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Copyright: The Scenes of a Faire Doctrine

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COPYRIGHT: THE SCENES A FAIRE DOCTRINE

Leslie A. Kurtz*

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I. INTRODUCTION

The phrase "scenes a faire" probably owes its origin to the nineteenth century drama critic Francisque Sarcey. Although Sarcey never provided a strict definition,¹ he used the phrase to mean an "obligatory scene," one the public "has been permitted to foresee and to desire from the progress of the action; and such a scene can never be omitted without a consequent dissatisfaction."²

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1. W. ARCHER, *PLAY-MAKING, A MANUAL OF CRAFTSMANSHIP* 147 (1960).
2. C. HAMILTON, *PROBLEMS OF THE PLAYWRIGHT* 56 (1917). It has been defined in P. ROBERT, *DICTIONNAIRE ALPHABETIQUE ET ANALOGIQUE DE LA LANGUE FRANCAIS* 353 (1966) as "la scene importante, qu'on attend, d'apres la logique de l'action" (the important scene you wait for according to the logic of the action); *see also* W. ARCHER, *supra* note 1, at 148 (the obligatory scene, according to Sarcey, is one which, for one reason or another, an audience expects and ardently desires).

Examples best explain Sarcey's understanding of the phrase. In Corneille's "Cinna," Cinna conspires against the Roman Emperor Augustus, who learns of the conspiracy and pardons him. Sarcey identified two scenes a faire.³ One is the pardon scene, the climax of the play. The other is a scene in which Augustus debates between revenge and pardon. These scenes carry the drama. Without them, there is no tragedy, but only a formless, nameless work. In another scene from "Cinna," Augustus consults two friends, both heads of the conspiracy against him. One pleads for the Republic, the other for the Empire. This is not a scene a faire, because Corneille could have devised another scene in which to introduce and create sympathy for Augustus. The scene is an important but not essential part of the drama.

In 1942, Judge Yankwich, a California federal district court judge, introduced the phrase "scenes a faire" into United States copyright law. In *Cain v. Universal Pictures Co.*,⁴ the plaintiff claimed that a church sequence appearing in the motion picture "When Tomorrow Comes" was an infringing copy of a similar scene from his novel "Serenade." In both the film and the novel, two lovers spent an idyllic night in a church choir loft, where they sought shelter from a storm. Judge Yankwich said the small details from events that took place in the church in both works, such as playing the piano, prayer, and hunger, were inherent in the situation itself.

They are what the French call "scenes a faire." Once having placed two persons in a church during a big storm, it was inevitable that incidents like these . . . should force themselves upon the writer in developing the theme. Courts have held repeatedly that such similarities and incidental details necessary to the environment or setting of an action are not the material of which copyrightable originality consists.⁵

Judge Yankwich did not use the phrase "scenes a faire" in the same way as Sarcey. He focused on details rather than on scenes central to the action of the play. Nor were these details obligatory in Sarcey's sense of the word. Although they flowed naturally from the

3. F. SARCEY, III HISTOIRE DU THEATRE DEPUIS CINQUANTE ANS 35-41 (1900).

4. 47 F. Supp. 1013 (S.D. Cal. 1942).

5. *Id.* at 1017; see Yankwich, *Originality in the Law of Intellectual Property*, 11 F.R.D. 457, 462 (1951) ("[W]hen you are dealing with a common idea, no matter how different the treatment may be, common elements will appear in both products . . . [S]imilarities may appear which are inherent in a situation. The French refer to them as *scenes a faire*, — that is, scenes which *must* follow a certain situation.") (emphasis in original).

situation, other details could have been used without changing the nature of the play or leaving the audience dissatisfied.

Courts have not precisely defined scenes a faire. In *Alexander v. Haley*,⁶ they were defined as “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.”⁷ Many courts have used this definition,⁸ which includes the two major strands of the scenes a faire doctrine. The first is that there are scenes which “must” be included in a given context, because identical situations call for identical scenes. The second is that certain scenes are standard or “stock” — the common stock of literary composition. In either context, scenes a faire are considered unprotected by copyright.⁹

6. 460 F. Supp. 40 (S.D.N.Y. 1978).

7. *Id.* at 45.

8. Other cases using the *Alexander v. Haley* definition of scenes a faire include *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 616 (7th Cir.) (quoting *Alexander*, 460 F. Supp. at 45), *cert. denied*, 459 U.S. 880 (1982); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir.) (same), *cert. denied*, 449 U.S. 841 (1980); *Steinberg v. Columbia Pictures, Inc.*, 663 F. Supp. 706, 713 (S.D.N.Y. 1987) (quoting *Walker v. Time Life Films, Inc.*, 615 F. Supp. 430, 436 (S.D.N.Y. 1985)), *aff'd*, 784 F.2d 44 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986); *Anderson v. Paramount Pictures Corp.*, 617 F. Supp. 1, 2 (C.D. Cal. 1985) (“incidents, characters, or settings that naturally flow from or are standard to the treatment of certain ideas and themes”); *Walker v. Time Life Films, Inc.*, 615 F. Supp. 430, 436 (S.D.N.Y. 1985) (“incidents, characters, or settings which, as a practical matter, are indispensable or standard in the treatment of a given topic”), *aff'd*, 784 F.2d 44 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986); *Universal City Studios, Inc. v. Nintendo Co.*, 615 F. Supp. 833, 858 (S.D.N.Y. 1985) (quoting *Alexander*, 460 F. Supp. at 45); *see Frybarger v. International Business Machs.*, 812 F.2d 525, 530 (9th Cir. 1987) (quoting *Atari*, 672 F.2d at 616). For other definitions, see *infra* notes 45-55 and accompanying text.

9. *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117 (9th Cir. 1987); *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); *Walker v. Time Life Films, Inc.*, 784 F.2d 44 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986); *Berkic v. Crichton*, 761 F.2d 1289 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985); *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984); *See v. Durang*, 711 F.2d 141 (9th Cir. 1983); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *Reyher v. Children's Television Workshop*, 533 F.2d 87 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976); *Evans v. Wallace Berrie & Co.*, 681 F. Supp. 813 (S.D. Fla. 1988); *Wavelength Film Co. v. Columbia Pictures Indus., Inc.*, 631 F. Supp. 305 (N.D. Ill. 1986); *Zambito v. Paramount Pictures Corp.*, 613 F. Supp. 1107 (E.D.N.Y.), *aff'd*, 788 F.2d 2 (2d Cir. 1985); *Overman v. Universal City Studios, Inc.*, 605 F. Supp. 350 (C.D. Cal. 1984), *aff'd*, 767 F.2d 933 (9th Cir. 1985); *Smith v. Weinstein*, 578 F. Supp. 1297 (S.D.N.Y.), *aff'd*, 738 F.2d 419 (2d Cir. 1984); *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222 (D. Md. 1981); *Jason v. Fonda*, 526 F. Supp. 774 (C.D. Cal. 1981), *aff'd*, 698 F.2d 966 (9th Cir. 1982); *Alexander v. Haley*, 460 F. Supp. 40 (S.D.N.Y. 1978); *Midwood v. Paramount Picture Corp.*, 1981 Copyright L. Rep. (CCH) ¶ 25,292 (S.D.N.Y. 1981).

The meaning of scenes a faire has strayed far afield from the one Sarcey gave it. Courts today tend to use it as a catch-phrase, a term recited in place of thoughtful analysis. They have not considered carefully what scenes a faire are, why they should be unprotectible, or what "unprotectible" means. Their opinions provide little helpful reasoning beyond general references to the distinction between ideas and expression, often referred to as the "idea/expression dichotomy."¹⁰

This article will first discuss the idea/expression dichotomy, which provides a background for understanding scenes a faire. It will then consider the nature of scenes a faire and what it means to say that a scene is indispensable or necessary. Finally, it will discuss why scenes a faire should be considered unprotectible, and the appropriate meaning of "unprotectible" in that context.

II. THE IDEA/EXPRESSION DICHOTOMY

Any original work of authorship that exists in tangible form is copyrightable — subject to protection under copyright.¹¹ Copyright protection, however, extends only to the particular expression of the ideas contained within the work, not to the ideas themselves.¹² As Justice Brandeis said, "the noblest of human productions — knowledge, truths ascertained, conceptions, and ideas — become, after voluntary communication to others, free as the air to common use."¹³ A playwright cannot, for example, obtain exclusive rights to the idea of feuding Irish and Jewish families whose children marry and produce grandchildren, leading to reconciliation.¹⁴ Nor will copyright give an artist the exclusive right to paint two cardinals on the branches of a blossoming apple tree.¹⁵

10. See *infra* notes 11-35 and accompanying text.

11. 17 U.S.C. § 102(a) (1982).

12. See *Mazer v. Stein*, 347 U.S. 201, 217 (1954); *Warner Bros., Inc. v. American Broadcasting Cos.*, 720 F.2d 231, 239 (2d Cir. 1983); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977); *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 363 (9th Cir. 1947); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930); *Dymow v. Bolton*, 11 F.2d 690, 691 (2d Cir. 1926). This principle, which developed in case law, has been codified in 17 U.S.C. § 102(b) (1982): "In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work."

13. *International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

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

15. See *Franklin Mint Corp. v. National Wildlife Art Exch., Inc.*, 575 F.2d 62 (3d Cir.), *cert. denied*, 439 U.S. 880 (1978).

Ideas are far too broad and general to be subject to monopoly control. An idea ordinarily encompasses many means of expression. If an author could gain control over an idea simply by expressing it in one form, then the stock of raw materials available to other authors would be diminished. As each copyright was obtained, the areas of thought open to discussion and development would be progressively narrowed.¹⁶ Subsequent writers would be barred from too large a precinct.¹⁷ Creativity and the exchange of thought would be impeded rather than encouraged.

The distinction between ideas and expression¹⁸ provides a way of reconciling two competing interests — the interest in rewarding ingenuity and the interest in allowing the public to benefit from new works by other authors on the same subject.¹⁹ The function of copyright is to promote creativity and the dissemination of creative works, so that the public may benefit from the labor of authors.²⁰ Copyright provides authors with an incentive to create by granting them the exclusive right to profit from and control specified uses of their works.²¹ Copyright, however, also has the capacity to diminish the potential for creativity. These exclusive rights may hinder the efforts of new authors who seek to build on the creativity of the past.²² The idea/ex-

16. *Eichel v. Marcin*, 241 F. 404, 408 (S.D.N.Y. 1913). Indeed, protecting ideas under copyright might create constitutional problems, as it would undercut the first amendment interest in the free exchange of ideas. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555-60 (1985).

17. B. KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 47 (1967).

18. The distinction between idea and expression is not always an easy one to make. *See infra* notes 23-34 and accompanying text.

19. *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706, 712 (S.D.N.Y. 1987) (rationale for copyright protection must reconcile two competing social interests, namely "rewarding individual ingenuity, and nevertheless allowing progress and improvements based on the same subject matter by others than the original author"); *see Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 912 (2d Cir. 1980); *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir.), *cert. denied*, 429 U.S. 930 (1976).

20. *See REGISTER OF COPYRIGHTS REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 3-6* (quoted in A. LATMAN, R. GORMAN & J. GINSBURG, *COPYRIGHT FOR THE EIGHTIES* 13 (1985)).

21. These include reproduction, performance, and the preparation of derivative works. 17 U.S.C. § 106 (1982) (exclusive rights in copyrighted works); *see Warner Bros., Inc. v. American Broadcasting Cos.*, 720 F.2d 231, 240 (2d Cir. 1983) ("By assuring the author of an original work the exclusive benefits of whatever commercial success his or her work enjoys, the law obviously promotes creativity.").

22. *See Sayre v. Moore*, 102 Eng. Rep. 139, 140 (1785) ("[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts retarded.").

pression dichotomy helps copyright strike a balance between providing incentives to create and maintaining the store of raw materials needed for new creations.

Although the boundary between unprotectible ideas and protectible expression is important, it is often difficult to draw.²³ When copying is literal, an idea can easily be isolated from its expression. If the defendant makes an exact copy of the plaintiff's work, or some major portion of it, expression has clearly been taken. The same is true even if the defendant's copy is not exact, but contains merely colorable variations. The expression found in the plaintiff's words is distinguishable from the abstract idea expressed by those words.

Of course, copyright protects against more than verbatim or near verbatim copying.²⁴ An author may infringe by appropriating the action of a play or novel, even if none of the words are taken.²⁵ To prove infringement, a plaintiff must show that the defendant copied the plaintiff's work, and that the copying went so far as to constitute improper appropriation.²⁶ The plaintiff usually accomplishes this by showing that the defendant's work is substantially similar to the plaintiff's.²⁷ Substantial similarity exists "if the fundamental essence or structure of one work is duplicated in another."²⁸ Although an author who copies the basic plot or theme of a work takes only an unprotectible idea, one who copies the patterning and arrangement of events and the interplay of characters commits an actionable taking of expression. In what has become known as the "abstractions" test, Judge Learned Hand said:

23. In some works, ideas and expression are more easily distinguishable than in others. Newton will survive at least as long as Homer, but the Newton that will survive, the essential Newton, is not the language in which he described his theories and findings but the theories and findings themselves. The essence of Homer, on the other hand, cannot be detached from his language.

Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1376 (1986).

24. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (protection "cannot be limited literally to the text, else a plagiarist would escape by immaterial variations").

25. See *Frankel v. Irwin*, 34 F.2d 142, 143 (S.D.N.Y. 1918).

26. Essentially, infringement requires ownership of the copyright by the plaintiff and copying by the defendant. In the absence of direct proof, the plaintiff will seek to establish copying by showing that the defendant had access to her work and that there is substantial similarity between the two works. 3 M. NIMMER, *NIMMER ON COPYRIGHT* § 13.01 (1988). Substantial similarity is also used to determine whether the "copying went so far as to constitute improper appropriation . . ." *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907 (3d Cir.), cert. denied, 423 U.S. 863 (1975); see *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

27. For a discussion of copying and improper appropriation, see *supra* note 26.

28. 3 M. NIMMER, *supra* note 26, § 13.03(A)(1).

Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the [work] is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended . . . Nobody has ever been able to fix that boundary, and nobody ever can.²⁹

As the defendant's taking departs further and further from the literal, from the specific words, sounds, or pictures used by the plaintiff, the boundary between unprotected ideas and protected expression becomes more and more uncertain.³⁰ The patterning and arrangement of the events in a work, taken apart from its words, cannot be seen on the written page; they exist solely in the mind. They are abstractions from the work, mental images or descriptions rather than the work itself.

An idea is a thought, a mental conception or image.³¹ When "expression" is an abstraction, it is of the same nature as an idea. The difference is one of degree, not of type. In this area, copyrights approach "what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent."³²

Although the idea/expression distinction provides a helpful way of thinking about copyright, it does not provide a particularly precise or useful tool. The necessarily subjective, ad hoc nature of this distinction³³ means that the classification ordinarily states the result reached rather than a reason for reaching it. It reformulates rather than solves the problem.³⁴ One must therefore keep in mind the underlying reason

29. *Nichols*, 45 F.2d at 121.

30. See B. KAPLAN, *supra* note 17, at 48 ("We are in a viscid quandary once we admit that 'expression' can consist of anything not close aboard the particular collocation in its sequential order.").

31. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 901 (2d ed. 1983).

32. *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901).

33. *Peter Pan Fabrics v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) ("[N]o principle can be stated as to when an imitation has gone beyond copying the 'idea' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc.").

34. See *Goodson-Todman Enters. v. Kellogg Co.*, 358 F. Supp. 1245, 1247 (quoting 2 M. NIMMER, NIMMER ON COPYRIGHT §§ 143.1, .11, at 619 (1972)). It is still necessary to decide the extent of similarity that is substantial and thus infringing.

for the distinction; that it provides a means of reconciling societal interests. Copyright provides incentives for creation. Taken to its extreme, however, it may unnecessarily impoverish the public domain, bar subsequent authors from building on past creativity, and reduce competition.

The scenes a faire doctrine has evolved from the same concerns. All authors build on the work of their predecessors. "No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others."³⁵ Some use of what has come before must be permitted or creativity will be stifled. The idea/expression dichotomy is helpful, but in some situations it may be necessary to permit subsequent authors to borrow more than ideas. When similarities naturally or necessarily result from an idea common to both works, protection, even of expression, may harm the very interests copyright seeks to advance.

III. THE NATURE OF SCENES A FAIRE

Judge Yankwich referred to scenes a faire as scenes which "must" be done.³⁶ "[W]hen you are dealing with a common idea, no matter how different the treatment may be, common elements will appear in both products . . . [S]imilarities may appear which are inherent in a situation. The French refer to them as scenes a faire, — that is, scenes which *must* follow a certain situation."³⁷

Earlier cases did not use the phrase "scenes a faire." They emphasized, however, that copyright did not protect stock situations, plot elements and incidents that existed in the common stock before the plaintiff's story was written.³⁸ They also noted that when the

35. *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436); *see infra* note 91 and accompanying text.

36. *Schwartz v. Universal Pictures Corp.*, 85 F. Supp. 270, 275 (C.D. Cal. 1945).

37. Yankwich, *supra* note 5, at 462 (emphasis in original).

38. *See Shipman v. R.K.O. Radio Pictures*, 100 F.2d 533 (2d Cir. 1938) (stress on marriage when husband is unsuccessful financially and wife supports family); *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1 (9th Cir. 1933) (small-town boy seeks popularity in college); *Dymow v. Bolton*, 11 F.2d 690 (2d Cir. 1926) (romantic relationship between ambitious young woman and ingenious young man in financial straits who helps her); *London v. Biograph Co.*, 231 F. 696 (2d Cir. 1916) (thieves commit a burglary, then poison each other); *Bachman v. Belasco*, 224 F. 817 (2d Cir. 1915) (dual personality); *Echevarria v. Warner Bros. Pictures*, 12 F. Supp. 632 (S.D. Cal. 1935) (historical incident); *Ornstein v. Paramount Prods.*, 9 F. Supp. 896 (S.D.N.Y. 1935) (husband contracts a disease and wife sacrifices her honor to pay for treatment); *Simonton v. Gordon*, 297 F. 625 (S.D.N.Y. 1918) (life in West Africa); *Frankel v. Irwin*, 34 F.2d 142 (S.D.N.Y. 1918) (person financially unable to travel abroad pretends to leave and remains in nominally closed house); *Underhill v. Belasco*, 254 F. 838 (S.D.N.Y. 1918) (child raised in convent); *Stevenson v. Harris*, 238 F. 432 (S.D.N.Y. 1917) (wartime spy stories); *Eichel v. Marcin*, 241 F. 404 (S.D.N.Y. 1913) (activities of a band of thieves).

plaintiff's and defendant's works were based on the same situation or subject, the treatment and development of the plot would inevitably contain similarities.³⁹ These similarities did not provide a sound basis for a finding of infringement. Nor would scattered and incidental similarities prove infringement unless they were combined and treated in similar ways.⁴⁰

Although Judge Yankwich continued to use the phrase after 1942,⁴¹ other courts did not. They did, however, state that a finding of infringement could not be based on similarities in well-known plot situations,⁴² or similarities that arose from common sources or subject matter.⁴³ Nor could such a finding be based on similarities that arose inevitably from the situation, genre, or historical setting.⁴⁴

39. *Ornstein v. Paramount Prods.*, 9 F. Supp. 896, 901 (S.D.N.Y. 1935); see *Shipman v. R.K.O. Radio Pictures*, 100 F.2d 533 (2d Cir. 1938) (stress on marriage when husband is financially unsuccessful and wife supports the family); *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1 (9th Cir. 1933) (small-town boy seeks popularity in college); *Dezendorf v. Twentieth Century-Fox Film Corp.*, 32 F. Supp. 359 (S.D. Cal. 1940) (orphaned child protected by bachelor in China); *Rush v. Oursler*, 39 F.2d 468 (S.D.N.Y. 1930) (seeming murder of audience member during stage performance); *Simonton v. Gordon*, 297 F. 625 (S.D.N.Y. 1924) (life in West Africa); *Underhill v. Belasco*, 254 F. 838 (S.D.N.Y. 1918) (child raised in convent).

40. *Dezendorf v. Twentieth Century-Fox Film Corp.*, 32 F. Supp. 359 (S.D. Cal. 1940); *Ornstein v. Paramount Prods.*, 9 F. Supp. 896 (S.D.N.Y. 1935); *Simonton v. Gordon*, 297 F. 625 (S.D.N.Y. 1924); *Fendler v. Morosco*, 253 N.Y. 281, 171 N.E. 56 (1930); see Yankwich, *supra* note 5, at 464-65 ("[S]imilarity of theme so obviously calls for similarity of treatment that originality will be made to reside in the association and grouping of materials, the delineation of character, the conflict and the other elements which are the very essence of a dramatic production . . .").

41. *Bradbury v. Columbia Broadcasting Sys.*, 174 F. Supp. 733, 745 (S.D. Cal. 1959), *rev'd*, 287 F.2d 478 (9th Cir. 1961); Yankwich, *supra* note 5. In *Supreme Records, Inc. v. Decca Records, Inc.*, 90 F. Supp. 904, 911 (S.D. Cal. 1950), Judge Yankwich said that the similarities between two arrangements of the same song were of a type that would occur to any arranger, a kind of "musique a faire."

42. *Funkhouser v. Loew's, Inc.*, 208 F.2d 185 (8th Cir. 1953) (many stories written about the Harvey Girls and the Santa Fe Railroad), *cert. denied*, 348 U.S. 843 (1954); *Twentieth Century-Fox Film Corp. v. Dieckhaus*, 153 F.2d 893 (8th Cir. 1946) (several stock "gags" and incidents); *Burnett v. Lambino*, 204 F. Supp. 327 (S.D.N.Y. 1962) (stock characters and situations with school background).

43. *Funkhouser v. Loew's, Inc.*, 208 F.2d 185 (8th Cir. 1953) (the Harvey Girls and the early days of the railroad), *cert. denied*, 348 U.S. 843 (1954); *Rosen v. Loew's, Inc.*, 162 F.2d 785 (2d Cir. 1947) (Nazi Germany); *Burnett v. Lambino*, 204 F. Supp. 327 (S.D.N.Y. 1962) (vocational school background); *Warsawsky v. Carter*, 132 F. Supp. 758 (D.D.C. 1955) (woman becomes President of the United States).

44. *Rosen v. Loew's, Inc.*, 162 F.2d 785 (2d Cir. 1947) (setting of Nazi Germany); *Bevan v. Columbia Broadcasting Sys.*, 329 F. Supp. 601 (S.D.N.Y. 1971) (setting of Nazi prisoner of war camps); *Burnett v. Lambino*, 204 F. Supp. 327 (S.D.N.Y. 1962) (vocational school setting); *Warsawsky v. Carter*, 132 F. Supp. 758 (D.D.C. 1955) (woman becomes President of the United States).

More recent decisions have used the phrase *scenes a faire*, but no single definition has emerged. Furthermore, while most definitions refer to necessary, indispensable, or inevitable scenes, courts have provided scant explanation of what makes a scene necessary.

A. *Recent Definitions of Scenes a Faire*

The phrase “scenes a faire” languished until 1976, when the Second Circuit decided *Reyher v. Children’s Television Workshop*.⁴⁵ In *Reyher*, both the plaintiff’s and defendant’s stories involved a lost child who identifies his/her mother as the most beautiful woman in the world. The village leader gathers beautiful women from the surrounding area, but none is the child’s mother. Finally a homely woman appears, whom the child greets joyfully as the missing mother.⁴⁶ In considering whether the defendant’s work infringed the plaintiff’s copyright, the court sought to distill the unprotected idea from protected expression. It said that a helpful analytic concept was that of scenes a faire, “sequences of events which necessarily follow from a common theme. ‘[S]imilarity of expression . . . which necessarily results from the fact that the common idea is only capable of expression in more or less stereotyped form will preclude a finding of actionable similarity.’”⁴⁷ Both works presented the theme or idea that to a lost child, the mother is beautiful, even though she may not be to the rest of the world. The stories also contained similar events.⁴⁸ This did not constitute infringement, however, as the similar scenes could be considered scenes a faire, “scenes which necessarily result from identical situations.”⁴⁹

After *Reyher*, the phrase “scenes a faire” exploded into use. Many courts used a definition derived from *Reyher*,⁵⁰ but other definitions

45. 533 F.2d 87 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976).

46. *Id.* at 92.

47. *Id.* at 91 (quoting 3 M. NIMMER, *supra* note 26, § 13.03(A), at 13-33).

48. *Id.* at 92.

49. *Id.*

50. *Id.* at 91; *see Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir.) (“scenes that necessarily result from the choice of a setting or situation”), *cert. denied*, 476 U.S. 1159 (1986); *Evans v. Wallace Berrie & Co.*, 681 F. Supp. 813, 817 (S.D. Fla. 1988) (“scenes which necessarily must follow from certain similar plot situations”); *Hartman v. Hallmark Cards, Inc.*, 639 F. Supp. 816, 819 (W.D. Mo. 1986) (“sequence of events which necessarily flow from a common theme”), *aff’d*, 833 F.2d 117 (8th Cir. 1987); *Wavelength Film Co. v. Columbia Pictures Indus.*, 631 F. Supp. 305, 306 (N.D. Ill. 1986) (“characters, settings, or events which necessarily follow from a certain theme or plot situation”); *Smith v. Weinstein*, 578 F. Supp. 1297, 1302 (S.D.N.Y.) (quoting *Reyher*, 533 F.2d at 91), *aff’d*, 738 F.2d 419 (2d Cir. 1984); *Davis v. United Artists, Inc.*, 547 F. Supp. 722, 727 (S.D.N.Y. 1982) (“sequences of events which necessarily follow from a common theme”); *Giangrasso v. Columbia Broadcasting Sys.*, 534 F. Supp. 472, 477 n.3

followed. For example, in *Alexander v. Haley*,⁵¹ the author of the novel "Jubilee" claimed that the book "Roots" infringed her copyright. Both books mingled fact and fiction, and involved the history of slavery in the United States. The court found that all the similarities the plaintiff claimed were in elements outside of copyright protection. These elements included (1) facts; (2) materials traceable to common sources, the public domain, or folk custom; (3) trite language and metaphors; and (4) scenes a faire.⁵² The court defined the last as "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic."⁵³ Some of these scenes a faire were attempted escapes, flights through the woods pursued by dogs, sex between a slave owner and his female slave, and the sale of a slave child away from her family.⁵⁴

The various definitions of scenes a faire⁵⁵ include two different, yet overlapping, concepts. The *Alexander* definition makes "stock" or "standard" sound like a more relaxed form of "indispensable." However, a stock scene may be different from a necessary or indispensable one. A stock scene is one that is often used. Such a scene may be

(E.D.N.Y. 1982) ("similarity in dramatic sequence . . . only capable of expression in more or less stereotyped form"); *Jason v. Fonda*, 526 F. Supp. 774, 777 (C.D. Cal. 1981) ("sequences which necessarily follow from a common theme"), *aff'd*, 698 F.2d 966 (9th Cir. 1982); *Gibson v. Columbia Broadcasting Sys.*, 491 F. Supp. 583, 585 (S.D.N.Y. 1980) (quoting *Reyher*, 533 F.2d at 91); *Midwood v. Paramount Pictures Corp.*, 1981 Copyright L. Rep. (CCH) ¶ 25,292 (S.D.N.Y. 1981) ("scenes which necessarily result from identical situations").

51. 460 F. Supp. 40 (S.D.N.Y. 1978).

52. *Id.* at 44-46.

53. *Id.* at 45. For other cases using a definition of scenes a faire derived from *Alexander v. Haley*, see *supra* note 8 and accompanying text.

54. *Id.* at 45 & 45 n.7.

55. Scenes a faire have been defined as "forms of expression that were either stock scenes or scenes that flowed necessarily from common unprotectable ideas." See *v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983); see *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485 (9th Cir.) (quoting *See*, 711 F.2d at 141), *cert. denied*, 469 U.S. 1037 (1984); *Overman v. Universal City Studios, Inc.*, 605 F. Supp. 350, 353 (C.D. Cal. 1984) ("forms of expression which . . . flow necessarily from the elements common to the two works"), *aff'd*, 767 F.2d 933 (9th Cir. 1985). They also have been defined as situations, scenes or incidents which flow naturally from a theme or plot premise. See *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir.) ("situations and incidents which flow naturally from a basic plot premise"), *cert. denied*, 474 U.S. 826 (1985); *Evans v. Wallace Berrie & Co.*, 681 F. Supp. 813, 817 (S.D. Fla. 1988) ("events which follow naturally from a common theme"); *Anderson v. Paramount Pictures Corp.*, 617 F. Supp. 1, 2 (C.D. Cal. 1985) ("incidents, characters or settings that naturally flow from or are standard to the treatment of certain ideas and themes"); *Miller Brewing Co. v. Carling O'Keefe Breweries, Ltd.*, 452 F. Supp. 429, 439 (W.D.N.Y. 1978) ("expressions which naturally flow from the attempt to convey a common . . . theme").

characterized as “common” in two senses. It is ordinary as well as common to plaintiff’s and defendant’s works. Another author may or may not “need” to use it. But when a scene follows “necessarily” from a common theme, topic, or idea, “common” means common to the two works; the scene may or may not be stock.

B. *The Meaning of “Necessary”*

It is much more difficult to grasp the meaning of a necessary scene than of a stock one. Even Judge Yankwich had some problems with the concept. In *Schwartz v. Universal Pictures*,⁵⁶ he sought to describe what he meant by a scene a faire, a scene which must be done.

For instance, the “scene a faire” in the present script is called for by the scene in which the girl burned her hand on a cigarette. Something had to be done with that burn, and the author uses it as a means of identification. In an old play in which Adolphe Menjou appeared . . . he came in, spilled some red ink; then took a handkerchief and wiped the ink off his hand with it. That was the beginning. Ultimately there had to be a scene explaining the red spot So in all dramatic works we find that situations which are identical call for scenes which are similar.⁵⁷

Once an author chooses a situation, “it calls for certain sequences in the method of treatment, which cannot be avoided, because they are, in the very nature of the development of the theme, and are used by every writer that knows his craft.”⁵⁸

It is unclear, however, what an author must necessarily or unavoidably do with the girl with the burned hand or the man with the ink-stained handkerchief. The only thing that seems truly necessary is that something be done with them.⁵⁹ The audience is likely to be dissatisfied if the author fails to put these situations and characters

56. 85 F. Supp. 270 (S.D. Cal. 1945).

57. *Id.* at 275. In an earlier case, *Cain v. Universal Pictures Co.*, 47 F. Supp. 1013, 1017 (S.D. Cal. 1942), Judge Yankwich made the same point when he said that certain incidents will arise inevitably from a situation. See *supra* notes 4-5 and accompanying text; Note, *Copyright Infringement: An Argument for the Elimination of the Scenes a Faire Doctrine*, 5 COMM. ENT. L.J. 147, 158 (1982).

58. *Schwartz*, 85 F. Supp. at 276.

59. In his later article, Judge Yankwich appeared to recognize this, saying that “[s]imilarities may appear which are inherent in a situation.” Once the scene involving spilled red ink was introduced, “quite evidently for a purpose, other scenes had to be resorted to to explain the spot.” Yankwich, *supra* note 5, at 462-63 (emphasis in original).

to some use. But if a play uses a burn as a means of identification or includes a man getting red ink on his handkerchief, many ensuing events are possible. No particular scene is necessary or unavoidable.

Courts have provided little assistance in confronting the nature of necessity in scenes a faire cases. They ordinarily define scenes a faire using one of the definitions given above, then describe a series of events that are scenes a faire and therefore unprotectible. Meanwhile, the meaning of "necessary" remains unclear.

1. Indispensable Scenes

The most obvious meaning of "necessary" is indispensable or essential, as water is necessary to life.⁶⁰ Few scenes will satisfy that requirement. Although scenes a faire are not necessary to sustain life, some courts seem to believe they are necessary to sustain creative life. These courts say that scenes a faire are forms of expression needed to express an idea, and must be left unprotected by copyright lest the idea itself be monopolized.⁶¹ "Scenes a faire are afforded no protection because the subject matter represented can be expressed in no other way than through the particular scene a faire. Therefore, granting a copyright 'would give the first author a monopoly on the commonplace ideas behind the scenes a faire.'"⁶² The scene a faire is considered necessary because the author cannot express a particular idea without it.

Plainly, some ideas admit of a greater variety of expression than others. Rarely, however, is an idea incapable of some alternative means of expression, particularly in fiction,⁶³ the setting in which most

60. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 1200 (2d ed. 1933).

61. *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1236 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 489 (9th Cir.), *cert. denied*, 469 U.S. 103 (1984); *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 616-17 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982); *Evans v. Wallace Berrie & Co.*, 681 F. Supp. 813, 817 (S.D. Fla. 1988) (quoting *Landsberg*, 736 F.2d at 489); *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222, 229 (D. Md. 1981).

62. *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1236 (3d Cir. 1986) (quoting *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 489 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984)), *cert. denied*, 479 U.S. 1031 (1987).

63. See *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984) ("Some ideas can be expressed in myriad ways, while others allow only a narrow range of expression. Fictional works generally fall into the first category."); see also *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1236-38 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987). Most of the scenes a faire cases which discuss monopolizing an idea are concerned not with plots of fictional books, plays, and films, but with video games and practically-oriented works. These cases discuss not only the scenes a faire doctrine,

scenes a faire cases arise. If more than one means of expression exists, forbidding other authors to copy one particular way of expressing the idea will not create an effective monopoly on that idea.

If scenes a faire consisted solely of scenes truly indispensable to the expression of an idea, the scenes a faire doctrine would encompass virtually nothing. However, the doctrine has not been so limited. Although courts often use the language of indispensability, an analysis of the cases shows that the doctrine in fact encompasses an alternate definition of "necessary": "inherent in the situation."⁶⁴

2. Scenes Inherent in the Situation

In some cases, necessity seems to arise from the standard or common nature of a scene. "Because it is virtually impossible to write about a particular historical era or fictional theme without employing certain 'stock' or standard literary devices, we have held that scenes a faire are not copyrightable as a matter of law."⁶⁵ Certain scenes appear almost inevitably in every genre. Stories about spies,⁶⁶ police,⁶⁷

but also the merger of expression and idea, the underlying principal of which is that expression merges into idea when the idea behind the expression can be expressed in only one or a very limited number of ways. *See Educational Testing Servs. v. Katzman*, 793 F.2d 533, 539 (3d Cir. 1986).

64. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 1200 (2d ed. 1983).

65. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980). Conversely, the more unusual or arbitrary a scene is, the less likely it is to flow from the logic or necessity of an idea and the more likely courts are to find it protectible. *See Bradbury v. Columbia Broadcasting Sys.*, 287 F.2d 478, 485 (9th Cir.), *cert. dismissed*, 368 U.S. 801 (1961); *Barris/Fraser Enters. v. Goodson-Todman Enters.*, 5 U.S.P.Q.2d (BNA) 1887, 1891 n.22 (S.D.N.Y. 1988).

66. *Stevenson v. Harris*, 238 F. 432 (S.D.N.Y. 1917).

Having acquired a spy, the novel and the play require that the spy must get somebody into trouble. Lost or stolen passports have long been a source of much difficulty and embarrassment. Then, of course, there must be a love affair, which, preferably, should end happily . . . The hero must not be named John or James. He must have the kind of name which annoys him through life while, fortunately, the heroine must have a simple name of biblical or historic origin. If possible, there must be an inn, for that makes a good setting, and even war figures must eat and, besides, there must be waiters or waitresses who hear or impart state and military secrets, as it is quite customary to discuss such matters in a loud voice in restaurants and inns.

Id. at 433-34.

67. *Walker v. Time Life Films, Inc.*, 615 F. Supp. 430, 436 (S.D.N.Y. 1985), *aff'd*, 784 F.2d 44 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986) (In any account of police work in the embattled part of the Bronx known as Fort Apache, "based on experiences in a poverty stricken, crime-ridden environment, depictions of bribery, prostitution, purse-snatching and neighborhood hostility to law enforcers are inevitable." Disarming threatening persons and the poor morale of unhappy officers are stock material for most police stories.).

female foundlings raised in convents,⁶⁸ and slavery⁶⁹ all have stock elements. Addressing two works about Nazi Germany, one court said that similar details, such as burning Jewish books and students rioting against their Jewish teachers were “nearly inevitable.”⁷⁰ Another court found that similarities between two works about prisoner of war camps in Hitler’s Germany were “virtually necessitated by the use of the same historical setting.”⁷¹ These similarities are not necessary in the sense that they are indispensable. Other scenes might have been substituted, but these scenes would be similar to those appearing in yet other works. They are, however, inherent in the situation.

Consider, for example, *Wavelength Film Co. v. Columbia Pictures Industries*.⁷² Two films, plaintiff’s “Wavelength” and defendant’s “Starman,” shared the theme of a stranded alien trying to return home, being pursued by hostile government authorities, and finally being rescued by friendly humans. The court found that the following similarities between the films were scenes a faire, indispensable to the treatment of that kind of science fiction theme:

[A]n alien arrives on earth in a spaceship; all humans are afraid of the unknown alien; governmental authorities are trying to capture or destroy the alien; one human becomes friendly with the alien and tries to help it return home safely; and the alien leaves earth on a spaceship immediately before death.⁷³

These elements certainly seem standard.⁷⁴ But they are not indispensable, as the theme could be expressed in other ways. For instance, the alien might arrive on a space beam. Most humans could admire and trust the alien, who is being pursued by a vicious government. The friendly humans could seek to keep the alien with them for their own purposes. Some concern other than impending death could create an urgent need for the alien’s return home; perhaps the alien carries a needed serum against a plague threatening the home world.

68. *Underhill v. Belasco*, 254 F. 838, 842 (S.D.N.Y. 1918) (The basic theme was old. “Given life in a convent, there must be in any two productions a certain amount of similar conversation and a certain amount of similar acts.”).

69. *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978).

70. *Rosen v. Loew’s, Inc.*, 162 F.2d 785, 788 (2d Cir. 1947).

71. *Bevan v. Columbia Broadcasting Sys.*, 329 F. Supp. 601, 607 (S.D.N.Y. 1971).

72. 631 F. Supp. 305 (N.D. Ill. 1986).

73. *Id.* at 307.

74. Indeed, there is a wonderful old science-fiction film called *The Day the Earth Stood Still* (20th Century-Fox 1951) starring Michael Rennie that contained all these elements.

Although the similarities listed in *Wavelength* are not in fact indispensable, they are all inherent in the situation. New authors should not be deprived of a whole series of plot elements that naturally arise from the basic theme. An author attempting to write without using these elements would be forced into unnatural contortions in an attempt to design around them.

Similarly, the use of talking, anthropomorphized eggs does not inevitably require that the eggs discuss such matters as lying under a chicken, being placed in a cardboard box, and their reactions to the possibility of being scrambled or fried.⁷⁵ In *Gibson v. Columbia Broadcasting System*,⁷⁶ the plaintiff argued that these similarities between his lecture and the defendant's television skit did not necessarily follow, as many events occur in the life of an egg. The egg might have been hatched in an incubator, colored, rolled, boiled, whipped, used in a souffle, or used raw. The court said, however, that the occurrences common to both works were "fairly predictable and usual in the life of an egg, while the alternatives . . . do not 'necessarily flow' from the 'common theme.'"⁷⁷ This seems incorrect, as the alternatives do seem to flow just as naturally or necessarily from the common theme of a talking egg with human characteristics. However, the plaintiff's uses of the theme were inherent in the situation. Those who subsequently wish to use the same theme should not be deprived of entire areas of egg behavior.

Video games provide another example. In *Atari, Inc. v. Amusement World, Inc.*,⁷⁸ the defendants based their video game on plaintiff's. Both involved spaceships combatting rocks and other spaceships, and had many common characteristics as well as differences. The court concluded that the many, detailed similarities in expression between the two games were dictated by the requirements of any version of the basic idea of a video game involving space rocks.⁷⁹ Despite the court's conclusion, these similarities were not inevitable. For example, both games had three sizes of rocks, which appeared in waves. The large rock, when hit, split into two medium rocks, a medium rock into two small ones, and a small rock disappeared.⁸⁰ Presumably, rocks could have come in four sizes not three, and could have broken into

75. See *Gibson v. Columbia Broadcasting Sys.*, 491 F. Supp. 583 (S.D.N.Y. 1980).

76. *Id.*

77. *Id.* at 586.

78. 547 F. Supp. 222 (D. Md. 1981).

79. *Id.* at 229.

80. *Id.* at 224.

three parts rather than two. Nonetheless, the first comer should not acquire a monopoly on what might well be the most convenient configuration of rocks.

Inevitability is too narrow a concept for defining scenes a faire. In *Steinberg v. Columbia Pictures Industries*,⁸¹ the plaintiff claimed that the defendant's poster infringed on his *New Yorker* cover illustration of the world as viewed from Manhattan. The court rejected the defendant's argument that the similarities were in scenes a faire.⁸² It noted that a striking stylistic relationship existed between the illustrations. Furthermore, both artists

chose a vantage point that looks directly down a wide two-way cross street that intersects two avenues before reaching a river. Despite defendants' protestations, this is not an inevitable way of depicting blocks in a city with a grid-like street system, particularly since most New York City cross streets are one way.⁸³

The *Steinberg* court was probably correct in concluding that the defendant's poster infringed the plaintiff's copyright, as the basic look of the poster, with very idiosyncratic stylistic elements, was taken. However, the court also seemed willing to protect the plaintiff's choice of vantage point and method of depicting city blocks. Although this choice obviously was not inevitable, others should not be forbidden from making a like choice. No one artist should be given the exclusive rights to so basic a vantage point. A too literal reading of "indispensable" can lead to overprotection, because any scene to which alternatives exist would not qualify as a scene a faire.

"Necessary" in the context of scenes a faire does not mean that there is no other way to do it. It may mean that there is no other equally satisfactory way to do it. A scene may be obligatory in Sarcey's sense, one which the audience expects and desires, without which the logic of the action is harmed and the audience left dissatisfied. An author should not be required to design around the most effective means of expression.

But scenes a faire have an even broader scope. Properly defined, they include scenes that flow naturally from the logic of a solution.⁸⁴

81. 663 F. Supp. 706 (S.D.N.Y. 1987).

82. *Id.* at 713.

83. *Id.* at 712.

84. Some courts have defined scenes a faire without using the words necessary or inevitable,

The human mind can imagine a wide spectrum of possibilities arising out of a given situation, theme, or setting. Given human experience, however, a limited number of results seem particularly logical or inherent in a situation.⁸⁵ Such scenes fall within the category of “necessary” scenes because they are akin to ideas or elements of vocabulary needed to construct a work.⁸⁶

IV. WHY SCENES A FAIRE ARE UNPROTECTIBLE

Having considered the meaning of scenes a faire, it is important to determine why they should be considered unprotected by copyright. Scenes a faire might be unprotectible for three reasons. First, they may not be original with the author. Second, any similarity between plaintiff's and defendant's works may not by itself be good evidence of copying. And third, even copying of some material that is original with the plaintiff should be permitted.

A. Originality

Copyright only protects original works of authorship.⁸⁷ The standard for originality is low, however. A work need not be novel, highly creative, or aesthetically appealing. Originality merely requires that the work owe its origin to the author — that it be independently created and not copied from other works.⁸⁸ It means little more than a prohibition against actual copying.⁸⁹

saying that they are situations, scenes, or incidents that flow naturally from a theme or plot premise. *See* *Berkie v. Crichton*, 761 F.2d 1289, 1293 (9th Cir.) (“situations and incidents which flow naturally from a basic plot premise”), *cert. denied*, 474 U.S. 826 (1985); *Evans v. Wallace Berrie & Co.*, 681 F. Supp. 813, 817 (S.D. Fla. 1988) (“events which follow naturally from a common theme”); *Anderson v. Paramount Pictures Corp.*, 617 F. Supp. 1, 2 (C.D. Cal. 1985) (“incidents, characters or settings that naturally flow from or are standard to the treatment of certain ideas and themes”); *Miller Brewing Co. v. Carling O’Keefe Breweries, Ltd.*, 452 F. Supp. 429, 439 (W.D.N.Y. 1978) (“expressions which naturally flow from the attempt to convey a common . . . theme”).

85. Of course, a scene may seem far more logical or inherent after we have read or viewed the plaintiff's work than before. This, however, is a problem requiring careful analysis rather than exclusion.

86. Similarities in scenes that arise from the logic of a situation may be poor evidence of copying. *See infra* notes 107-21 and accompanying text. Such scenes also should be deemed unprotectible because otherwise the options open to new authors will be progressively narrowed. *See infra* notes 147-48 and accompanying text.

87. 17 U.S.C. § 102(a) (1982).

88. 1 M. NIMMER, *supra* note 26, § 2.01(A).

89. *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 103 (2d Cir. 1951) (quoting *Hoague-Sprague Corp. v. Frank C. Myer Co.*, 31 F.2d 583, 586 (E.D.N.Y. 1929)).

If two works are based on a common source, many of the events in each are likely to be unoriginal. The same is true of stock events. Indeed, dramatic situations are few. Few scenes, events, or situations are truly unique in the abstract. The number of themes available for use, which all authors must share, is limited. One writer has asserted that no more than thirty-six fundamental dramatic situations exist.⁹⁰ The number is arbitrary, but the principle is correct. As Judge Story said:

In truth, in literature, in science and in art, there are, and can be, few, if any things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.⁹¹

Thus, an author cannot claim protection for the abstract expression of his work "if the work on such abstract level is not the product of his original authorship."⁹²

In many early cases, courts refused to protect stock situations because they considered them common property that existed long before the plaintiff's story was written.⁹³ They often seemed to assume

90. "Gozzi maintained that there can be but thirty-six tragic situations. Schiller took great pains to find more, but he was unable to find even so many as Gozzi." G. POLTI, *THE THIRTY-SIX DRAMATIC SITUATIONS* 7 (1954 reprint); see *Schwartz v. Universal Pictures Co.*, 85 F. Supp. 270, 275 (S.D. Cal. 1945) (the world's dramatic literature can be reduced to three dozen situations); *Echevarria v. Warner Bros. Pictures, Inc.*, 12 F. Supp. 632, 634 (S.D. Cal. 1935) (same); *Desny v. Wilder*, 46 Cal. 2d 715, 741, 299 P.2d 257, 271 (1956) (same).

91. *Emerson v. Davies*, 8 F. Cas. 615, 619 (D. Mass. 1845) (No. 4436); See *Berkie v. Crichton*, 761 F.2d 1289, 1294 (9th Cir.), cert. denied, 474 U.S. 826 (1985) (there is nothing original or new under the sun); *Bachman v. Belasco*, 224 F. 817 (2d Cir. 1915) (there is rarely anything that is physically new, that does not contain something from a previous publication); *Simonton v. Gordon*, 297 F. 625, 627 (S.D.N.Y. 1924) (works inevitably contain something found in previous publications).

92. 3 M. NIMMER, *supra* note 26, § 13.03(A)(1).

93. See *Funkhouser v. Loew's, Inc.*, 208 F.2d 185 (8th Cir. 1953) (many stories written about the Harvey Girls and the Santa Fe Railroad), cert. denied, 348 U.S. 843 (1954); *Twentieth Century-Fox Film Corp. v. Dieckhaus*, 153 F.2d 893 (8th Cir. 1946) (several stock "gags" and incidents); *Shipman v. R.K.O. Radio Pictures*, 100 F.2d 533 (2d Cir. 1938) (stress on marriage when husband is unsuccessful financially and wife becomes the "bread winner"); *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1 (9th Cir. 1933) (small-town boy seeks popularity in college); *London v. Biograph Co.*, 231 F. 696 (2d Cir. 1916) (thieves commit a burglary, then poison each other); *Burnett v. Lambino*, 204 F. Supp. 327 (S.D.N.Y. 1962) (stock characters and situations inherent in school setting); *Ornstein v. Paramount Prods.*, 9 F. Supp. 896 (S.D.N.Y. 1935) (husband contracts a disease and wife sacrifices her honor to pay for treatment); *Simonton v. Gordon*, 297 F. 625 (S.D.N.Y. 1924) (life in West Africa); *Frankel v. Irwin*, 34 F.2d 142 (S.D.N.Y. 1918) (person financially unable to travel abroad pretends to leave, but remains in nominally closed house); *Underhill v. Belasco*, 254 F. 838 (S.D.N.Y. 1918) (child raised in a convent).

that these old and much used plot elements lacked originality. Originality could be found in the association and grouping of incidents in a new way, but not in the incidents themselves.⁹⁴

For example, in *London v. Biograph Co.*,⁹⁵ the plots of both the plaintiff's story and defendant's motion picture involved two thieves who commit a burglary, return to their room, and quarrel over the booty. Each manages to put poison in something the other is about to swallow, and both thieves die.⁹⁶ The court said that the plaintiff's copyright could not protect the old, common plot that had appeared in Chaucer's "Pardoner's Tale" and in still earlier versions.⁹⁷ Although the copyright might protect the author's embellishments of an old plot, it would not "operate to prohibit the presentation by someone else of the same old plot without the particular embellishments."⁹⁸ Similarly, in *Walker v. Time Life Films*,⁹⁹ the court said that foot chases, the morale problems of policemen, and the familiar figure of the Irish cop are "venerable and often-recurring themes of police fiction. As such, they are not copyrightable except to the extent they are given unique — and therefore protectible — expression in an original creation."¹⁰⁰

To a certain extent, therefore, the requirement of originality explains the scenes a faire doctrine. But it does not provide a full explanation. Even stock scenes may occasionally be original. An author might create a scene that is in fact stock without ever having heard of it, making it, in copyright terms, an original creation. "A work is original and may command copyright protection even if it is completely identical with a prior work provided it was not copied from such prior work but is rather a product of the independent efforts of its author."¹⁰¹ Indeed, Professor Nimmer has objected to the references to "stock" or "standard" in definitions of scenes a faire because they imply that "copyright is not available for the hackneyed even if original with the

94. *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1 (9th Cir. 1933); *Simonton v. Gordon*, 297 F. 625 (S.D.N.Y. 1924); *Stevenson v. Harris*, 238 F. 432 (S.D.N.Y. 1917); see *Schwartz v. Universal Pictures, Inc.*, 85 F. Supp. 270 (S.D. Cal. 1945); *Echevarria v. Warner Bros. Pictures, Inc.*, 12 F. Supp. 632 (S.D. Cal. 1935); see also *Reyher v. Children's Television Workshop*, 533 F.2d 87, 92 n.4 (2d Cir.) (originality found in association and grouping of materials and other elements which are the essence of dramatic production), *cert. denied*, 429 U.S. 980 (1976).

95. 231 F. 696 (2d Cir. 1916).

96. *Id.* at 697.

97. *Id.* at 698-99.

98. *Id.* at 699.

99. 784 F.2d 44 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986).

100. *Id.* at 50; see *Stevenson v. Harris*, 238 F. 432, 433-34 (S.D.N.Y. 1917).

101. 1 M. NIMMER, *supra* note 26, § 2.01(A)(1).

copyright claimant."¹⁰² This echoes Judge Hand's comments in *Sheldon v. Metro-Goldwyn Pictures Corp.*¹⁰³ In discussing cases that seemingly held that an old plot could not be copyrighted,¹⁰⁴ he said that "anticipation as such cannot invalidate a copyright."¹⁰⁵ An author does not have to be first to be original.

Perhaps seeking evidence of originality in cases where the similarities between the plaintiffs and defendant's works are in stock scenes wastes judicial resources. As the abstraction of an old and hackneyed scene is unlikely to be original, and the value to be derived from protecting it is, in any event, low, it may be preferable to conclude that such a scene is not protectible. As Professor Kaplan said, "to make the copyright turnstile revolve, the author should have to deposit more than a penny in the box, and some like measure ought to apply to infringement."¹⁰⁶ However, the scenes a faire doctrine extends beyond the question of whether the plaintiff's scene is original.

B. Evidence of Copying

Copyright does not protect against independent creation, but only against copying. If there is no copying, there is no infringement. Thus, no infringement exists if a subsequent work, although substantially similar to a prior work, has been independently created without reference to its predecessor.¹⁰⁷ This is true despite "that obsessive conviction, so frequent among authors and composers, that all similarities between their works and any others which appear later must inevitably be ascribed to plagiarism."¹⁰⁸ Thus, the mere existence of similarity,

102. 3 M. NIMMER, *supra* note 26, § 13.03(A), 13-33 n.43.

103. 81 F.2d 49, 53-54 (2d Cir. 1936).

104. He referred to *London v. Biograph Co.*, 231 F. 696 (2d Cir. 1916) and *Eichel v. Marcin*, 241 F. 404 (S.D.N.Y. 1913). *Sheldon*, 81 F.2d at 54.

105. *Sheldon*, 81 F.2d at 54. He added that a plagiarist is not an author, but "if by some magic a man who had never known it were to compose anew Keat's Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's." *Id.*

106. B. KAPLAN, *supra* note 17, at 46.

107. 2 M. NIMMER, *supra* note 26, § 8.01(A); see *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 16-17 (9th Cir. 1933); *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 147 (S.D.N.Y. 1924); *Emerson v. Davies*, 8 F. Cas. 615, 624 (D. Mass. 1845) (No. 4436).

108. *Dellar v. Samuel Goldwyn, Inc.*, 150 F.2d 612, 613 (2d Cir.), *cert. denied*, 327 U.S. 790 (1945). In *Lewys v. O'Neill*, 49 F.2d 603, 606 (S.D.N.Y. 1931), the court stated that [o]n Tuesday, October 2, 1753, in the *Adventurer*, No. 95, Dr. Johnson wrote an essay on plagiarism . . . [writing] "The allegation of resemblance between authors, is indisputably true; but the charge of plagiarism, which is raised upon it, is not to be allowed with equal readiness. A coincidence of sentiment may easily happen without any communication, since there are many occasions in which all reasonable

or even identity, between two works does not mean that one infringes the other. Such similarity is only evidence of copying. The strength of this evidence depends on the surrounding circumstances, on the likelihood that similarity exists in the absence of copying.¹⁰⁹

Substantial similarity between two works often cannot be readily explained by anything other than copying. The similarity may be so great as to make coincidence unlikely. In cases involving scenes a faire, however, other explanations do exist.¹¹⁰ When two works use the same stock scenes, or are based on the same source, they are likely to be substantially similar even in the absence of copying.

A common source may suggest plot elements and dialogue to more than one author, each of whom works independently. For example, in *Bachman v. Belasco*,¹¹¹ the plaintiff and defendant both wrote plays about a young woman with a dual personality. Both authors traced the idea to nonfictional accounts of such a woman. The court said that all significant similarities could readily be accounted for by the common source, which naturally suggested certain situations. This included the situation central to each play, "that an attractive young lady with a dual personality, one serious and conventional, the other frisky and highly unconventional, may find herself placed in situations calculated to injure her reputation."¹¹² Conversely, the more unusual or arbitrary a scene, the less likely it is that similarities between two works are coincidental.¹¹³

men will nearly think alike. Writers of all ages have had the same sentiments, because they have in all ages had the same objects of speculation; the interests and passions, the virtues and vices of mankind, have been diversified in different times, only by unessential and casual varieties; and we must, therefore, expect in the words of all those who attempt to describe them, such a likeness as we find in the pictures of the same person drawn in different periods of his life."

109. *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 16-17 (9th Cir. 1933).

110. See *infra* notes 111-21; see also *Funkhouser v. Loew's Inc.*, 208 F.2d 185, 188 (8th Cir. 1953) (similar incidents in plaintiff's stories and defendant's film due to nature of the subject matter and background, not to copying), *cert. denied*, 348 U.S. 843 (1954); *Harold Lloyd*, 65 F.2d at 617 (similarity is not infringing if it results from the fact that both works deal with the same subject or make use of common sources); *Burnett v. Lambino*, 204 F. Supp. 327, 331 (S.D.N.Y. 1962) (similarities inherent in the vocational schools' background not infringing).

111. 224 F. 817 (2d Cir. 1915).

112. *Id.* at 818. When two works involved POW camps within Hitler's Germany, similarities in stock items, characteristic of the POW camp genre of literature, did not demonstrate copying. *Bevan v. Columbia Broadcasting Sys.*, 329 F. Supp. 601 (S.D.N.Y. 1971); see also *Echevarria v. Warner Bros. Pictures, Inc.*, 12 F. Supp. 632, 637-38 (S.D. Cal. 1935) (similarities not infringing when they arise from the use of the same two historical characters in the same historical setting).

113. See *Bradbury v. Columbia Broadcasting Sys.*, 287 F.2d 478 (9th Cir.), *cert. dismissed*, 380 U.S. 801 (1961).

The same problem arises from the portrayal of events that “necessarily” or naturally follow from a common theme, subject, situation, or idea. If these events are similar in two works, copying is not the only explanation. Results that are particularly logical or inherent in a situation can easily occur to different authors who have never heard of one another and never seen each other’s work. In *Warshawsky v. Carter*,¹¹⁴ for example, both the plaintiff’s and defendant’s stories concerned a woman who became President of the United States. The court found many substantial similarities between the works, but concluded that these similarities would normally occur in two stories about a woman who became President.¹¹⁵ For instance, the protagonist in both stories was elected Vice President then succeeded to the presidency after the President’s death.¹¹⁶ Writing in 1955, the *Warshawsky* court said it “would be naive indeed to assume that [a woman] could be nominated and elected as [President] instead of succeeding as an elected Vice President.”¹¹⁷ The court recognized that similarity can result from copying, but may also occur because of the subject matter and setting common to both stories.¹¹⁸ In a more recent case,¹¹⁹ both plaintiff’s and defendant’s stories involved an underwater world where inhabitants used sand dollars as currency, food made of seaweed, seahorses for transportation, and plates made of mother of pearl.¹²⁰ These similarities were not explainable only by copying; they were probably due to the common idea of an underwater setting.¹²¹

In cases involving scenes a faire, similarity is likely even in the absence of copying. Independent creation is a plausible explanation for similarity when two authors use similar stock scenes or scenes that are likely given the nature of the subject matter or theme. But

114. 132 F. Supp. 758 (D.D.C. 1955).

115. *Id.* at 760.

116. *Id.* at 759.

117. *Id.* at 760. With respect to the similarity in the protagonist’s political roles, the court said it was “unrealistic to assume that any woman could aspire to be, much less succeed in being, nominated as a vice presidential candidate without some substantial support and backing for an advocated program that had some appeal among a substantial number of voters.” *Id.*

118. *Id.*

119. *Evans v. Wallace Berrie & Co.*, 681 F. Supp. 813 (S.D. Fla. 1988).

120. *Id.* at 817.

121. *Id.* at 818 n.6 (discussing striking similarity between the works); see *Rush v. Oursler*, 39 F.2d 468, 473 (S.D.N.Y. 1930) (The parties’ plays both had a stage performance interrupted by a murder of a person seated in the audience, who pretends to be a real audience-member. The court said: “When two authors portray the same occurrence, in the same setting, presupposing the presence of the same people in the same environment, acting under the same emotions, similarities of incident, unaccompanied by similarities in plot, are not persuasive evidence of copying [S]uch similarities are inevitable.”).

this likelihood alone insufficiently explains the scenes a faire doctrine, as the doctrine contemplates a lack of liability under some circumstances even if copying exists.¹²²

C. *Permissible Copying*

Copyright does not forbid all copying. In an infringement case, the plaintiff must show improper appropriation as well as copying.¹²³ Plaintiffs can usually establish both these elements in the same way — by showing substantial similarity between the defendant's work and their own. But copying and improper appropriation are not the same thing.¹²⁴ For example, an artist can sit for hours before a copyrighted painting "copying" it, but if its appearance is entirely different, the artist has not infringed.

Ideas may be freely copied and used.¹²⁵ They are unprotected even against direct copying.¹²⁶ In a case involving several fictional versions of the same murder and trial,¹²⁷ Judge Learned Hand said that the

122. *Beřkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985).

123. *See supra* note 26 and accompanying text; *see also* *Walker v. Time Life Films, Inc.*, 784 F.2d 44 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986); *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982); *Davis v. United Artists, Inc.*, 547 F. Supp. 722 (S.D.N.Y. 1982); *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222 (D. Md. 1981); *Bevan v. Columbia Broadcasting Sys.*, 329 F. Supp. 601 (S.D.N.Y. 1971).

124. Some cases say a plaintiff may show that expression was improperly appropriated by proving that substantial similarities exist as to protectible material. *See* *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986); *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 614 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *Barris/Fraser Enters. v. Goodson-Todman Enters.*, 5 U.S.P.Q.2d (BNA) 1887 (S.D.N.Y. 1988).

125. *See supra* notes 12-15 and accompanying text; *see also* *Lewys v. O'Neill*, 49 F.2d 603, 607 (S.D.N.Y. 1931) (quoting A. BIRRELL, *Literary Larceny*, in SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 167 ("Ideas . . . are [as] free as air. If you happen to have any, you fling them into the common stock, and ought to be well content to see your poorer brethren thriving upon them."); *Eichel v. Marcin*, 241 F. 404, 411 (S.D.N.Y. 1913) (quoting *Chatterton v. Cave*, 3 App. Cas. 483, 501 (1878)).

An idea may be taken from a drama and used in forming another, without the representation of the second being a representation of any part of the first. For example, I have no doubt that Sheridan, in composing 'The Critic,' took the idea from 'The Rehearsal'; but I think it would be an abuse of language to say that those who represent 'The Critic' represent 'The Rehearsal' or any part thereof; and if it were left to me to find the fact, I should, without hesitation, find that they did not.

126. *Frybarger v. International Business Machs.*, 812 F.2d 525, 529 (9th Cir. 1987).

127. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936).

defendants could use not only material the plaintiffs did not originate, but "even the plaintiffs' contribution itself, if they drew from it only the more general patterns; that is, if they kept clear of its 'expression.'"¹²⁸ Similarly, in *Nichols v. Universal Pictures Corp.*,¹²⁹ both the plaintiff's play and the defendant's motion picture concerned a quarrel between a Jewish and Irish father, the marriage of their children, the birth of grandchildren, and a reconciliation.¹³⁰ Judge Hand said that even if the plaintiff's play was wholly original, which he doubted, and the defendant took those elements from the plaintiff, there was no infringement. "Though the plaintiff discovered the vein, she could not keep it to herself; so defined, the theme was too generalized an abstraction from what she wrote. It was only a part of her 'ideas.'"¹³¹ An author may directly copy ideas, themes, or facts from another author without infringement.

If that which is denominated a scene a faire is considered an idea, it is therefore unprotectible. In *Rush v. Oursler*,¹³² the plaintiff's and defendant's plays included the interruption of a stage performance by the murder of a person seated in the audience. Both plays created the illusion that the murder was real, and that the murder victims were members of the audience rather than the cast. The *Rush* court said that this was a dramatic incident which is not copyrightable.¹³³ An author could not "by obtaining a copyright withdraw from others the right to portray such an occurrence in literary or dramatic form."¹³⁴ In a later but similar case,¹³⁵ the court said that even if the defendant copied the idea of a remote broadcast interrupted by an armed robber, the copying was not actionable "because it is only of an idea, and the handling, scenes, details and characterization used by plaintiffs and defendants in their works based on this idea are unquestionably not substantially similar."¹³⁶

128. *Id.* at 54.

129. 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

130. *Id.* at 122.

131. *Id.*; see *Dymow v. Bolton*, 11 F.2d 690 (2d Cir. 1926) (If there was copying — which the court did not believe — it was permissible because the mere subsection of plot that was similar was not susceptible of copyright.).

132. 39 F.2d 468 (S.D.N.Y. 1930).

133. *Id.* at 472-73.

134. *Id.*; see *Ornstein v. Paramount Prods.*, 9 F. Supp. 896 (S.D.N.Y. 1935) (although defendants probably had taken some ideas from plaintiff's play, there was no infringement).

135. *Giangrasso v. Columbia Broadcasting Sys.*, 534 F. Supp. 472 (E.D.N.Y. 1982).

136. *Id.* at 476.

This does not preclude liability for copying a plot, at least if "plot" is broadly defined.¹³⁷ A defendant who takes a sufficiently detailed and concrete pattern from the plaintiff's work may have appropriated the plaintiff's expression.¹³⁸ Of course, the line between idea and expression frequently is difficult to draw.¹³⁹ The essence of infringement, however, lies not in taking a general theme, but rather "its particular expression through similarities of treatment, details, scenes, events and characterization."¹⁴⁰

But the scenes a faire doctrine extends beyond the idea/expression dichotomy.¹⁴¹ A number of cases say that both ideas and scenes a faire are unprotected.¹⁴² Some state that scenes a faire include forms of

137. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930). Judge Hand said that *Dymow v. Bolton*, 11 F.2d 690 (2d Cir. 1926), did not hold that a plagiarist was never liable for stealing a plot, although in that case the most detailed pattern common to both was not very detailed, and there was no infringement. He added, "but we do not doubt that two plays may correspond in plot closely enough for infringement. How far that correspondence must go is another matter." *Nichols*, 45 F.2d at 121; see also 3 M. NIMMER, *supra* note 26, § 13.03(A) (cases denying protection to a plot ordinarily have defined it "as . . . the equivalent of an abstract idea").

138. See *supra* notes 24-29 and accompanying text.

139. See *Reyher v. Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976); see also *supra* notes 23-34 and accompanying text.

140. *Reyher v. Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976); *Davis v. United Artists, Inc.*, 547 F. Supp. 722, 726 (S.D.N.Y. 1982); *Giangrasso v. Columbia Broadcasting Sys.*, 534 F. Supp. 472, 476 (E.D.N.Y. 1982); see *Warner Bros., Inc. v. American Broadcasting Cos.*, 654 F.2d 204, 209 (2d Cir. 1981) (quoting *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 191 F.2d 594, 600 (2d Cir. 1951) ("[N]o one infringes, unless he descends so far into what is concrete [in a work] as to invade . . . [its] expression."); *Frankel v. Irwin*, 34 F.2d 142, 143 (S.D.N.Y. 1918) ("It is doubtful whether incidents per se can become copyrightable literary property, but it does not take many of them, nor much causal connection thereof, to make what will pass for a plot, or scene, and constitute the action of a play; and that a scene has literary quality and can be copyrighted, and piracy may consist in appropriating the action of a play without any of the words is well settled.").

141. Or at least it may, given the difficulty of distinguishing between an idea and the abstract expression of that idea.

142. *Frybarger v. International Business Machs.*, 812 F.2d 525, 529-30 (9th Cir. 1987); *Berkie v. Crichton*, 761 F.2d 1289, 1293-94 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985); See *v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983); *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 615 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982); *Wavelength Film Co. v. Columbia Pictures, Inc.*, 631 F. Supp. 305 (N.D. Ill. 1986); *Zambito v. Paramount Pictures Corp.*, 613 F. Supp. 1107, 1112 (E.D.N.Y.), *aff'd*, 788 F.2d 2 (2d Cir. 1985); *Overman v. Universal City Studios, Inc.*, 605 F. Supp. 350, 353 (C.D. Cal. 1984), *aff'd*, 767 F.2d 933 (9th Cir. 1985); *Jason v. Fonda*, 526 F. Supp. 774, 777 (C.D. Cal. 1981), *aff'd*, 698 F.2d 966 (9th Cir. 1982); *Gibson v. Columbia Broadcasting Sys.*, 491 F. Supp. 583, 584 (S.D.N.Y. 1980); *Miller Brewing Co. v. Carling O'Keefe Breweries, Ltd.*, 452 F. Supp. 429, 439 (W.D.N.Y. 1978); *Barris/Fraser Enters. v. Goodson-Todman Enters.*, 5 U.S.P.Q.2d (BNA) 1887, 1893 (S.D.N.Y. 1988).

expression that either necessarily flow from a common idea or are essential to an idea.¹⁴³ “[C]ertain forms of literary expression are not protected against copying [T]he general idea for a story is among these. So too are all situations and incidents which flow naturally from a basic plot premise, so-called scenes a faire.”¹⁴⁴ In more general terms, some courts require not only that a plaintiff show copying by proving access and substantial similarity, but also that the defendant improperly appropriated the plaintiff’s expression. To prove the latter, the plaintiff must show that the similarities relate to protectible material.¹⁴⁵

Thus, even an admitted copier of original expression may not be an infringer. This may enhance judicial economy. If the only similarities between plaintiff’s and defendant’s works are in scenes a faire, it is unnecessary to decide if the plaintiff’s work is original or if it has been copied.¹⁴⁶ More important, when scenes a faire are involved, ostensibly substantial similarities in expression should not always be actionable, even if the defendant has copied from the plaintiff.

When the similarities between two works exist in stock or “necessary” scenes, the scenes are likely to look and feel the same. They may be similarly patterned at a high level of specificity. Substantial similarity, as ordinarily understood, does not suffice as a means of finding copying or improper appropriation. A trier of fact may find copying where it does not exist. Even when some copying is present, it should not be actionable merely because the works look and feel the same. Although copyright must provide incentives to create, it must also protect the public domain and avoid hindering new creations. “[T]he purpose of the copyright law is to create the most efficient and productive balance between protection (incentive) and dissemination of information, to promote learning, culture and development.”¹⁴⁷ Too

143. See *v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983); *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222, 228 (D. Md. 1981); *Miller Brewing Co. v. Carling O’Keefe Breweries, Ltd.*, 452 F. Supp. 429, 439 (W.D.N.Y. 1978); see *Frybarger v. International Business Machs.*, 812 F.2d 525 (9th Cir. 1985).

144. *Berkie v. Crichton*, 761 F.2d 1289, 1293 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985); see *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983) (The trial court inaccurately characterized the scenes a faire doctrine as relating to unprotected ideas, but properly applied it to “hold unprotectable forms of expression that were either stock scenes or scenes that flowed necessarily from common unprotectable ideas.”).

145. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *Davis v. United Artists, Inc.*, 547 F. Supp. 722, 723-24 (S.D.N.Y. 1982); *Barris/Fraser Enters. v. Goodson-Todman Enters.*, 5 U.S.P.Q.2d (BNA) 1887 (S.D.N.Y. 1988).

146. Given the inclination of attorneys to argue every possible issue, and judges to discuss every argued issue, this economy may be illusory.

147. *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1235 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

little protection may fail to provide authors with sufficient incentive to create. Too much, however, may cut new authors off from the ability to use and develop stock and "necessary" material on an equal basis.

Some borrowing — building on the creativity of the past — is both inevitable and desirable. Copyright must perform the difficult task of determining how much borrowing is permissible. Ideas are free for all to use; they are a universal heritage and common store from which all may draw. They are the raw materials of creation. If ideas are withdrawn from the public domain, the areas of thought open to exploration will progressively narrow.

Scenes a faire also have a certain universality. Writing without stock literary devices is possible, but such devices are part of the universal heritage. Although "necessary" scenes do not provide the only available path for an author, they do have a connotation of limits. There may be only a limited number of satisfactory or obvious ways to deal with a particular situation.¹⁴⁸ Scenes a faire provide a type of vocabulary. An author who has been exposed to a work containing an idea or situation should not be forced to avoid one of the most natural or logical ways of expressing it. Otherwise, the options open to new authors will be progressively narrowed. Furthermore, avoiding a scene a faire may be more difficult than creating it. Authors should not be required to design around an obvious choice, even if others are available.

V. THE MEANING OF UNPROTECTIBLE

Scenes a faire are often termed uncopyrightable.¹⁴⁹ At first glance, this seems odd. Some works, such as those that are completely unorig-

148. A slightly different question of limits can be seen in a case involving beer commercials. See *Miller Brewing Co. v. Carling O'Keefe Breweries, Ltd.*, 452 F. Supp. 429 (W.D.N.Y. 1978). The court stated that "arm wrestling, argument in a tavern, recitation of poetry, and siblings speaking in unison used in Miller's and Carling's light beer commercials are only ideas or themes therein and do not constitute expressions subject to copyright protection." *Id.* at 440. Similarity was to be expected from competitors selling the same product. Furthermore, a thirty-second commercial "leaves little room for factual and thematic development whereby a competitor can place distinguishing features therein to avoid infringing another's . . . work." *Id.* at 441.

149. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90-91 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976); *Wavelength Film Co. v. Columbia Pictures Indus.*, 631 F. Supp. 305, 306 (N.D. Ill. 1986); *Zambito v. Paramount Pictures, Inc.*, 613 F. Supp. 1107, 1110-11 (E.D.N.Y.), *aff'd*, 788 F.2d 2 (2d Cir. 1985); *Smith v. Weinstein*, 578 F. Supp. 1297, 1302 (S.D.N.Y.), *aff'd*, 738 F.2d 419 (2d Cir. 1984); *Davis v. United Artists, Inc.*, 547 F. Supp. 722, 727 (S.D.N.Y. 1982); *Barris/Fraser Enters. v. Goodson-Todman Enters.*, 5 U.S.P.Q.2d (BNA) 1887, 1889 (S.D.N.Y. 1988); see *Whelan*, 797 F.2d at 1236 (scenes a faire are afforded no

inal or not fixed in any tangible form of expression, are uncopyrightable.¹⁵⁰ But scenes a faire are ordinarily elements of works that are both copyrightable and copyrighted. Copyright, however, does not preclude appropriation of every element of a work; ideas, for example, may be taken freely. *Alexander v. Haley*¹⁵¹ listed other attributes of a copyrightable work that are not subject to copyright protection. These include facts, scenes a faire, material traceable to a common source, and phrases conveying an idea that is expressible only, or at least typically, in a limited number of stereotyped fashions.¹⁵² One can therefore conceptualize copyright protection as extending only to those components of a work that are "copyrightable." This "presupposes that there may be much in what is popularly called a copyrighted work as to which the statute affords no protection."¹⁵³

With respect to "uncopyrightable" ideas, Professor Nimmer has said that the distinction between ideas and expression is not so much a limitation on the copyrightability of works, as it is a measure of the degree of similarity which must exist between a copyrightable work and an unauthorized copy, in order for the latter to constitute an infringement.¹⁵⁴ The same holds true for scenes a faire. Chopping up a work, taking out bits, and declaring them uncopyrightable is not a productive way of looking at the problem. The question should not be whether a scene in the plaintiff's work is protectible in the abstract. Rather, it should be whether the similarities that exist between plain-

copyright protection); *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986) (scenes a faire are "not copyrightable except to the extent they are given unique — and therefore protectible — expression in an original creation"); *see also Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985) (scenes a faire not protected against copying).

150. 17 U.S.C. § 102 (1982).

151. 460 F. Supp. 40 (S.D.N.Y. 1978).

152. *Id.* at 45-46.

153. *Dymow v. Bolton*, 11 F.2d 690, 691 (2d Cir. 1926). The court said that ideas, including basic plots, are not copyrightable. It must be determined if anything was appropriated, and then whether this appropriation was of copyrightable subject matter and was substantial. *See Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986) (plaintiff must show that similarities relate to copyrightable material); *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 616-17 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982) ("that a work is copyrighted says very little about the scope of its protection"); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir.) (wrongful appropriation ordinarily shown by proving substantial similarity of copyrightable expression), *cert. denied*, 449 U.S. 841 (1980).

154. 1 M. NIMMER, *supra* note 26, § 2.03(D). However, Nimmer does refer to "copyrightable expression." *Id.* § 2.18(D).

tiff's and defendant's works are sufficient for infringement — that is, whether the defendant has copied and improperly appropriated the plaintiff's work.

A. *Uncopyrightability in the Abstract*

The difficulties inherent in declaring scenes a faire uncopyrightable in the abstract are evident in statements by two courts that “a second author does not infringe even if he reproduces verbatim the first author's expression, if that expression constitutes ‘stock scenes or scenes that flow’ necessarily from common unprotectible ideas.”¹⁵⁵ But literal copying is quite different from taking an abstraction.¹⁵⁶ Literal copying is the quintessential form of copying in copyright, and expression can be readily distinguished from idea. Depriving a new author of the right to use the exact words of another does not prevent that author from using a “necessary” scene.¹⁵⁷ If the taking is significant,

155. *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 489 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984); *see Evans v. Wallace Berrie & Co.*, 681 F. Supp. 813, 817 (S.D. Fla. 1988).

156. When part of a work is copied verbatim or nearly verbatim, Professor Nimmer calls it “fragmented literal similarity,” 3 M. NIMMER, *supra* note 26, § 13.03(A)(2), as opposed to “comprehensive nonliteral similarity.” *Id.* § 13.03(A)(1). In the case of fragmented literal similarity, the question is the “quantum of . . . literal similarity permitted without crossing the line of substantial similarity” *Id.* § 13.03(A)(2). Unfortunately, the difference between literal and abstract similarity sometimes goes unrecognized. For example, in *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986) the plaintiff offered lists of specific alleged similarities, seeking to prove “fragmented literal similarity.” However, these similarities, that the film and book both “begin with the murder of a black and a white policeman with a handgun at close range [and] both depict cockfights, drunks, stripped cars, prostitutes, and rats” are abstract similarities, a fact left unrecognized, or at least unmentioned, by the court. *See id.*

157. In cases involving such things as practical works and fairly simple pictorial works, idea and expression come very close together. Based on the need to protect the underlying art or the limited number of possible variations in expression, some courts have required a showing of identical or nearly identical reproduction in order to show infringement. *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600 (1st Cir. 1988) (statues of animals); *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503 (9th Cir. 1987) (synthetic animals); *Cooling Systems & Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485, 491 (9th Cir. 1985) (sales catalogs); *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977) (animated television series and a restaurant advertising campaign); *Continental Casualty Co. v. Beardsley*, 253 F.2d 702 (2d Cir.) (insurance bonds), *cert. denied*, 358 U.S. 816 (1958); *Dorsey v. Old Surety Life Ins. Co.*, 98 F.2d 872, 874 (10th Cir. 1938) (insurance policies); *Worlds of Wonder v. Vector Intercontinental, Inc.*, 653 F. Supp. 135, 139 (N.D. Ohio 1986) (cassette tapes); *Farmers Indep. Tel. Co. v. Thorman*, 648 F. Supp. 457, 461 (W.D. Wis. 1986) (telephone directories); *Gaye v. Gillis*, 167 F. Supp. 416, 418 (D. Mass. 1958) (coupon books). Others have found that even verbatim copying may fail to infringe. *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 741 (9th Cir. 1971) (gold jewel-encrusted pin in the shape of a bee); *Morrissey v. Proctor*

then it properly constitutes infringement.¹⁵⁸ Courts that have said otherwise may have been misled by the frequently repeated statement that scenes a faire are uncopyrightable, meaning unprotectible in the abstract, into saying that even their verbatim expression is not protected by copyright.

Furthermore, it is difficult to analyze infringement by eliminating unprotected elements of a work and then comparing protected elements with the defendant's work. One appellate court instructed the trial court to look only at those aspects of the plaintiff's work that were protected expression and copied by the defendant.¹⁵⁹ The trial court was then to determine whether the plaintiff was "likely to prove, under the ordinary observer test, that [defendant's] works were substantially similar to its own."¹⁶⁰ The ordinary observer test requires substantial similarity to be judged by the spontaneous response of the ordinary lay observer.¹⁶¹ One cannot, however, react spontaneously and carefully compare fragmented pieces of a work all at once. Ordinary observers do not look at things that way.

Another court that held scenes a faire and facts to be uncopyrightable recognized a related problem:

We are aware, however, that in distinguishing between themes, facts, and scenes a faire on the one hand, and copyrightable expression on the other, courts may lose sight of the forest for the trees. By factoring out similarities based on noncopyrightable elements, a court runs the risk of overlooking wholesale usurpation of a prior author's expression.¹⁶²

If one dismantles a plot far enough, almost every element is arguably stock or an idea, with the patterning of these elements and the

& Gamble Co., 379 F.2d 675, 678 (1st Cir. 1967) (rules for promotional contest involving participants' social security numbers); *Crume v. Pacific Mut. Ins. Co.*, 140 F.2d 182 (7th Cir.) (insolvent insurers' reorganization plan), *cert. denied*, 322 U.S. 755 (1944). Complex fictional works do not involve the ability to practice any underlying art and involve many possible forms of expression.

158. See *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986) (scenes a faire are protectible when given unique expression in an original creation).

159. *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 611 (1st Cir. 1988).

160. *Id.*

161. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 51 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986); see *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir. 1966); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960); *Evans v. Wallace Berrie & Co.*, 681 F. Supp. 813, 817 (S.D. Fla. 1988); 3 M. NIMMER, *supra* note 26, § 13.03(E)(1).

162. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979-80 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980).

language providing its originality and expressiveness. Sufficient similarity in complex and specific patterning evidences infringement. Although copying individual words does not constitute infringement,¹⁶³ appropriating their arrangement ordinarily does. Similarly, copying a particular mixture of elements may be infringement, although copying any one individual element is not. The ordering and interaction of situations, characters, and milieu is what comprises a protectible plot.¹⁶⁴ If elements are removed from the plaintiff's work before it is compared to the defendant's, it is difficult to determine whether this similarity in patterning exists.¹⁶⁵

In all likelihood, that which the plaintiff calls evidence of substantial similarity of expression the defendant will characterize as unprotected ideas and scenes a faire. Such was the case in *Universal City Studios, Inc. v. Film Ventures International*,¹⁶⁶ which involved the motion picture "Jaws" and a very similar shark-based movie called "Great White." The films shared the following similarities: (1) a local politician who, in the interest of local tourism, plays down news of the shark; (2) a finale in which the shark eats a shark hunter and later dies when a shark expert detonates something the shark has swallowed; (3) a demonic shark that attacks people and boats for reasons beyond hunger; and (4) a shark that attacks a dinghy and consumes the occupant.¹⁶⁷ The defendants argue that eliminating the unprotected ideas and scenes a faire from "Jaws" would strip the two works of virtually all similarities. The court rejected the defendants' arguments, and

163. *Holmes v. Hurst*, 174 U.S. 82, 86 (1899) (Words are "as little susceptible of private appropriation as air or sunlight The right is to that arrangement of words which the author has selected to express his ideas"); see *Jefferys v. Boosey*, 10 Eng. Rep. 681, 702 (1854) (Property exists in the *order* of words, not words, which are analogous to elements of matter. They are not appropriated unless combined.).

164. See *Barris/Fraser Enters. v. Goodson-Todman Enters.*, 5 U.S.P.Q.2d (BNA) 1887, 1891 (S.D.N.Y. 1988) (although a television game show was made up of stock devices, an original selection, organization, and presentation could be protected, just like an original combination of words); *Frankel v. Irwin*, 34 F.2d 142, 143 (S.D.N.Y. 1918) ("It is doubtful whether incidents per se can become copyrightable literary property, but it does not take many of them, nor much causal connection thereof, to make what will pass for a plot, or scene, and constitute the action of a play; and that a scene has literary quality and can be copyrighted, and piracy may consist in appropriating the action of a play without any of the words, is well settled."); see also *supra* notes 24-29 and accompanying text.

165. This sort of similarity is defined by Professor Nimmer as "comprehensive nonliteral similarity." 3 M. NIMMER, *supra* note 26, § 13.03(A)(1). It exists when the "fundamental essence or structure of one work is duplicated in another." *Id.* It is in this area that it is difficult to separate ideas from expression. See *supra* notes 30-34 and accompanying text.

166. 543 F. Supp. 1134, 1141 (C.D. Cal. 1982).

167. *Id.* at 1137-38.

agreed with the plaintiff that the similarities in the basic story line, major characters, and sequence of events were substantial and infringing.¹⁶⁸

The temptation is understandably strong to dismiss a claim because elements in plaintiff's work are uncopyrightable, particularly when a complaint is patent nonsense. *Anderson v. Paramount Pictures Corp.*¹⁶⁹ is a particularly egregious case. In *Anderson*, the two screenplays were remarkably different.¹⁷⁰ The plaintiff apparently based his claim on the alleged appropriation of the following elements: (1) two wealthy characters who make a bet and ride around in a chauffeured limousine; (2) people toasting with champagne; (3) a character who pretends to be blind with dark glasses and a change cup; (4) the wealthy bettors bribe the subject of their bet to enter their limousine; (5) the subject initially thinks the bettors are interested in sex; and (6) wallets containing credit cards, people chewing gum, houses with fireplaces, men shaving, and passing references to Harvard, the Russians, and unemployment.¹⁷¹ The court dismissed the plaintiff's claim with prejudice.¹⁷² Rather than declare those elements uncopyrightable, however, the *Anderson* court determined that the defendant had not infringed. The similarities between the plaintiffs' and defendants' works either were unprotectible scenes a faire or random, insignificant elements.¹⁷³

B. Using Comparisons

The unprotectibility of scenes a faire is best viewed in terms of comparisons. The similarities between two works should be reviewed

168. *Id.* at 1141.

169. 617 F. Supp. 1 (C.D. Cal. 1985).

170. The plaintiff's screenplay *High Stakes* was a romantic melodrama about a lonely woman executive in New York City who makes a wager with her best friend. She bets that she can train an uneducated man in six months to appear sufficiently genuine as an entrepreneur to fool her company's board of directors. Naturally, she falls in love with her subject. The defendants' motion picture, *Trading Places*, was about a bet between two wealthy brothers as to whether a successful executive would become a derelict criminal and whether a derelict criminal would become a successful executive if they simply traded places. When the subjects learn about the bet, they become allies and avenge themselves through a commodity market manipulation scheme. The plaintiff's choice of defendants seems an odd one. The screenplay is far more similar to the (also uncopyrightable) story of *Rhinestone*, in which Dolly Parton bets that she can turn anyone into a successful country and western singer in a limited time and then tries to do so with Sylvester Stallone.

171. *Anderson*, 617 F. Supp. at 2-3.

172. *Id.* at 3.

173. *Id.* at 2.

to determine whether one infringes the other. The question is what effect the lack of protection for scenes a faire has on the protection copyright grants to the work as a whole. Perhaps some courts, eager to grant summary judgment against plaintiffs' baseless claims, prefer the language of copyrightability to that of infringement because substantial similarity has traditionally been considered a factual issue that does not readily lend itself to summary judgment.¹⁷⁴ Recently, however, courts have recognized that summary judgment is appropriate when similarity exists only in uncopyrightable¹⁷⁵ elements, or when no reasonable jury could find substantial similarity.¹⁷⁶ Courts need not

174. *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), *cert. denied*, 330 U.S. 85 (1947); *see* *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985); *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985); *Jason v. Fonda*, 526 F. Supp. 774, 777 (C.D. Cal. 1981), *aff'd*, 698 F.2d 966 (9th Cir. 1982).

175. The word uncopyrightable is often used very loosely, encompassing entire works that are uncopyrightable and elements of copyrightable works that are deemed unprotected by the copyright. I have sought to suggest in this article that the second use of the word is inappropriate. However, when courts seek to determine whether similarities are in unprotected elements, rather than whether an element is, in the abstract, unprotected, the problem is less severe.

176. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986); *Warner Bros., Inc. v. American Broadcasting Cos.*, 720 F.2d 231, 240 (2d Cir. 1983); *Barris/Fraser Enters. v. Goodson-Todman Enters.*, 5 U.S.P.Q.2d (BNA) 1887, 1891 (S.D.N.Y. 1988); *Friedman v. International Television Corp.*, 644 F. Supp. 46, 47 (E.D.N.Y. 1986); *Zambito v. Paramount Pictures Corp.*, 613 F. Supp. 1107, 1110 (E.D.N.Y.), *aff'd*, 788 F.2d 2 (2d Cir. 1985). Even in the Ninth Circuit, where courts must contend with the confusing, unworkable two-part test set out in *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977), a court may grant summary judgment if no reasonable jury could find substantial similarity. *See* *Frybarger v. International Business Machs.*, 812 F.2d 525, 528 (9th Cir. 1987); *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985); *Litchfield v. Spielberg*, 736 F.2d 1352, 1358 (9th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985); *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983); *Jason v. Fonda*, 526 F. Supp. 774, 777 (C.D. Cal. 1981), *aff'd*, 698 F.2d 966 (9th Cir. 1982). These cases showed a far more relaxed attitude toward granting summary judgment than did *Krofft*, which implied that summary judgment would rarely be appropriate if similarity in idea existed. 562 F.2d at 1166. The *Krofft* court created a two-part test for determining substantial similarity. The determination of whether there is a substantial similarity in ideas is made by an objective "extrinsic" test, which permits analytic dissection and expert testimony. *Id.* at 1164. The determination of whether there is substantial similarity in expression is made by a subjective "intrinsic" test, which does not permit analytic dissection or expert testimony. *Id.* The second part of the test is not very helpful in cases that involve numerous possibly unprotectible elements, such as facts and scenes a faire. Although the Ninth Circuit has not repudiated *Krofft*, it has made it more workable by distorting it. This is accomplished by enormously expanding the meaning of idea, saying that the test for substantial similarity of ideas compares "not the basic plot ideas for stories, but the actual concrete elements that make up the total sequence of events and the relationships between the major characters . . . [It] requires a comparison of plot, theme, dialogue, mood, setting, pace and sequence." *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir.)

distort copyright law by converting infringement issues into issues of copyrightability in order to grant summary judgment to a defendant in a ridiculous case. The plaintiff's and defendant's works can be compared to determine their similarities. Then the issues of copying and improper appropriation can be faced.

The process of comparison is not without difficulties. Determining whether substantial similarity exists is inherently uncertain. With scenes a faire, the ordinary observer test aggravates this uncertainty, as two works may look and feel very much alike even in the absence of copying or improper appropriation.¹⁷⁷ It is easy to say that if similarity exists only in abstractions of scenes a faire, not in their patterning and language, then the defendant has not infringed. Unfortunately, it is difficult to sift out for comparison only the protected material, particularly where nonprotectible similarities pervade.¹⁷⁸

Furthermore, even similarities in patterning should not always support a finding of infringement. The author of a work

[w]here various incidents, in themselves common literary property, are grouped to form a particular story, must be confined, in his claim to copyright, close to the story he has thus composed . . . [A]nother author, who, by materially varying the incidents, materially changes the story, should not be held to be an infringer.¹⁷⁹

The same principle applies to "necessary" scenes. The similarity in patterning must exist at a high level of complexity and specificity, well beyond that which arises from the logic of the situation.¹⁸⁰

(quoting *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985)), *cert. denied*, 474 U.S. 826 (1985); see *Jason v. Fonda*, 526 F. Supp. 774, 777 (C.D. Cal. 1981), *aff'd*, 698 F.2d 966 (9th Cir. 1982).

177. See *Bevan v. Columbia Broadcasting Sys.*, 329 F. Supp. 601, 607 (S.D.N.Y. 1971). There, the court stated that the jury, although instructed to disregard similarities that were necessary, incorrectly found for the plaintiff, probably because of the difficulty in sifting out the protectible material. *Id.* Courts also have difficulties with this process. The court in *McCulloch v. Albert E. Price, Inc.*, 823 F.2d 316 (9th Cir. 1987), comparing all elements of the work, including the unprotectible ones, decided that a decorative red plate with a floral design bearing the phrase "You Are Special Today" in white was infringed by a white plate with a different floral design and the same phrase in red letters. The court seemed to find infringement based on the total look and feel of the two plates, ignoring the fact that the look and feel were the same because both used the same unprotectible elements. See *id.* at 319-21.

178. *Bevan*, 329 F. Supp. at 607.

179. *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 24 (9th Cir. 1933).

180. This requirement can be met, as it was in the case involving *Jaws* and *Great White*. See *supra* notes 166-68 and accompanying text.

Despite these problems, the scenes a faire doctrine serves a useful function when it is used to determine whether substantial similarity exists between plaintiff's and defendant's works. It avoids the underprotection that might occur if scenes a faire were considered "uncopyrightable" in the abstract. It also avoids the overprotection that might result if infringement were judged solely on the basis of the look and feel of two given works.

VI. CONCLUSION

Scenes a faire are often unoriginal. The defendant frequently has not copied at all or has copied only the plaintiff's ideas. The scenes a faire doctrine, however, is more than a response to these two facts. It recognizes that when scenes a faire are involved, even similarities in expression that are the product of copying should not always be actionable.

Scenes a faire include stock scenes, scenes that arise naturally from the logic of a situation, and perhaps a few rare scenes that are inexpressible in any other way. These diverse strands can be woven together. Scenes a faire are elements of creation, a vocabulary needed to create a work. Perhaps no one element, like no one word, is truly essential. As these elements are withdrawn from use, however, the store of raw materials available for creation gradually diminishes. This potential danger justifies the scenes a faire doctrine, which declares these elements unprotectible by copyright.

Courts frequently recite the phrase "scenes a faire" formulaically, without thought or analysis. But if the doctrine is used to determine whether there has been copying and improper appropriation, it provides a useful tool. If similarities exist solely in scenes a faire, infringement should not be found unless there are highly complex and specific similarities in patterning. The scenes a faire doctrine provides a useful brake on the natural tendency to find infringement when works look and feel very much alike. It provides a clearer standard than the idea/expression dichotomy, and provides support and guidance to nervous or uncertain courts.

Without the scenes a faire doctrine, later authors might be required to design around the most satisfactory, natural, or logical choices. Like the idea/expression dichotomy, the scenes a faire doctrine helps strike a balance between the need to protect past creations and the need to encourage new ones.