</sup> Under the Ninth Circuit's "inverse ratio rule," the plaintiff has a "lower standard of proof" for substantial similarity if he can also show that the defendant had access to his work.<sup>72</sup> In *Metcalf*, the court found it dispositive that the defendant had seen the work more than once and therefore, the plaintiff was relieved of his burden of fully proving substantial similarity.<sup>73</sup>

Finally, a typical copyright infringement claim also affords the defendant several possible defenses: the merger doctrine, the scenes à faire principle, and the "independent creation" defense.<sup>74</sup> Under the merger doctrine, a defendant is not liable if the idea only has one form of expression.<sup>75</sup> In such a case, the idea merges with the expression and neither will merit copyright protection.<sup>76</sup> Crasson suggested that "juggling a bowling ball, a chainsaw and a hedgehog cannot be copyrighted" nor could the performance of that act because of the merger doctrine.<sup>77</sup> Meanwhile, the scenes à faire principle stipulates that certain types of expression are inherent to the idea and, therefore, do not merit protection.<sup>78</sup> For instance, "pulling a rabbit out of a hat" is so generic to a magic trick that it would not constitute infringement.<sup>79</sup> Finally, the defendant can also attempt to show that he created his work without copying the plaintiff's work under the "independent creation defense."<sup>80</sup> If the defendant independently created an act similar to the plaintiff's act, infringement of the plaintiff's work did not occur even if he reduces the novelty of it.<sup>81</sup> Thus, a claim for copyright infringement imposes a fairly high burden on the plaintiff who must demonstrate copying through substantial similarity and access while also negating any defenses put forward by the defendant.<sup>82</sup>

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<sup>70</sup> See Crasson, *supra* note 21, at 113. See generally *Horgan*, 789 F.2d at 157.

<sup>71</sup> *Rice*, 330 F.3d at 1178 (citations omitted); Thomas, *supra* note 32, at 34; see also Siprut, *supra* note 33, at 117.

<sup>72</sup> *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178 (9th Cir. 2003) (citations omitted); Thomas, *supra* note 32, at 34; see also Siprut, *supra* note 33, at 121, 126.

<sup>73</sup> *Metcalf v. Bochco*, 294 F.3d 1069, 1075 (9th Cir. 2002); see also Siprut, *supra* note 33, at 121.

<sup>74</sup> Thomas, *supra* note 32, at 30; Hong, *supra* note 32, at 45.

<sup>75</sup> Thomas, *supra* note 32, at 30.

<sup>76</sup> *Id.*

<sup>77</sup> Crasson, *supra* note 21, at 117.

<sup>78</sup> Thomas, *supra* note 32, at 30.

<sup>79</sup> Crasson, *supra* note 21, at 85.

<sup>80</sup> Hong, *supra* note 32, at 45.

<sup>81</sup> Weinhardt, *supra* note 57, at 842–43.

<sup>82</sup> See generally discussion *supra* notes 38–81 and accompanying text.



### B. Magic Under Copyright Law

The previously discussed legal standard and analysis has largely developed independent of and without accounting for the elements of performance entertainment that copyright law should protect.<sup>83</sup> Although the 1976 Copyright Act accounts for tangible expressions of variety and magic acts under its pantomime and choreography provision, the case law tends to disregard these forms of entertainment.<sup>84</sup> Despite this apparent divorce between the statute and actual protection, magic and intellectual property rights have a common root that would make magic a natural object for protection.<sup>85</sup>

Magic and intellectual property rights share the same foundational logic.<sup>86</sup> Although the United States codified copyright law in 1909 and subsequently amended it in 1976, legal anthropologists contend that copyright and intellectual property rights hark back to traditional cultures and ritual magic.<sup>87</sup> Ritual magic represented a means for an individual to explain a beneficial discovery without foregoing the opportunity to capitalize on it by revealing his secret.<sup>88</sup> Accordingly, a farmer who discovered a simple process involving fish that yielded a better crop could only capitalize on the discovery if he kept the precise process a secret.<sup>89</sup> To do so, he employed magic's primary tool of misdirection.<sup>90</sup> Rather than revealing the secret, he could claim that his ritual contributed to the crop yield.<sup>91</sup> He secured a role for himself and a means to profit.<sup>92</sup> Similar to copyright law, ritual magic constituted a means to protect a creation.<sup>93</sup> Although magic shares such a common logic with intellectual property law and could be a natural object for its protection, intellectual property protection has not yet extended to it.<sup>94</sup>

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

<sup>84</sup> Crasson, *supra* note 21, at 83. *See generally* Copyright Act, Pub. L. No. 94-553, § 102(a)(4), 90 Stat. 2541 (1976) (current version at 17 U.S.C. § 102(a)(4) (2012)).

<sup>85</sup> U.S. Const. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); *see* Mark C. Suchman, *Invention and Ritual: Notes on the Interrelation of Magic and Intellectual Property in Pre-literate Societies*, 89 COLUM. L. REV. 1264, 1273-75 (1989). *See generally* Crasson, *supra* note 21.

<sup>86</sup> *See* Suchman, *supra* note 85.

<sup>87</sup> *See id.*; *see also* W. Ron Gard & Elizabeth Townsend Gard, *The Present (User-Generated Crisis) Is the Past (1909 Copyright Act): An Essay Theorizing the "Traditional Contours of Copyright" Language*, 28 CARDOZO ARTS & ENT. L.J. 455, 488 (2011).

<sup>88</sup> *See* Suchman, *supra* note 85, at 1273-75.

<sup>89</sup> *Id.* at 1274-75 (describing in depth the example of a farmer using ritual magic to maintain the value of his discovery and labor).

<sup>90</sup> *See id.* at 1273-75. *See generally* Macknik, *supra* note 3.

<sup>91</sup> Suchman, *supra* note 85, at 1273-75.

<sup>92</sup> *Id.* at 1275-76.

<sup>93</sup> *See id.* at 1276.

<sup>94</sup> *See* Crasson, *supra* note 21. *See generally* Suchman, *supra* note 85, at 1276.

While the policy behind copyright law establishes the basis for protecting magic, the manifestation of the principles through case law fails to account for magic's creative contributions.<sup>95</sup> Copyright policy dictates that the law must protect artistic or innovative expression because it contributes to society.<sup>96</sup> Accordingly, case law helps to incentivize authors to continue creating literature by protecting original expression such as plot, characters, and action.<sup>97</sup> Case law, however, does not provide the same incentives for performance art because their artistic contribution does not rest solely upon the already protected and defined elements of plot, character, and action.<sup>98</sup> Instead, a performance's creation is much more nebulous.<sup>99</sup>

Protecting magic illusions under copyright law challenges the common understanding of an entertainment piece's value and creation.<sup>100</sup> A good illusion continues to defy expectations because the audience either does not know the secret, or cannot comprehend the trick despite knowing the secret.<sup>101</sup> For example, Penn & Teller revealed the secret behind the famous cups-and-ball trick, yet the illusion was still valuable because the audience's eyes could not follow the movement and the mind remained bewildered.<sup>102</sup> While magic may offer some indirect value through traditionally protected elements such as video sales and trick licensing, the predominant value rests upon deceiving the audience's minds.<sup>103</sup> Deception involves an idea for the trick, the equipment and props, the presentation, the misdirection and timing of the misdirection, the secret, and the perfection in drawing it all together.<sup>104</sup> Thus far, copyright law has failed to adequately protect this type of artistic creation because it does not protect the comprehensive performance.<sup>105</sup>

The documented intellectual property rights cases involving magic performance attempt to frame the performance in terms of traditional copyright claims, detaching them from their value.<sup>106</sup> Yet, magic performers, for their part, have yet to present cases that fully challenge the courts' perceptions.<sup>107</sup> In one of the earliest intellectual property rights cases about magic (a patent case), the law failed to fully protect the genius behind magic.<sup>108</sup> By trying to conform to the

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<sup>95</sup> See generally Crasson, *supra* note 21.

<sup>96</sup> *Id.* at 81.

<sup>97</sup> See Carroll, *supra* note 29, at 799–802.

<sup>98</sup> See generally Macknik, *supra* note 3.

<sup>99</sup> See generally *id.*

<sup>100</sup> See generally Crasson, *supra* note 21.

<sup>101</sup> See generally Macknik, *supra* note 3.

<sup>102</sup> *Id.*; Lehrer, *supra* note 6 (explaining that Teller used clear cups and explained how the trick was done, but rather than ruining the trick, more people clamored to see it).

<sup>103</sup> See Exhibit 10 for Defendant, Teller v. Dogge, No. 2:12-cv-00591-JCM-GWF (D. Nev. Oct. 21, 2012).

<sup>104</sup> See generally Macknik, *supra* note 3.

<sup>105</sup> See generally Crasson, *supra* note 21.

<sup>106</sup> See discussion *infra* notes 108–127 and accompanying text.

<sup>107</sup> See discussion *infra* notes 108–127 and accompanying text.

<sup>108</sup> See generally Goldin v. R.J. Reynolds Tobacco Co., 22 F. Supp. 61, 65 (S.D.N.Y. 1938).

law, the magician lost the value of his trick when he revealed the secret.<sup>109</sup> In the 1920's, Horace Goldin patented the equipment for his illusion of "sawing a woman in half."<sup>110</sup> Problematically, patents are public information and a tobacco company snatched his invention for an advertising campaign.<sup>111</sup> The company featured Goldin's invention on a cartoon strip.<sup>112</sup> Goldin naturally sued, but lost because the information was already public.<sup>113</sup> Goldin's case signaled to magicians that there might be a trade-off between protecting their creation and maintaining its value.<sup>114</sup>

A later case in the 1940s further narrowed the legal protection afforded magicians and specifically focused on the copyright of magic.<sup>115</sup> The case implied that copyright protection might only exist for magicians in theory because the court could not conceive of creation in comprehensive terms beyond literature-like elements.<sup>116</sup> In this case, Charles Hoffman sued a fellow magician for stealing his act.<sup>117</sup> Back in the 1930s and 40s, Hoffman was a Vaudevillian regular.<sup>118</sup> The public knew him for an act he called "think-a-drink" in which he requested the audience to write down a desired beverage. Without seeing the drink order, Hoffman would produce the drink including "zombies" and ice cream sodas.<sup>119</sup> For this trick, he was known as "the highest paid bartender in the world."<sup>120</sup> Originally featuring the trick as part of a performance with a monologue about prohibition, he modernized and perfected the trick.<sup>121</sup> He made the act famous, but he did not create the trick unlike Teller.<sup>122</sup>

He sued another performer, Glazer of 'Bill Jordan's Bar of Music' for infringing upon his act.<sup>123</sup> The other magician used the exact same monologue

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<sup>109</sup> *Id.* at 65; *see also* Crasson, *supra* note 21.

<sup>110</sup> *Goldin*, 22 F. Supp. at 63; *see also* Crasson, *supra* note 21, at 109.

<sup>111</sup> *Goldin*, 22 F. Supp. at 62; *see also* Crasson, *supra* note 21, at 109.

<sup>112</sup> *Goldin*, 22 F. Supp. at 61.

<sup>113</sup> *Id.* at 65; *see also* Crasson, *supra* note 21, at 109.

<sup>114</sup> *See* Crasson, *supra* note 21, at 109. *See generally* *Goldin v. R.J. Reynolds Tobacco Co.*, 22 F. Supp. 61, 65 (S.D.N.Y. 1938).

<sup>115</sup> *See generally* *Glazer v. Hoffman*, 153 Fla. 809 (1943).

<sup>116</sup> *See id.*; *see also* Crasson, *supra* note 21, at 98–99.

<sup>117</sup> *See Glazer*, 153 Fla. at 811.

<sup>118</sup> Crasson, *supra* note 21, at 98.

<sup>119</sup> *Glazer*, 153 Fla. at 811. Zombies are a drink made of various types of rum and pineapple and papaya juice. *Zombies*, ESQUIRE, <http://www.esquire.com/drinks/zombie-drink-recipe> (last visited Dec. 10, 2012). To watch Hoffman perform the trick, please see *Think A Drink Hoffman*, YOUTUBE, <http://www.youtube.com/watch?v=okGBex-BTD8> (last visited Dec. 10, 2012).

<sup>120</sup> FRANK CULLEN, VAUDEVILLE OLD & NEW: AN ENCYCLOPEDIA OF VARIETY PERFORMERS IN AMERICA 518 (Psychology Press, 2004).

<sup>121</sup> *See* Steve Cohen, *Think-A-Drink*, STEVE COHEN'S CHAMBER MAGIC BLOG (Dec. 10, 2009), <http://www.chambermagic.com/think-a-drink/>.

<sup>122</sup> *Glazer v. Hoffman*, 153 Fla. 809, 812 (1943).

<sup>123</sup> *Id.* at 811. *See generally* Crasson, *supra* note 21, at 99.

and illusion with the same devices.<sup>124</sup> Glazer ultimately prevailed on defending his performance, although not the use of the speech.<sup>125</sup> He defended himself by waging that the trick was scenes à faire similar to pulling a rabbit out of the hat and known to many magicians.<sup>126</sup> The Florida Supreme Court agreed with the defendant that the illusion did not belong exclusively to Hoffman because he had simply performed, but did not create it.<sup>127</sup> These early intellectual property rights cases about magic undervalued its creative contribution and failed to comport with the principles of copyright law. They did not, however, specifically address the scenario in which the performer created and scripted the trick, as epitomized in Teller's case.

## II. TELLER'S LAWSUIT & LIKELIHOOD OF SUCCESS

Despite unfavorable case precedence, the time is ripe for the courts to adjust the way copyright law as it pertains to performance entertainment is analyzed. Teller's lawsuit represents an ideal opportunity for the Ninth Circuit because not only did Teller invent the illusion, but he also obtained a copyright on it.<sup>128</sup> Additionally, as an expert on magic, who has contributed to publications about magic's cognitive aspects, he can explain the value behind a magic performance.<sup>129</sup> His case overcomes the defects of earlier cases sufficiently to challenge the courts to reconsider how they analyze creation and expression.<sup>130</sup> While he might be able to satisfy the Ninth Circuit's traditional copyright test and show substantial similarity because he documented the characters, setting, and plot for his illusion, he may still struggle with overcoming the scenes à faire defense.<sup>131</sup> Even though his claim represents a best-case scenario for applying the traditional test to a magic illusion, his creation, like many other performance entertainers' work, cannot easily be reduced to the traditional test.<sup>132</sup> Therefore, although he should argue the traditional test, his success will also likely depend on the persuasiveness of his copyright policy arguments.<sup>133</sup>

### A. Background on Teller's Lawsuit

Teller's lawsuit arose only after he tried to pursue a magician's agreement.<sup>134</sup> After a friend alerted him to the YouTube video, Teller began to seek remedies.<sup>135</sup> First, he used a "DMCA takedown notice" to remove the video

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<sup>124</sup> *Glazer*, 153 Fla. 803 at 812.

<sup>125</sup> *Id.* at 816.

<sup>126</sup> *Id.* at 812, 816.

<sup>127</sup> *Id.* at 816; *see also* Crasson, *supra* note 21, at 99.

<sup>128</sup> *Glazer v. Hoffman*, 153 Fla. 809, 816 (1943).

<sup>129</sup> *See generally* Macknik, *supra* note 3.

<sup>130</sup> *See generally* Complaint, *supra* note 12.

<sup>131</sup> *See generally id.*; *see also supra* notes 78–79 and accompanying text.

<sup>132</sup> *See generally* Complaint, *supra* note 12.

<sup>133</sup> *See generally supra* notes 100–105 and accompanying text.

<sup>134</sup> *See* Complaint, *supra* note 12.

<sup>135</sup> *Id.* at 25; Jones, *supra* note 1.

from YouTube.<sup>136</sup> Second, Teller offered to pay Dogge to keep the illusion a secret.<sup>137</sup> As part of the industry's custom of self-policing, he offered Dogge \$15,000, reasoning that he would normally pay an assistant \$7,500 to help him develop a mechanical apparatus for a trick.<sup>138</sup> In his letter to Dogge, Teller indicated that his offer included payment for the device and a non-competitor-type-of agreement precluding Dogge from using the trick and sharing the know-how with anyone else.<sup>139</sup> Although he recognized Dogge's efforts, he expressed displeasure to even offer money for "something that should not have been done without [his] consent in the first place."<sup>140</sup> Dogge, however, held out for \$125,000.<sup>141</sup> Teller found the counter-offer unreasonable and filed copyright infringement and unfair competition claims on April 11, 2012.<sup>142</sup>

Dogge's response to the lawsuit is almost a magical illusion in itself, with the District Court of Nevada unable to confirm his "whereabouts" or citizenship.<sup>143</sup> Dogge, however, knows about the lawsuit, as he has filed a defamation lawsuit in Belgium in reaction to it and has responded to Teller's complaint.<sup>144</sup> In his response, Dogge begins by indicating his lack of representation, mastery of the English language, and knowledge of the American judicial system.<sup>145</sup> Full of conclusory statements, he offers some quirky allegations, but hardly provides a legal defense.<sup>146</sup> His claims include statements that he did not violate Teller's copyright because his video only received fourteen views; that Teller could not possibly prove injury because he received "free publicity"; and that he did not have notice of Teller's copyright because Teller is a libertarian.<sup>147</sup> Each of these assertions is illogical and irrelevant to copyright law.<sup>148</sup> His clearest argument appears to be that Teller did not properly copyright his work or somehow contributed to the infringement because he did not make the copyright known with the display of a copyright symbol.<sup>149</sup> As a live performance, it is not clear how a display of the copyright symbol would

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<sup>136</sup> See Complaint, *supra* note 12.

<sup>137</sup> Gardner, *supra* note 10.

<sup>138</sup> Exhibit 1 for Defendant, Teller v. Dogge, No. 2:12-cv-00591-JCM-GWF (D. Nev. Oct. 21, 2012).

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

<sup>140</sup> *Id.*

<sup>141</sup> Exhibit 4 for Defendant, Teller v. Dogge, No. 2:12-cv-00591-JCM-GWF (D. Nev. Oct. 21, 2012).

<sup>142</sup> Complaint, *supra* note 12.

<sup>143</sup> Teller v. Dogge, 2012 WL 4792912, at \*1 (D. Nev. Oct. 9, 2012) (order denying plaintiff's emergency motions).

<sup>144</sup> *Id.*; Response for Defendant, Teller v. Dogge, No. 2:12-cv-00591-JCM-GWF (D. Nev. Oct. 9, 2012) [hereinafter *Response*].

<sup>145</sup> Response, *supra* note 144, at 1.

<sup>146</sup> See generally Response, *supra* note 144.

<sup>147</sup> See *id.* at 5–6.

<sup>148</sup> See generally *id.*

<sup>149</sup> Response, *supra* note 144, at 9.

function.<sup>150</sup> Regardless, display of a copyright symbol is not necessary or even dispositive of a copyright.<sup>151</sup> Thus, in over forty-pages of response, it does not appear that Dogge has substantiated any type of legal defense.<sup>152</sup> Nonetheless, copyright law imposes the burden on the plaintiff to prove the copying.<sup>153</sup>

### B. Merits of the Lawsuit

Although Teller characterized his reluctance to litigate to protect his signature trick as a civilized gesture in the realm of noble magicians, he may have realized that his legal battle would be more of a “gamble” than his proposed settlement.<sup>154</sup> Policy considerations and a broader construction of copyright law, especially under the substantially similar test as the Second Circuit found possible with dance choreography, will be Teller’s greatest arguments.<sup>155</sup>

Teller may have difficulty proving substantial similarity under the standard analysis.<sup>156</sup> The ideas are similar, and Dogge even insinuates the likeness in his advertisement, suggesting his trick was modeled after the “great Penn & Teller [performance of] a similar trick.”<sup>157</sup> As copyright law does not protect ideas, however, the court’s inquiry will turn on whether the expression is substantially similar.<sup>158</sup> Teller included in his copyright a detailed description of the setting, characters, and action.<sup>159</sup> Under the extrinsic inquiry, these literary elements may suffice to show substantial similarity.<sup>160</sup> Nonetheless, the Court may conclude that the elements with a dark stage and a spotlight are still too generic, akin to the *Hoffman* analysis.<sup>161</sup> Under the intrinsic test, Teller can assert that Dogge’s act is substantially similar based on an “essence” analysis under *Horgan*.<sup>162</sup> Although courts have been reluctant to apply this argument after *Metcalfe*, magic is analogous to choreography and *Horgan* appears to be the only case on point.<sup>163</sup>

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<sup>150</sup> See generally *id.*

<sup>151</sup> Justin E. Daily, *Intellectual Property for A Wired World*, BUS. L. TODAY 43, 44 (Mar. 2002).

<sup>152</sup> See generally Response, *supra* note 144.

<sup>153</sup> See *supra* notes 32–81 and accompanying text.

<sup>154</sup> See Exhibit 3 for Defendant, Teller v. Dogge, No. 2:12-cv-00591-JCM-GWF (D. Nev. Oct. 21, 2012). Teller explained to Dogge that he was willing to settle for \$15,000 for Dogge’s equipment and promise not to perform or reveal the secret even though it was a pure “gamble” whether he would be able to use the equipment and trust Dogge.

<sup>155</sup> See generally *Horgan v. MacMillan*, 789 F.2d 157, 160 (2d Cir. 1986); U.S. Const. art. I, § 8, cl. 8.

<sup>156</sup> See generally U.S. Const. art. I, § 8, cl. 8; Macknik, *supra* note 3; Suchman, *supra* note 85, at 1273–75.

<sup>157</sup> Complaint, *supra* note 12, at 23.

<sup>158</sup> See *supra* notes 38–70 and accompanying text.

<sup>159</sup> Exhibit 1 for Plaintiff, *supra* note 10.

<sup>160</sup> See *supra* notes 40–52 and accompanying text.

<sup>161</sup> See generally *Glazer v. Hoffman*, 153 Fla. 809 (1943).

<sup>162</sup> See generally *Horgan v. MacMillan*, 789 F.2d 157, 157 (2d Cir. 1986).

<sup>163</sup> See discussion *supra* notes 41–42, 57–70 and accompanying text. See generally *id.*

Teller likely also needs to show that Dogge had access to his act because his argument may not be strong enough on substantial similarity alone.<sup>164</sup> The parties dispute whether Dogge actually has seen the act live.<sup>165</sup> Even if Dogge had seen the act live, however, it is not clear that access to viewing the illusion will suffice for infringement because the court might reason that Dogge needed access to the secret to infringe upon the copyright.<sup>166</sup>

Because Teller may not even reach the intrinsic element under the traditional test, his likelihood of success depends largely on the persuasiveness of his policy arguments.<sup>167</sup> The current standards for evaluating copyright infringement are simply a poor fit for magic because the objective criteria is difficult to apply and when courts try to apply it, they often overlook the artistic expression and value in magic.<sup>168</sup> Teller needs to convince the District Court of Nevada that he, other magicians, and performers need copyright protection, and the current standard represents but an illusion of protection for them.<sup>169</sup> Instead, the court should adopt a test that recognizes the value behind the magic and performance similar to the *Horgan* test of “essence” or the Metcalf “totality of similarities” test.<sup>170</sup> If there is any case for a court to set precedence for magic as entertainment under copyright law, this is the ideal case.<sup>171</sup>

#### CONCLUSION

Although there have been but a few magic cases to appear before courts, Teller’s lawsuit may be a bellwether case for copyright protection of performance entertainment.<sup>172</sup> A court opinion that fails to account for the creation of magic as a comprehensive performance or the value of the secret behind the magic trick is not in line with the spirit of the Copyright Act.<sup>173</sup> In breaking away from the magician’s code of honor to police his or her own kind, Teller has presented a gift of opportunity to the court to reevaluate its copyright law standard for performance entertainment, and particularly magic.<sup>174</sup> The case presents the ideal situation, with the plaintiff securing copyright protection of his illusion without disclosing the secret behind it.<sup>175</sup> The plaintiff also serves as an

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<sup>164</sup> See generally discussion *supra* notes 41–42, 57–73 and accompanying text.

<sup>165</sup> Compare Complaint, *supra* note 12, at 20 with Response, *supra* note 144, at 4.

<sup>166</sup> See Crasson, *supra* note 21, at 112.

<sup>167</sup> See generally discussion *supra* notes 57–70, 100–105, 161, and accompanying text.

<sup>168</sup> See generally Crasson, *supra* note 21.

<sup>169</sup> See generally *supra* notes 100–105 and accompanying text.

<sup>170</sup> See *supra* notes 61–70 and accompanying text; Metcalf v. Bochco, 294 F.3d 1069, 1074 (9th Cir. 2002). See generally *Horgan v. MacMillan*, 789 F.2d 157, 161 (2d Cir. 1986).

<sup>171</sup> See generally Gardner, *supra* note 10.

<sup>172</sup> See Complaint, *supra* note 12. See generally discussion *supra* Part III.

<sup>173</sup> See generally discussion *supra* Part III.

<sup>174</sup> See generally Complaint, *supra* note 12.

<sup>175</sup> See generally *id.*

authority on the cognitive value of magic illusions, as well as a master of the craft.<sup>176</sup> If any plaintiff can educate the court on the “creation” of magic, that which copyright law should protect, it would be Teller. Perhaps Teller’s lawsuit is just another one of his illusions to lead the court to the conclusion that he desires: protection for the magic community.<sup>177</sup>

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<sup>176</sup> See Macknik, *supra* note 3.

<sup>177</sup> See generally Jones, *supra* note 1 (“Could Teller’s lawsuit be part of some incredible trick—that Gerard Bakardy is a stooge or an actor or never existed in the first place? (*The better than in Las Vegas trick . . .*” “*Not now. Soon you’ll see why.*”) Even for someone as devoted as Teller, even for someone so good at long cons and keeping secrets, that would be an almost impossible trick. That would be the trick of a lifetime. That would be the sort of magic that would make you want to close your eyes.”).