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GROUNDING THE SCÈNES À FAIRE DOCTRINE

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ABSTRACT

The scènes à faire doctrine is one of several "limiting principles" judges apply during the infringement analysis to limit the scope of protection for certain elements of an expressive work. Though first applied in the context of literary works and motion pictures, the doctrine has extended to new contexts, playing an important role in the adjudication of functional works and signaling the doctrine's utility as a scoping mechanism across different subject matter. Despite its practical and conceptual importance, the scènes à faire doctrine remains misunderstood. Because the doctrine offers the ability to integrate comparatively concrete principles and details into copyright's infringement analysis, it is especially important to develop a more accurate understanding of the doctrine's proper scope. This Article seeks to offer a more accurate and grounded understanding of the doctrine's origins and purpose. Doing so helps disentangle the doctrine from other limiting doctrines with which it is often combined, conflated, and confused. By articulating ways in which the discourse has gone astray and the risks undermining the doctrine, this Article seeks to reaffirm the doctrine's vitality and cohesion as a flexible and practical tool in the judicial toolkit for nonidentical copyright infringement cases.

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TABLE OF CONTENTS

I. INTRODUCTION

Tolstoy allegedly wrote that all stories can be boiled down to two plots: a stranger comes to town or a hero departs on a journey. This literary truism reflects that certain stories, tropes, character types, and narrative structures hold enduring appeal for audiences. It also hints at how audience demand may limit or shape creative choices: creators return to these archetypal figures and situations partly because they can and partly because they must. As a function of what draws audience or consumer interests, creators face creative and technical constraints that produce a sense of indispensability around certain elements used in an expressive work. Legal doctrines reflect solicitude for this aesthetic bind by permitting common use of customary or expected elements—aspects of an otherwise expressive work that are entailed by the choice of a premise, situation, theme, historical setting, stock character, or idea.[1]

1. Monbo v. Nathan, 623 F. Supp. 3d 56, 91 (E.D.N.Y. 2022), *reconsideration denied*, No. 18-CV-5930, 2022 WL 4134455 (E.D.N.Y. Sept. 11, 2022) (premise); Berkic v. Crichton,

Copyright law, which regulates legal interests in expressive works, acknowledges this idea of creative indispensability and simultaneously polices its originality requirement by excluding from protection the stock, formulaic, or overly general elements that populate many otherwise protectable works. Specifically, the "scènes à faire" doctrine identifies, with its somewhat inscrutable, "vaguely French" label,[2] that some elements in expressive works "must be done," or literally are *the* scenes "to do," and thus, may not be monopolized by any single author.[3] In contemporary understanding of the theater, a scène à faire is "[a] scene the audience expects."[4] At a high level in copyright law, scènes à faire are elements in an author's work that may be indispensable, expected, standard, formulaic, or commonplace, such that permitting any monopoly in them would be harmful to copyright's other stakeholders, such as audiences, other authors, intermediaries, and the public domain.[5]

The scènes à faire label was first applied in the context of literary works and motion pictures,[6] but it has since been "revived" and extended to new contexts.[7] It now applies to software, greeting

761 F.2d 1289, 1293 (9th Cir. 1985) (premise); Cain v. Universal Pictures Co., 47 F. Supp. 1013, 1017 (S.D. Cal. 1942) (situation); Schwarz v. Universal Pictures Co., 85 F. Supp. 270, 275 (S.D. Cal. 1945) (theme); Walker v. Time Life Films, Inc., 784 F.2d 44, 50 (2d Cir. 1986) (stock character); Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 979 (2d Cir. 1980) (historical setting); Reyher v. Child.'s Television Workshop, 533 F.2d 87, 91 (2d Cir. 1976) (idea). Of course, there is overlap in these categories and in the descriptions that courts have used when analyzing them.

2. Satava v. Lowry, 323 F.3d 805, 810 n.3 (9th Cir. 2003).

3. Rucker v. Harlequin Enters., Ltd., No. H-12-1135, 2013 WL 707922, at *8 (S.D. Tex. Feb. 26, 2013) ("*Scenes à faire* provide features that are 'freely available for authors and creators to use in their creative works.'" (quoting Randolph v. Dimension Films, 634 F. Supp. 2d 779, 789 (S.D. Tex. 2009))) (surveying cases and rationales); *accord* Comput. Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 710 (2d Cir. 1992) ("Closely related to the non-protectability of *scenes a faire* [sic], is material found in the public domain. Such material is free for the taking and cannot be appropriated by a single author even though it is included in a copyrighted work.").

4. JONNIE PATRICIA MOBLEY, NTC'S DICTIONARY OF THEATRE AND DRAMA TERMS 133 (1992).

5. Bucklew v. Hawkins, Ash, Baptie & Co., 329 F.3d 923, 929 (7th Cir. 2003); Leslie A. Kurtz, *Copyright: The Scenes a Faire Doctrine*, 41 FLA. L. REV. 79, 86, 91–92, 95, 99 (1989). In perhaps its most common contemporary formulations, courts refuse to protect elements that are "indispensable," "stock, or standard." *Id.* at 91–92.

6. Kurtz, *supra* note 5, at 80.

7. Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 994 (1990) ("Courts have revived the *scènes à faire* doctrine, invented in the context of motion picture infringement cases, and applied it to a variety of new contexts." (citations omitted)); Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 616–17 (7th Cir. 1982) (describing the doctrine as applying "[i]n the context of literary works" and extending the concept to expressive elements in the video game, PAC-MAN).

cards, etiquette manuals, music, television, visual arts, and architecture, among others, signaling the doctrine's utility as a scoping mechanism across different kinds of subject matter.[8] Whatever its origins in fictional works, the scènes à faire doctrine now plays an important role in the adjudication of functional works as well.[9] Indeed, the scènes à faire doctrine has been cited hundreds of times in the eight decades since its introduction, including in all U.S. Circuit Courts.[10] In sum, the doctrine is both widely applied and continuing to develop.

Its broad applicability can be explained, in part, by the fact that it is one of several "limiting principles" judges apply during an infringement analysis to limit the scope of protection for certain elements of an expressive work.[11] Copyright's limiting doctrines play a role in shaping the "carefully crafted bargain" at the heart of copyright law, which provides conditional property rights for limited times to fixed works of sufficiently original human authorship.[12] For instance, ideas are not protected under copyright—only their expression can give rise to copyright protection.[13] To hold otherwise would imperil the store of expressive potential by limiting creators' abilities to develop ideas.[14] Though it is notoriously elusive to differentiate ideas from expression, courts must continue to do so.

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8. *See, e.g.*, Apple Comput., Inc. v. Microsoft Corp., 35 F.3d 1435, 1444–45 (9th Cir. 1994) (software); SAS Inst., Inc. v. World Programming Ltd., 64 F.4th 1319, 1326 (Fed. Cir. 2023) (software); Taylor Corp. v. Four Seasons Greetings, LLC, 315 F.3d 1039, 1042–43 (8th Cir. 2003) (greeting cards); Civility Experts Worldwide v. Molly Manners, LLC, 167 F. Supp. 3d 1179, 1196 (D. Colo. 2016) (etiquette manuals); Skidmore v. Zeppelin, 952 F.3d 1051, 1069 (9th Cir. 2020) (music); Olson v. Nat'l Broad. Co., 855 F.2d 1446, 1452–53 (9th Cir. 1988) (television characters); Bill Diodato Photography, LLC v. Kate Spade, LLC, 388 F. Supp. 2d 382, 392 (S.D.N.Y. 2005) (fashion photography); Design Basics, LLC v. Forrester Wehrle Homes, Inc., 302 F. Supp. 3d 933, 941–42 (N.D. Ohio 2018) (architecture); Zalewski v. Cicero Builder Dev., Inc., 754 F.3d 95, 102–03 (2d Cir. 2014) (architecture).

9. *See* Pamela Samuelson, *Reconceptualizing Copyright's Merger Doctrine*, 63 J. COPYRIGHT SOC'Y U.S.A. 417, 447–48, 447 n.187 (2016).

10. 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 4:24, Westlaw (database updated Sept. 2023).

11. Robert Kirk Walker, *Breaking with Convention: The Conceptual Failings of* Scènes à Faire, 38 CARDOZO ARTS & ENT. L.J. 435, 437 (2020).

12. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 347–50 (1991).

13. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936) ("[O]thers may 'copy' the 'theme,' or 'ideas,' or the like, of a work, though not its 'expression.'"); Warner Bros. Inc. v. Am. Broad. Cos., 654 F.2d 204, 208 (2d Cir. 1981) ("[C]opyright protection only extends to the expression of the author's idea, not to the idea itself.").

14. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985); Satava v. Lowry, 323 F.3d 805, 807, 812 n.5 (9th Cir. 2003) ("Congress carefully drew the contours of copyright protection. . . . It granted artists the exclusive right to the original

In instances in which an idea is inextricable from its potential expression due to expressive scarcity or other relevant constraints that minimize the alternative means of expressing the idea, the idea is said to "merge" with its expression and, under the merger doctrine, will be treated as unprotectable.[15] Facts are likewise excluded from copyright protection,[16] though creative compilations of fact may be protected with respect to the choices made in compiling the facts, though not the facts themselves.[17] Relatedly, copyright cannot subsist in research or data.[18] Methods, processes, and systems are likewise excluded from copyright.[19] These limiting doctrines reflect longstanding commitments in copyright law to exclude "common property," safeguard the public domain, secure breathing space for other creators, and balance copyright's incentives to create with other economic, legal, and equitable principles.[20] Accordingly, these limitations help prevent anticompetitive monopolies and, as enforcers of the public domain, are crucial to the health of the copyright system overall.[21]

A similarly antimonopolistic ethos animates the scènes à faire doctrine, and judges applying it often emphasize the importance of safeguarding the common store of unprotectable elements.[22] The

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expression in their works, thereby giving them a financial incentive to create works to enrich our culture. But it denied artists the exclusive right to ideas and standard elements in their works, thereby preventing them from monopolizing what rightfully belongs to the public. . . . Congress did not intend for artists to fence off private preserves from within the public domain." (footnote omitted)); *see also* Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971).

15. Kern River Gas Transmission Co. v. Coastal Corp., 899 F.2d 1458, 1463 (5th Cir. 1990); CDN Inc. v. Kapes, 197 F.3d 1256, 1261 (9th Cir. 1999); Morrissey v. Proctor & Gamble Co., 379 F.2d 675, 678–79 (1st Cir. 1967).

16. *Harper & Row*, 471 U.S. at 556 ("No author may copyright his ideas or the facts he narrates."); *accord Feist Publ'ns*, 499 U.S. at 344–45, (referring to the foregoing statement in *Harper & Row* as "[t]he most fundamental axiom of copyright law").

17. *Feist Publ'ns*, 499 U.S. at 344–45, 348.

18. Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 310 (2d Cir. 1966); Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1372 (5th Cir. 1981) (rejecting the plaintiff's argument that finding research copyrightable would not amount to a monopoly in facts).

19. 17 U.S.C. § 102(b).

20. *See* Zahr K. Said, *Scènes à Faire*, *in* ENCYCLOPEDIA OF LAW AND LITERATURE (forthcoming 2023) (manuscript at 1) (on file with Author) (citation omitted).

21. *See* Litman, *supra* note 7 at 968, 983 ("The public domain should be understood not as the realm of material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use.").

22. *See, e.g.*, Holmes v. Hurst, 174 U.S. 82, 88–89 (1899); Echevarria v. Warner Bros. Pictures, Inc., 12 F. Supp. 632, 635 (S.D. Cal. 1935). More recently, see *Satava v. Lowry*, 323 F.3d 805, 807 (9th Cir. 2003) (describing how copyright law "denie[s] artists the exclusive right to ideas and standard elements in their works, thereby preventing them

doctrine has thus been described as one "that constrain[s] the ability of infringement plaintiffs to claim expansive intellectual-property rights in a manner that impedes future creativity."[23] It is perhaps unsurprising, in light of the 20th century's expansion of copyrightable subject matter and duration, that the scènes à faire doctrine's salience has grown; as the availability of rights grew, so too did the need to apply limiting doctrines robustly to maintain a policy balance.[24]

Despite its practical and conceptual importance, the scènes à faire doctrine remains poorly understood. Judicial application of the doctrine can be quite nimble and dynamic, though, at times, courts offer very little particularized reasoning or implicitly conflate the doctrine's reasoning with the idea/expression distinction as though the two doctrines were interchangeable.[25] Sometimes courts intermix or explicitly confuse scènes à faire with other limiting doctrines.[26]

Recently, several commentators have revisited the doctrine, illuminating its enduring importance.[27] This wave of renewed interest drew attention to some of the doctrine's justifications and limitations and sought to highlight some of its supposed conceptual flaws. Yet, in doing so, some recent commentary also introduced or heightened certain inaccuracies explored below in Part IV. This Article seeks to offer a more accurate and grounded

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from monopolizing what rightfully belongs to the public"); *Skidmore v. Zeppelin*, 952 F.3d 1051, 1069 (9th Cir. 2020) ("These building blocks belong in the public domain and cannot be exclusively appropriated by any particular author."); *Gray v. Hudson*, 28 F.4th 87, 97 (9th Cir. 2022) ("[C]opyright *does* require at least a modicum of creativity and does not protect every aspect of a work; ideas, concepts, and common elements are excluded. Nor does copyright extend to common or trite musical elements, or commonplace elements that are firmly rooted in the genre's tradition. These *building blocks* belong in the public domain and cannot be exclusively appropriated by any particular author." (second emphasis added) (quoting *Skidmore*, 952 F.3d at 1069))).

23. Design Basics, LLC v. Signature Constr., Inc., 994 F.3d 879, 882 (7th Cir. 2021).

24. Litman, *supra* note 7, at 981–82 ("In the twentieth century, Congress extended the scope of copyright enormously by granting more expansive rights in an increasingly inclusive array of works.").

25. Kurtz, *supra* note 5, at 82 ("[Judicial] opinions provide little helpful reasoning [on the scènes à faire doctrine] beyond general references to the distinction between ideas and expression . . . .").

26. Samuelson, *supra* note 9, at 447–48.

27. Sarah Louise Bishop, Scènes à Faire: Novelty & Genre 6, 9 (2023) (unpublished manuscript) (on file with author); Walker, *supra* note 11, at 456, 458; Dale Cendali, *Litigating Scènes À Faire*, 43 COLUM. J.L. & ARTS 415, 417 (2020); Robert W. Clarida, *Making Sense of Scènes À Faire Through the Lens of* Feist, 43 COLUM. J.L. & ARTS 419, 420 (2020); Joseph P. Fishman & Kristelia García, *Authoring Prior Art*, 75 VAND. L. REV. 1159, 1171 (2022); Logan Sandler, Note, *What Is Standard Tomorrow, May Not Have Been Today: An Argument for Claiming Scènes à Faire*, 76 U. MIAMI L. REV. 377, 393–94 (2021).

understanding of the doctrine's origins and purpose. Doing so helps disentangle the doctrine from other limiting doctrines with which it is often combined, conflated, and confused. While scènes à faire analysis can overlap with idea/expression analysis, parallel the merger doctrine, and bolster other limiting doctrines, it need not do so. The scènes à faire doctrine plays an independent role and deserves renewed attention for the practical and versatile role it can play independently in infringement analysis. A key benefit of the scènes à faire doctrine is precisely its pragmatic potential: it offers the ability to integrate comparatively concrete principles and details into copyright's infringement analysis, which is known for being deeply indeterminate.[28] Thus, it is especially important to develop a more accurate understanding of the doctrine's proper scope.

II. THE DOCTRINE'S ROLE IN INFRINGEMENT ANALYSIS

The scènes à faire doctrine is most commonly applied as a limitation or defense during copyright infringement's substantial similarity analysis, which begins with judicial assessment of allegedly infringing works that are similar but not identical.[29] Such cases represent the bulk of infringement actions (and infringement actions, in turn, represent the bulk of copyright litigation).[30] In some circuits, the scènes à faire doctrine is even considered a core part of the court's approach to conducting

28. Zahr K. Said, *Jury-Related Errors in Copyright*, 98 IND. L.J. 749, 753 (2023).

29. Some courts have applied scènes à faire at the validity stage rather than infringement. Cendali, *supra* note 27, at 415–16. The more common approach is to apply it as a limitation on, or defense to, infringement. *See* Clarida, *supra* note 27, at 421; WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 337–38 (1994) ("Although *scenes à faire* are occasionally analyzed as a copyrightability issue, the better approach is to regard the doctrine as relevant only to the scope of protection, since there will typically be expression in the treatment of stock scenes, and since it will be a rare work that consists entirely of *scenes à faire*." (footnotes omitted)). Some courts have strongly rejected the use of the doctrine to invalidate works, arguing that few works will be composed entirely of scènes à faire. *See* Bucklew v. Hawkins, Ash, Baptie & Co., 329 F.3d 923, 929 (7th Cir. 2003) (citing Reed-Union Corp. v. Turtle Wax, Inc., 77 F.3d 909, 913–14 (7th Cir. 1996)); *see also* See v. Durang, 711 F.2d 141, 143 (9th Cir. 1983). Some courts have treated the distinction as largely formal because the doctrine will exert similar pressure at either stage. Taylor Corp. v. Four Seasons Greetings, LLC, 403 F.3d 958, 966 (8th Cir. 2005). A more precise formulation holds that while "*[s]cenes a faire* are not uncopyrightable, *per se*, . . . they are excluded from the extrinsic analysis." Fleener v. Trinity Broad. Network, 203 F. Supp. 2d 1142, 1150 (C.D. Cal. 2001).

30. Said, *supra* note 28, at 794 (citing empirical studies of copyright litigation); Christopher A. Cotropia & James Gibson, *Copyright's Topography: An Empirical Study of Copyright Litigation*, 92 TEX. L. REV. 1981, 1997 (2014).

infringement analysis with respect to nonidentical works.[31] Consequently, the scènes à faire doctrine plays a vitally important role in deciding many infringement claims.[32]

In order better to understand this doctrine's role and the implications of modifying the scope of its application, it is necessary first to establish some background on copyright's (notoriously complex and confusing) infringement doctrine.[33]

A. Identical vs. Nonidentical Copying.

In the words of one influential judicial opinion: "[T]hat a work is copyrighted says very little about the scope of its protection."[34] Copyright registration exists at the level of the "work" registered, whereas infringement analysis exists at the level of the aspects copied and not all elements in the work can be protected against other uses during infringement analysis.[35] When a person makes verbatim, unauthorized copies of an entire copyrighted work, there is no need for a court to question whether copying occurred; the verbatim embodiment by the defendant's work stands as proof that copying occurred. In cases of verbatim (also known as "identical," "literal," or "exact" copying), there is typically little need to consider whether what the copier has taken constitutes protected expression versus unprotected elements; by virtue of making identical copies, the copier has captured whatever expression (if any) may be presumed to exist in the work.[36]

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31. Comput. Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 706 (2d Cir. 1992); Apple Comput., Inc. v. Microsoft Corp., 35 F.3d 1435, 1438–39, 1444 (9th Cir. 1994).

32. Andrew B. Hebl, *A Heavy Burden: Proper Application of Copyright's Merger and* Scenes A Faire *Doctrines*, 8 WAKE FOREST INTELL. PROP. L.J. 128, 139 (2007) (stating that along with the merger and idea/expression, "[t]hese doctrines are critical in assisting courts to promote the fundamental policy objectives of copyright law").

33. Shyamkrishna Balganesh, *The Questionable Origins of the Copyright Infringement Analysis*, 68 STAN. L. REV. 791, 794 (2016) ("The complexity of the modern copyright infringement analysis cannot be overstated. . . . Copyright's infringement analysis has been variously described as 'bizarre,' 'mak[ing] no sense,' 'viscid,' and 'problematic.'" (alteration in original) (citations omitted)).

34. Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 616–17 (7th Cir. 1982).

35. *See* Elizabeth L. Rosenblatt, *Copyright's One-Way Racial Appropriation Ratchet*, 53 U.C. DAVIS L. REV. 591, 655–56 (2019) (advocating for a reframing of copyright to focus on "original *aspects*, rather than original *works*" to reflect this distinction).

36. Kurtz, *supra* note 5, at 108–09. Fair use will also incorporate the scoping analysis in cases of exact copying so that works of greater functionality and less protected expression are comparatively more available for fair users. *See* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1521–22, 1524 (9th Cir. 1992); Satava v. Lowry, 323 F.3d 805, 812–13 (9th Cir. 2003).

However, many works resemble each other without being identical. In cases of alleged "nonidentical copying" (also known as "partial" or "nonliteral" copying), similarities between the works might not provide conclusive evidence either of copying or infringement, depending on the nature of and reasons for these similarities.[37] For instance, if two works both target similar markets with similar aims, such as teaching etiquette or arithmetic, it stands to reason that both works would contain numerous similarities attributable to the market and to the authors' similar goals rather than to copying by one of the other.[38] Or if two works both draw on a common public domain source, they may resemble each other as a function of those public domain elements that *neither* of the parties originated, and thus any such similarities would again fail to infringe.[39] Of course, such an approach can also make a plaintiff's claim stronger by highlighting when the defendant has clearly replicated details lacking from the public domain but found in the plaintiff's work.[40] Even if similarities do tend to prove that one work copied from the other, these will not amount to infringement if the kinds of elements copied are ones that copyright excludes from protection, such as facts, ideas, and details incidental to a historical setting.[41]

As a result, when two works are similar in some respects but not identical, a court trying an infringement claim must examine the works in question and explore the reasons for the alleged similarities.[42] What follows is a set of inquiries usually categorized under the legal conclusion of "substantial similarity" and routinely decried for their lexical and conceptual incoherence.[43] By way of simple overview—and before exploring these questions in detail in the next few paragraphs—these inquiries can be captured as follows. First, did the defendant copy from the plaintiff's work? If there was no copying, there can be no infringement. Second, if the

37. *See* Highland Tank & MFG. Co. v. PS Intern., Inc., 393 F. Supp. 2d 348, 361 (W.D. Pa. 2005) (discussing nonidentical copying); Dollcraft Indus., Ltd. v. Well-Made Toy Mfg., 479 F. Supp. 1105, 1117 (E.D. N.Y. 1978) (discussing partial copying of common features); Lotus Dev. Corp. v. Borland Intern., Inc., 49 F.3d 807, 814 (1st Cir. 1995) (distinguishing between nonliteral copying and word-for-word copying).

38. Civility Experts Worldwide v. Molly Manners, LLC, 167 F. Supp. 3d 1179, 1196 (D. Colo. 2016); Emerson v. Davies, 8 F. Cas. 615, 625–26 (D. Mass. 1845).

39. *See* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 489–91 (2d Cir. 1976) (en banc).

40. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 49–50, 56 (2d Cir. 1936).

41. Alexander v. Haley, 460 F. Supp. 40, 44–45 (S.D.N.Y. 1978).

42. Said, *supra* note 28, at 792.

43. *Id.* (collecting commentary critiquing the application of substantial similarity and its "quasi-Dadaist character").

defendant did copy, were the elements copied ones that are excluded from infringement claims, such as unprotected facts and ideas, or other elements copyright law excludes from the ambit of its protection, such as scènes à faire? If all that was copied consists of uncopyrightable elements, then a court next considers whether the defendant's copying of the plaintiff's selection and arrangement, or other relevant acts of compilation and curation of unprotected elements, could support an infringement claim. If not, then the defendant has not made a substantially similar copy and will not be liable. Finally, if the defendant's work did copy some protected materials and might otherwise be considered "substantially similar" to the plaintiff's work, do any limitations or defenses apply?

B. Proof of Copying and Proof of Substantial Similarity.

Copyright infringement claims require proof of ownership of the work in question and copying of copyrightable expression, or "constituent elements of the work that are original."[44] There are two substantive elements at issue: (1) copying; and (2) proof that what was copied contains copyrightable expression.[45]

Proof of copying is required because independent creation is a complete defense and creating a very similar work without ever accessing the plaintiff's does not result in liability.[46] Direct evidence of copying is rarely available.[47] If direct evidence of copying is unavailable, plaintiffs may prove copying alternatively through circumstantial evidence of (a) the defendant's access to the plaintiff's work; and, (b) a demonstration that the works possess "similarities probative of copying."[48] Probative similarity is intended to establish copying and aid the court or trier of fact in ruling out the likelihood that similarities between two works are the result of "coincidence, independent creation, or prior common

44. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991); Baxter v. MCA, Inc., 812 F.2d 421, 423 (9th Cir. 1987).

45. Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 131 (2d Cir. 2003) ("To demonstrate unauthorized copying, the plaintiff must first 'show that his work was actually copied'; second, he must establish 'substantial similarity' or that 'the copying amounts to an improper or unlawful appropriation . . . .'" (quoting Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 137–38 (2d Cir. 1998))).

46. Skidmore v. Zeppelin, 952 F.3d 1051, 1064 (9th Cir. 2020).

47. Lewinson v. Henry Holt & Co., 659 F. Supp. 2d 547, 562 (S.D.N.Y. 2009).

48. *Skidmore*, 952 F.3d at 1064 (citing Rentmeester v. Nike, Inc., 883 F.3d 1111, 1117 (9th Cir. 2018)); *Lewinson*, 659 F. Supp. 2d at 562 (citing Jorgensen v. Epic/Sony Recs., 351 F.3d 46, 51 (2d Cir. 2003)).

source."[49] In its probative similarity assessment, the court considers similarity between the two works to assess the likelihood that they might have arisen independently of each other and includes in its assessment both the protected and unprotectable elements in the works.[50]

If copying is established, courts must conduct careful assessment of the works to understand the nature of their similarities because under this "substantial similarity" inquiry, only similarities related to protected materials can give rise to liability.[51] At this stage, courts must ensure that the similarities between works are attributable to the protected elements within the works, rather than to unprotected elements such as ideas, facts, methods, historical details, or scènes à faire.[52] Even when works are protected by a valid copyright, in other words, not all of their elements are protected against the use—even intentionally—of similar elements by others.[53]

C. Infringement Analysis and Nichols's Abstractions Test.

Different courts deploy different methods for conducting infringement analysis, and multiple tests may be used even within the same case.[54] Perhaps the most influential or far-ranging of these has been the "abstractions test," attributable to dicta in an opinion by Judge Learned Hand in a lawsuit involving competing

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49. Bernal v. Paradigm Talent & Literary Agency, 788 F. Supp. 2d 1043, 1052 (C.D. Cal. 2010) (quoting 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.02[B] (2009)).

50. Probative similarity is a less demanding test than substantial similarity and requires only that the works are similar enough to support an inference that the defendant copied the plaintiff's work. Stated somewhat differently, the plaintiff must establish that there are similarities between the two works that would not be expected to arise if the works had been created independently. In this analysis, a court must examine the entire work, not just the protectable elements.

Lewinson, 659 F. Supp. 2d at 563 (quoting Blakeman v. Walt Disney Co., 613 F. Supp. 2d 288, 304 (E.D.N.Y. 2009)).

51. Williams v. Crichton, 84 F.3d 581, 588–89 (2d Cir. 1996) ("When we determine that a work contains both protectible and unprotectible elements, we must take care to inquire only whether 'the *protectible elements, standing alone*, are substantially similar.'" (quoting Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996, 1002 (2d Cir. 1995))); *Skidmore*, 952 F.3d at 1064.

52. *Rentmeester*, 883 F.3d at 1117–18, *overruled on other grounds by Skidmore*, 952 F.3d 1051.

53. *See* Gray v. Hudson, 28 F.4th 87, 97 (9th Cir. 2022) (citing *Skidmore*, 952 F.3d at 1069).

54. *See generally* Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC'Y U.S.A. 719 (2010); Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 NW. U. L. REV. 1821 (2013).

cross-cultural love stories.[55] It has become one of the most cited passages in copyright law,[56] perhaps because of its well-respected author but also because of the continued significance of the abstractions test.

Learned Hand begins by explaining that infringement claims do not require verbatim copying and, indeed, that nonidentical claims may pose more difficult questions because of the need to assess and qualify the relationship between the two works. He then describes how a given work can be characterized at different levels of abstraction; as the abstraction occurs at an increasingly higher level, the description will be so general as to avoid the work's particularity and identify mere patterns that may be found in common in many works.

> Upon any work, and especially upon a play, a great number of pat-terns [sic] of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer pro-tected [sic], 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. . . . In such cases we are rather concerned with the line between expression and what is expressed.[57]

The crux of the issue is that while identical copies are usually easy to detect, partial copies may not be. However, the "easier" the case and the more identical the two works, the less this test will help. The harder the case—imagine two works whose similarities are partial and subtle and call for careful scrutiny—the less useful the test will be in any practical way and the "more uncertain" the line "between unprotected ideas and protected expression."[58]

Though there is no evidence that Hand sought to introduce a "test" or method, it has been widely operationalized by twentieth-century courts in infringement analyses, especially for functional works, such as software.[59] The abstractions test has been subject to critiques for its indeterminacy, imprecision, and vagueness, even by commentators who admit the passage holds

55. Nichols v. Universal Pictures Corp., 45 F.2d 119, 120–21 (2d Cir. 1930).

56. *See* Samuelson, *supra* note 54, at 1836 & n.100.

57. *Nichols*, 45 F.2d at 121 (citations omitted).

58. Kurtz, *supra* note 5, at 85.

59. Samuelson, *supra* note 54, at 1835–36.

useful insights.[60] It was not initially treated as a test even by most citing courts. Of the first thirteen cases to cite *Nichols*, only one cited the passage above and seemed to refer to its reasoning in a way that suggested it could be generalized to something approaching a test.[61] The thirteenth explicitly cast doubt on whether *Nichols*'s "test" should be followed as such, even as it otherwise adopted and applied it.[62] Judge Yankwich, it may be interesting to note, was among the early adopters of *Nichols* as a precedent, but he declined to cite this passage and would later become one of its sharpest critics.[63]

Learned Hand, the author of *Nichols*, also authored *Sheldon v. Metro-Goldwyn Pictures*, a classic opinion and one of these early cases citing *Nichols*.[64] Nonetheless, even Learned Hand formulated his understanding of the *Nichols* test in ways that do not correspond with our contemporary understanding of the abstractions test and that seemed potentially at odds with his brethren on the bench.[65] This is all to say that general confusion and uncertainty fogged the infringement jurisprudence of the era, which would ultimately give lasting shape to much modern copyright law. However, one aspect of the abstractions test that has proven especially persistent and useful is the notion that some sort of process is necessary for the differentiation of protected from unprotected materials. In practice, limiting doctrines often structure and shape this process of distinguishing the types of elements in a copyrightable work.

D. Limiting Doctrines Applied in Infringement Analysis.

Numerous rules and so-called "limiting doctrines" help courts calibrate the scope of copyright protection during the substantial similarity analysis as courts seek to differentiate protected expression from public domain and unmonopolizable elements.[66] Copyright's limiting doctrines may appear in slightly different

60. *See, e.g.*, BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 48 (1967) ("Hand's explanation does, I think, sharpen our awareness of what we are about, but surely the technique described lacks precision.").

61. Harold Lloyd Corp. v. Witwer, 65 F.2d 1, 25–26 (9th Cir. 1933).

62. *See* discussion *infra* Part III (discussing *Shipman v. R.K.O. Radio Pictures*, 100 F.2d 533, 537 (2d Cir. 1938)).

63. *See* discussion *infra* Part III.

64. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54–55 (2d Cir. 1936).

65. *See infra* notes 121–26 and accompanying text (discussing *Shipman*).

66. Zalewski v. Cicero Builder Dev., Inc., 754 F.3d 95, 102–03 (2d Cir. 2014) ("Numerous doctrines separate protectable expression from elements of the public domain.").

formulations but can be said to include: (1) the idea-expression dichotomy (which excludes mere ideas from copyright protection);[67] (2) the merger doctrine (which limits protections even for *expression* of ideas when there are limited ways to express them and thus the idea "merges" with the expression);[68] (3) the originality requirement (which prohibits protecting factual, historical, or stock elements);[69] and (4) the functionality requirement (which affirms the originality requirement and prohibits protecting systems, processes, methods, or other functional, rather than expressive, elements).[70] Other limits certainly exist, such as the refusal to protect short phrases, titles, and blank forms, for instance.[71] There are at least ten *categories* of exclusions from (or limitations to) copyright protection, though courts do not always make these limits explicit.[72] Because of their capacity to shape the scope of appropriate copyright protection, the limiting doctrines warrant close and careful attention.

As one such limitation, the scènes à faire doctrine can play a significant role in infringement's substantial similarity analysis by identifying unprotectable expression and calibrating the scope

67. Dymow v. Bolton, 11 F.2d 690, 691 (2d Cir. 1926) ("[I]deas as such are not protected."); *Sheldon*, 81 F.2d at 54 ("[O]thers may 'copy' the 'theme,' or 'ideas,' or the like, of a work, though not its 'expression.'"); *see* Mazer v. Stein, 347 U.S. 201, 217 (1954); Baker v. Selden, 101 U.S. 99, 102–03 (1879); Franklin Mint Corp. v. Nat'l Wildlife Art Exch., Inc., 575 F.2d 62, 64 (3d Cir. 1978) ("To reconcile the competing societal interests inherent in the copyright law, copyright protection has been extended only to the particular *expression* of an idea and not to the idea itself.").

68. CDN Inc. v. Kapes, 197 F.3d 1256, 1261 (9th Cir. 1999); Bevan v. Columbia Broad. Sys., Inc., 329 F. Supp. 601, 607 (S.D.N.Y. 1971) ("Copyright is not infringed by an expression of the idea which is substantially similar where such similarity is necessary because the idea or system being described is the same.").

69. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 347–48 (1991); Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 978–79 (2d Cir. 1980); *Bevan*, 329 F. Supp. at 606–07.

70. Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 794–95 (5th Cir. 2002) (en banc); Attia v. Soc'y of N.Y. Hosp., 201 F.3d 50, 57 (2d Cir. 1999); Gates Rubber Co. v. Bando Chem. Indus., Ltd., 9 F.3d 823, 838 (10th Cir. 1993); Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 68 (2d Cir. 2010); *Zalewski*, 754 F.3d at 105; Comput. Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 708–10 (2d Cir. 1992).

71. 37 C.F.R. § 202.1(a) (2022) (excluding "[w]ords and short phrases such as names, titles, and slogans" from copyright protection); 37 C.F.R. § 202.1(c) (2022) (excluding "[b]lank forms" from copyright protection); *see also* McDonald v. West, 138 F. Supp. 3d 448, 454 (S.D.N.Y. 2015) ("[S]hort phrases, including titles and slogans, rarely if ever exhibit sufficient originality to warrant copyright protection."); Alexander v. Haley, 460 F. Supp. 40, 46 (S.D.N.Y. 1978) (excluding "cliched language, metaphors" from copyright protection); Advanz Behav. Mgmt. Res., Inc. v. Miraflor, 21 F. Supp. 2d 1179, 1180 (C.D. Cal. 1998) ("[F]orms are not copyrightable subject matter.").

72. Samuelson, *supra* note 54, at 1841–42 (listing ten categories of unprotectable elements and calling for courts to "be more explicit than they typically have been about the unprotectability of all of these elements").

of protection.[73] Substantial similarity analysis remains, as noted throughout Part II, an area of significant import and contestation for copyright litigation. Substantial similarity analysis pits copyright's various stakeholders against each other and requires careful calibration of the relative strength and scope of ownership versus other interests. The indeterminacy associated with infringement analysis can be especially vexing for courts, juries, lawyers, and litigants themselves.[74] Clarifying scènes à faire's role in infringement analysis could shed helpful light on an area that matters for litigants and policy.

Turning to the doctrine's earliest appearances helps contribute to a clearer understanding of the origins and operation of scènes à faire in copyright law.

III. THE DOCTRINE'S ORIGINS AND GROWTH

The scènes à faire doctrine was first labeled as such in *Cain v. Universal Pictures Co.*,[75] a 1942 copyright infringement case decided by Judge Leon René Yankwich (1888–1975).[76] It appears that the label itself originated with a populist French theater critic writing in the second half of the nineteenth century, Francisque Sarcey (1827–1899).[77] It is unknown precisely how Yankwich, deciding *Cain* in the United States in the 1940s, discovered Sarcey's work, yet a few possibilities exist.

On the one hand, Sarcey was a momentous cultural figure whose writings and taste influenced—or provoked—artists, academics, and audiences, and thus anyone familiar with the theater or literary theories of late nineteenth-century France would have known of his name and general professions on the dramatic arts. A sign of his persistent cultural relevance is that

73. *Id.*; Apple Comput., Inc., v. Microsoft Corp., 35 F.3d 1435, 1444, 1446 (9th Cir. 1994) (stating that "the party claiming infringement may place 'no reliance upon any similarity in expression resulting from' unprotectable elements" and analyzing the parties' overlapping elements through extensive use of the scènes à faire doctrine).

74. Said, *supra* note 28, at 768, 773–74.

75. Kurtz, *supra* note 5, at 80.

76. *Leon Yankwich, U.S. Judge, Is Dead*, N.Y. TIMES (Feb. 12, 1975), https://www.nytimes.com/1975/02/12/archives/leon-yankwich-us-judge-is-dead-author-of-elk-hills-ruling-on-oil.html [https://perma.cc/WAQ6-SXTT].

77. Kurtz, *supra* note 5, at 106; *M. Francisque Sarcey Dead.; The Noted French Dramatic Critic Has Passed Away*, N.Y. TIMES (May 16, 1899), https://www.nytimes.com/1899/05/16/archives/m-francisque-sarcey-dead-the-noted-french-dramatic-critic-has.html [https://perma.cc/3BQM-JWXY].

Sarcey's decades' worth of weekly reviews of Parisian theater were collected and published as a series of independent volumes.[78]

On the other hand, Yankwich was both a known Francophile[79] and a self-professed "student of literature."[80] Yankwich could have encountered Sarcey's work on his own time, reading voraciously as his literarily inflected opinions suggest he must have done.[81] However, the influence may well have been even more direct and occurred earlier in time. Yankwich emigrated to the United States at nineteen, having studied the classics in his native Romania, then in Paris at the Sorbonne.[82] This cultural and intellectual formation and the timing of his study in Paris—which occurred in the period shortly before his emigration in 1907—were not long after Sarcey's death in 1899. Whatever the reasons for Yankwich's familiarity with Sarcey's work, it inspired him enough to employ the idea of scènes à faire in his judicial writings for close to two decades. Thus, it is worth understanding how and why Yankwich might have sought to import this literary concept into intellectual property law.

In *Cain v. Universal Pictures Co.*, Judge Yankwich faced the question of whether a movie studio's film, *When Tomorrow Comes*, infringed James Cain's novel *Serenade*.[83] Cain was a very successful writer whose prior work had been widely published.[84] Universal Pictures had paid Cain $17,500 for the right to adapt another of his stories, *Modern Cinderella*.[85] Cain argued that a specific sequence from his novel, a racy love scene set in a church, had been copied by the motion picture, which featured characters escaping into a church to shelter from a storm.[86] Unlike the short story, the novel was not covered by Universal's license.[87]

78. *See, e.g.*, FRANCISQUE SARCEY, QUARANTE ANS DE THÉÂTRE (FEUILLETONS DRAMATIQUES): CORNEILLE, RACINE, SHAKESPEARE ET LA TRAGÉDIE (Vol. III) (1900).

79. Litman, *supra* note 7, at 987. Indeed, readers of his opinions regularly encounter French phrases, concepts, and literary texts. *See, e.g.*, Schwarz v. Universal Pictures Co., 85 F. Supp. 270, 275 (S.D. Cal. 1945) (referring to several different instances of French literature and using the French phrase, "scènes à faire").

80. Cain v. Universal Pictures Co., 47 F. Supp. 1013, 1017 (S.D. Cal. 1942); *Schwarz*, 85 F. Supp. at 274.

81. As a case in point, see *Bradbury v. Columbia Broad. Sys., Inc.*, 174 F. Supp. 733, 745–46 (S.D. Cal. 1959).

82. *Leon Yankwich, U.S. Judge, Is Dead*, *supra* note 76.

83. *Cain*, 47 F. Supp. at 1015.

84. *Id.* at 1014.

85. *Id.* at 1015.

86. *Id.* at 1015, 1017.

87. *Id.* at 1015.

To adjudicate the dispute, Yankwich read the book, the screenplay, and a summary of the film's scenes, and he also watched the film at a private viewing.[88] Even assuming, *arguendo*, that both access and copying were proven, Yankwich reasoned, the instant infringement query would fail due to the lack of similarity between the two works overall.[89] In any event, the plaintiff had conceded the issue of the overall works' similarity by focusing on only a comparison of a small part of the works, namely the church sequence.[90]

Yankwich tackled the scenes' allegedly infringing similarities and rejected them all as grounds for infringement. First, choosing to situate characters in a church to take shelter during a storm was not protectable for the purposes of copyright protection because "[h]ouses of worship have been asylums since their very beginning."[91] Put another way, such a choice was not original with the author and could not be protected during infringement analysis. More broadly, it had long been recognized that the choice of a locale is not protected by copyright.[92]

The scenes in the two works contained numerous other details in common, ones that Yankwich would frame as scènes à faire, "such as the playing of the piano, the prayer, [and] the hunger motive."[93] Yankwich discounted these similarities as details that were aesthetically dependent on the author's prior choice of situation or setting: "Once having placed two persons in a church during a big storm," such details would "force themselves upon the writer in developing the theme."[94] In Yankwich's framing, the mere choices of situation and theme diminished the writer's agency and originality. Finding that such details were "inherent in the situation itself," Yankwich reasoned that they must be excluded from consideration of shared similarities during infringement analysis since "such . . . details . . . are not the

88. *Id.*

89. *Id.* at 1015–17.

90. *Id.* at 1016–17.

91. *Id.* at 1017.

92. Underhill v. Belasco, 254 F. 838, 840–41 (S.D.N.Y. 1918). This is a point that Yankwich would underscore in his later opinion in *Schwarz v. Universal Pictures Co.*, discussed below. Schwarz v. Universal Pictures Co., 85 F. Supp. 270, 276 (S.D. Cal. 1945) ("Locale is not the subject of copyright protection, or to common law protection as literary property.")

93. *Cain*, 47 F. Supp. at 1017.

94. *Id.*

material of which copyrightable originality consists."[95] In assessing the similarity of only these two scenes, then, Yankwich stressed the importance of adopting the perspective of "the ordinary reader and observer," and concluded that it was "inconceivable that the ordinary theater-goer . . . would see in [the two scenes] . . . any similarity."[96]

In summary, details incidental to an uncopyrightable choice (such as choice of premise or locale) were not original and thus could not be protected during infringement analysis. Moreover, these details would be indispensable for later authors seeking to explore similar premises or locales. Finally, the works in their final form were insufficiently similar to rise to the level of infringement. As the preceding summary makes clear, Yankwich did not cast his analysis in terms of *ideas* and their lack of copyright protection relative to protectable *expression*. Influential existing caselaw modeled a view of infringement analysis that considered similarities between two works in terms of "abstractions,"[97] yet Yankwich, in *Cain,* offered a more grounded and practical model oriented in lay audiences' ordinary impressions.

Yankwich reapplied the scènes à faire label again three years later in *Schwarz v. Universal Pictures* in an action brought against the same defendant motion picture studio.[98] In *Schwarz*, the plaintiff had submitted a short script treatment to the defendant studio, which had rejected and returned the submission within a few weeks of receiving it.[99] The studio employee who had received the plaintiff's treatment and then ultimately returned it, testified that he had not shared details of it with other employees. Moreover, the treatment had only been one and a half pages long when submitted and had continued to evolve in the weeks following the manuscript's initial submission. Judge Yankwich carefully reconstructed the work's creative evolution based on

95. *See id.* Yankwich's reference to a lack of "copyrightable originality" did not mean that a finding of scènes à faire could invalidate the work's overall copyright; he referred to copyrightability only in service of infringement analysis, as is made clear in his conceding originality: "Conceding to the plaintiff originality in the . . . church sequence in 'Serenade', [sic] I find such dissimilarity in the effect, purpose and impression upon the observer in the church sequence in 'When Tomorrow Comes,' that it did not and could not have its genesis in it." *Id.*

96. *Id.* at 1016–17.

97. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

98. Schwarz v. Universal Pictures Corp., 85 F. Supp. 270, 278 (S.D. Cal. 1945).

99. *Id.* at 272.

differently dated sketches of the script.[100] Even if Universal Studios *had* had more general access to the work in its initially submitted form, what it had received at that time bore few similarities to the later, more developed form of the screenplay that served as the basis for the plaintiff's present infringement claim. Finding the relevant testimony credible and lacking any other evidence to the contrary, Yankwich rejected the plaintiff's theory of corporate access to the work.[101] Without such access to the work, the defendants could not have copied it.[102] He could have stopped there, but preferring to issue a ruling on the merits, Yankwich bracketed the question of access and proceeded to analyze the works' similarity.[103]

Yankwich dutifully recited the need to exclude from similarity analysis the elements that should not be protected, such as elements necessary to chronicles of certain historical accounts and dramatic situations.[104] He revisited the notion of aesthetic indispensability reflected in his earlier use of scènes à faire, writing:

> [O]nce we deal with a particular situation which is not original with any one, it calls for certain sequences in the methods of treatment, which cannot be avoided, because they are, [*sic*] in the very nature of the development of the theme, and are used by every writer who knows his craft."[105]

Here, Yankwich grounded his infringement analysis in the lack of originality (in his words, the choice of a "particular situation which is not original") as well as in a pragmatic view of situational necessity (the choice of situation inevitably entailed subsequent choices, or "calls for certain sequences . . . which cannot be avoided"). Such choices, in Yankwich's view, pertained to the author's chosen theme and reflected universal aesthetic conventions ("are used by every writer who knows his craft").

Just as he had done in *Cain*, in *Schwarz*, Yankwich acknowledged the well-settled principles that applied to the conflict and, once again, used the scènes à faire label as a means, ostensibly, of consolidating prior cases with long-settled principles; he was not articulating new legal ideas so much as

100. *Id.* at 272–74.
101. *Id.* at 272.
102. *Id.* at 274.
103. *Id.*
104. *Id.* at 274–76.
105. *Id.* at 276.

applying familiar rules to new facts.[106] While he may have merely built on existing caselaw, he nonetheless continued to emphasize his own view of infringement analysis, which was grounded in practical details rather than the more abstract and theoretical jurisprudence often associated with the idea/expression doctrine at the time and since.

With this initial pair of opinions, and relying on his growing experience on the bench, Yankwich offered the beginnings of a vision for the broader application of scènes à faire.[107] Following *Cain* and *Schwarz*, Yankwich would take three more opportunities to develop and expand upon his efforts, to mixed effect. First, Yankwich extended the scènes à faire concept to music five years later, applying "musique à faire" in an opinion with a more controversial legacy.[108] Second, Yankwich mentioned the scènes à faire doctrine again the following year in a scholarly lecture he delivered and published, elaborating on his ideas about originality and copyright law.[109] In his lecture, Yankwich remained almost stubbornly grounded in the practical logic of the expressive arts, describing scènes à faire as "scenes which must follow a certain situation."[110] While he did refer to ideas, he did so in a way that yoked them to the more determinate, pragmatic framing of dramatic situations. Yankwich wrote:

> [W]hen you are dealing with a common idea, no matter how different the treatment may be, common elements will appear in both products. In so far as these common elements are distinct, they amount to creative originality. And, in so considering them, the similarities which are traceable to the common sources are disregarded. But similarities may appear which are inherent in a situation. The French refer

106. *Id.* at 271.

107. Judge Yankwich bolstered his reasoning with reference to the experience he had developed in this area of law, quoting at least two of his own prior opinions at some length. *See id.* at 271–72, 274, 277 (first quoting *Cain v. Universal Pictures Corp.*, 47 F. Supp. 1013, 1017 (S.D. Cal. 1942); then quoting *Echevarria v. Warner Bros. Pictures, Inc.*, 12 F. Supp. 632, 634 (S.D. Cal. 1935); and then quoting *James v. Universal Pictures Corp.*, an opinion he handed down in 1928 while working on the Superior Court of Los Angeles County).

108. Supreme Recs., Inc. v. Decca Recs., Inc., 90 F. Supp. 904, 911 (S.D. Cal. 1950). The opinion has generated important scholarship exploring the inequitable impact of the musique à faire doctrine and the racist implications of Supreme Records. ANJALI VATS, THE COLOR OF CREATORSHIP: INTELLECTUAL PROPERTY, RACE, AND THE MAKING OF AMERICANS, 44–46 (2020). While Yankwich appears to test the application of his doctrine in the realm of music, it did not catch on in this realm the way it did in other copyright jurisprudence. Further discussion of this important topic is beyond the scope of this Article.

109. Hon. Leon R. Yankwich, *Originality in the Law of Intellectual Property (Its Meaning from a Legal and Literary Standpoint)*, 11 F.R.D. 457, 461–65 (1952).

110. *Id.* at 462–63 (emphasis omitted).

> to them as *scènes a faire*—that is, scenes which *must* follow a certain situation.[111]

Hence, works using common ideas as referents would inevitably share similarities, "no matter how different the treatment," because such similarities would be "inherent in a situation."[112] Rather than calling for a metaphysical distillation of ideas based on "levels of abstraction" at which ideas could be defined and differentiated from expression; however, as Judge Learned Hand had done, Yankwich focused on situational necessity and pragmatically bounded scenarios.

For example, Yankwich pointed to an earlier case, *Underhill v. Belasco*, involving two stories both set in convents and thus containing certain similarities attributable to the (unprotectable) choice of locale.[113] The action of the story required contact between a male protagonist and a nun, but male visitors were forbidden from entry into the convent. This rule was relaxed during wartime, which, in Yankwich's view, helped explain why both stories were set in convents during war time.[114] Overall, Yankwich's vision of originality was highly particularized and pragmatic. He appeared to develop a copyright jurisprudence oriented in the audience's expectations and perspective and informed by a theory of aesthetic indispensability. Both strands of his thinking tied into the scènes à faire doctrine.

Third and finally, Judge Yankwich elaborated on the doctrine in 1959 in evaluating an infringement claim brought by the celebrated writer Ray Bradbury over alleged copying of *The Fireman* and *Fahrenheit 451*.[115] In *Bradbury v. CBS (Bradbury I)*, Yankwich ruled for the defendant, finding that certain elements common to both works were inevitable and thus not monopolizable under copyright law.[116] He mentioned the scènes à faire label only in passing, likening these elements to "[s]tock and [f]amiliar [s]ituations."[117] The label appears to have been less important than the concept, because in referring to it, he cited only one case,

111. *Id.*

112. *Id.*

113. *Id.* at 463 (citing Underhill v. Belasco, 254 F. 838, 839–40 (S.D.N.Y. 1918)).

114. *Id.* at 464 ("[I]n order to bring a soldier into the convent, it was necessary that the scene be placed in war-time, for only in war-time could a soldier enter the convent.").

115. Bradbury v. Columbia Broad. Sys., Inc., 174 F. Supp. 733, 745–46 (S.D. Cal. 1959).

116. *Id.* at 745–46, 748.

117. *Id.* at 745.

yet it is one in which the French phrase itself never appears.[118] Nonetheless, the same intellectual and jurisprudential concerns as can be observed in his earlier scènes à faire cases reappear.

Yankwich did not find that copying had been proven on the basis of either testimony or the strength of inferences permitted by circumstantial evidence of copying.[119] Some authorities outside his Circuit had held that when the defendant had direct access to the work, "the probability of copying is high."[120] Curiously, Yankwich seems to have gone out of his way to disagree with these (nonmandatory) authorities on what appears to have been a matter of intra-circuit squabbling nearly two decades old.

Shipman v. R.K.O. Radio Pictures, Inc. was decided by a three-judge panel of the Second Circuit, which included Judges Swan and Learned Hand, with an opinion authored by Judge Manton.[121] Rather than applying Learned Hand's indeterminate abstractions test from *Nichols*, *Shipman* proposed a more streamlined way forward in cases in which copying was probable: "[A]re there similarities of matters which justify the infringement claimed? Was there a piracy of a copyrightable play as shown by similarities of locale, characters, and incidents?"[122] *Shipman* thus reflected an explicit attempt to simplify the complicated analysis by which copyrightable expression could be identified in the course of infringement analysis.[123]

Shipman justified the simplification by reference to *Nichols*, which reflected judicial frustration with substantial similarity analysis. *Nichols* lamented the inconsistency in copyright caselaw on the subject, noting that "the decisions cannot help much in a new case."[124] Though the abstractions test is often cited in our era as a source of vexing indeterminacy, Judge Learned Hand's test reflects an attempt to respond to, and we may surmise, improve upon, the troubling indeterminacy of the existing jurisprudence. In *Shipman*'s telling, *Nichols* had "attempted to provide a workable test" but in introducing its "device of 'abstractions'" had

118. *Id.* ("In dealing with a problem of this character, stock situations, scènes à faire, cannot be avoided. . . . They are not the materials to which the copyright monopoly attaches." (citing Warshawsky v. Carter, 132 F. Supp. 758 (D.D.C. 1955))). While *Warshawsky* does deal with stock situations and continues to be cited in connection with the scènes à faire doctrine, it never uses that phrase. *See generally Warshawsky*, 132 F. Supp.

119. *Bradbury*, 174 F. Supp. at 736.

120. *Id.* at 734 (citing Nikanov v. Simon & Schuster, Inc., 246 F.2d 501, 504 (2d Cir. 1957)).

121. Shipman v. R.K.O. Radio Pictures, Inc., 100 F.2d 533, 533 (2d Cir. 1938).

122. *Id.* at 537.

123. *Id.*

124. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

merely given a new name for the process of "comparing 'similarity of sequences of incident.'"[125] As *Shipman* pointed out somewhat cattily, the abstractions test did "not seem to have been used since its suggestion."[126]

Judge Learned Hand, who had authored both *Nichols* and *Sheldon*, did not exactly agree with *Shipman*'s characterization. Hand used his concurrence to clarify his support for *Shipman*'s holding while defending his own earlier opinions in *Nichols* and *Sheldon* which, in his view, "followed exactly the same doctrine." *Nichols* thus still represented the proper way to describe the method used to identify copyrightable expression:

> [*Nichols*] held that there is a point where the similarities are so little concrete (are therefore so abstract) that they become only 'theme', [sic] 'idea', [sic] or skeleton of the plot, and that these are always in the public domain; no copyright can protect them. The test is necessarily vague and nothing more definite can be said about it. Precisely this doctrine was also used in Sheldon v. Metro-Goldwyn Pictures Corp., 2 Cir., 81 F.2d 49, though of course the result was different. . . . Since I am not sure that the opinion in the case at bar does not interpret Nichols v. Universal Pictures Corp. and Sheldon v. Metro-Goldwyn Pictures Corp. in another sense, I do not wish my concurrence to be understood as indicating any change in my views.[127]

It is rather remarkable to hear the sure-footed Judge Learned Hand admitting his lack of certainty ("I am not sure that the opinion . . . does not interpret Nichols . . . and Sheldon . . . in another sense . . . ."), especially about the holding he is otherwise endorsing and its relationship to his two earlier copyright rulings, both cases of such importance. Professor Bruce Boyden offers a fascinating account of the case and its role in a deeper division among the judges over the role of copyright's ordinary observer test.[128] An unrelated scandal led to Judge Manton's leaving the bench, and a few months later, a panel of judges instated Judge Learned Hand's concurrence as the majority opinion and cast Manton's opinion as "the minority opinion" to be downgraded accordingly.[129]

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125. *See supra* note 64 and accompanying text.

126. *Shipman*, 100 F.2d at 537.

127. *Id.* at 538 (L. Hand, J., concurring).

128. Bruce E. Boyden, Daly v. Palmer*, or the Melodramatic Origins of the Ordinary Observer*, 68 SYRACUSE L. REV. 147, 176 (2018).

129. *Id.*

Especially considering the intrajudicial drama, it seems all the more curious that Yankwich inserted himself into the dialogue. To be fair, Yankwich might not have independently gone out of his way to use this hardly recent jurisprudential fissure in the copyright jurisprudence of the Second Circuit simply to shed light on his own ruling in a district court on the other side of the country. However, the plaintiff's reliance on *Sheldon* had apparently compelled him to respond to this line of reasoning.[130] More pertinently, his attempt to mobilize *Shipman* gives additional evidence of Yankwich's desire to simplify the substantial similarity analysis, and perhaps even to displace the abstract analysis of *Nichols* to some extent.

Indeed, Yankwich seems to have had no patience for the lofty metaphysics Learned Hand seemed to propound in the abstractions test in *Nichols*. Yankwich emphasizes *Shipman*'s utility "because it condemns 'abstraction'" as a means of determining similarity. In *Bradbury I*, Yankwich points out that Bradbury and his expert converted the term, respectively, into "aura" and "impression" or "other terms equally nebulous."[131] Yankwich makes his concerns plain when describing why experts may not be all that useful in certain cases. When it comes to infringement analysis, "[t]he test is pragmatic," and by means of either "dissection" of a work into component parts or "abstraction" into the levels of the work or more "generalized terms," one could "find similarity everywhere."[132] Indeed, he concludes, "[a]lmost any dramatic story can be reduced to a metaphysical abstraction."[133] Yankwich was seemingly ready to do away with the abstractions test, and he dropped a footnote to emphasize that his criticism was not his alone.[134] This view did not ultimately

130. Bradbury v. Columbia Broad. Sys., Inc., 174 F. Supp. 733, 734–35 (S.D. Cal. 1959) ("On this topic, it is well to quote from *Shipman v. R. K. O. Radio Pictures, Inc.*, 2 Cir., 1938, 100 F.2d 533, 537, because the court there distinguished its own prior case, *Sheldon v. Metro-Goldwyn Pictures Corp.*, 2 Cir., 1936, 81 F.2d 49, on which so much reliance was placed by plaintiff in the case before us.").

131. *Id.* at 735.

132. *Id.* at 739.

133. *Id.*

134. *Id.* at 735 n.1 ("Courts of Appeals, including our own, have consistently condemned 'abstraction' as a means of establishing similarity." (first citing Kustoff v. Chaplin, 120 F.2d 551, 561 (9th Cir. 1941); then citing Twentieth Century-Fox Film Corp. v. Stonesifer, 140 F.2d 579, 582 (9th Cir. 1944,); and then citing Funkhouser v. Loew's, Inc., 208 F.2d 185, 188 (8th Cir. 1953))).

triumph and the abstractions test remains alive and well.[135] The case, overall, did not withstand appellate scrutiny.

Unfortunately for the scènes à faire doctrine's immediate reception, *Bradbury I* was reversed on appeal in a conclusory opinion with little helpful analysis and no mention of scènes à faire.[136] It is noteworthy that *Bradbury II*'s majority opinion prompted a lively dissent by Judge Barnes, who offered reasoning in line with the scènes à faire doctrine though not labeled as such.[137] Judge Barnes also pointed out Yankwich's renown in this area of law.[138] Notwithstanding this indirect endorsement of the doctrine in *Bradbury II*'s dissent, scènes à faire all but disappeared in 1959 for nearly twenty years.[139]

Professor Leslie A. Kurtz, who appears to be the first scholar to have studied the scènes à faire doctrine in any depth, notes that the doctrine "languished" before "explod[ing]" into prominence in 1976,[140] the year after Yankwich passed away. It may slightly overstate matters to treat the period between 1959–1976 (during which no mentions of the doctrine appear in the record), as entirely scènes-à-faire-free. Caselaw continued to develop ideas that seemed in dialogue with Yankwich's reasoning and shaped the limiting doctrines in terms of "situations" and particular details or incidents that could not be protected.[141] Still, implicit development of the doctrine can be more challenging to trace, but it is certainly true that the late 1970s saw the doctrine's revival and further development.

Kurtz attributes the doctrine's later adoption and popularity to its application in *Reyher v. Children's Television Workshop*.[142] In *Reyher*, the plaintiff was the author of a children's story based

135. Samuelson, *supra* note 54, at 1823, 1835–36 (listing it as one of the five dominant approaches to contemporary infringement analysis).

136. Bradbury v. Columbia Broad. Sys., Inc. (*Bradbury II*), 287 F.2d 478, 486 (9th Cir. 1961) (ruling that the lower court's finding of "no similarity in the literary expression between" litigants' works was "clearly erroneous").

137. *Id.* at 486–87 (Barnes, J., dissenting).

138. *Id.* at 486 ("The latter is no stranger to this segment of the law, holding an acknowledged national reputation as an authority on plagiarism.").

139. Kurtz, *supra* note 5, at 88.

140. *Id.* at 87–88 (citing Reyher v. Child.'s Television Workshop, 533 F.2d 87, 91 (2d Cir. 1976)).

141. For example, see *Burnett v. Lambino*, 204 F. Supp. 327, 331 (S.D.N.Y. 1962) ("Such stock characters and situations are inherent . . . as a background and are not copyrightable. The familiar test of copyrightability distinguishes between the 'ideas' used by the author and his 'expression' of them. Only the latter is said to be copyrightable." (citations omitted)).

142. Kurtz, *supra* note 5, at 88.

on her recollection of a folktale that her Russian mother told her, and she alleged that a television program and subsequent magazine issue for children infringed the story's copyright.[143] The district court dismissed the complaint and the appellate court affirmed, holding that the defendant's story did not infringe merely because the works presented the same thematic concept, namely that a lost child's eventual reunion with their mother is delayed by their sentimental (but apparently inaccurate) description of her as "the most beautiful woman in the world."[144]

After briefly introducing the idea/expression distinction and its challenges, Judge Meskill in *Reyher* turned to the scènes à faire doctrine.[145] *Reyher* described the doctrine as "[a]nother helpful analytic concept," and defined scènes à faire as "sequences of events which necessarily follow from a common theme."[146]

Reyher cited the Nimmer treatise to the effect that similarities resulting from the use of a common idea are not actionable.[147] Next, it cited the already-classic *Nichols v. Universal* to support that only protected expression (not ideas, nor stock characters) could be protected.[148] In line with these principles, *Reyher* reasoned that the plot similarities between the litigants' works were scènes à faire, "scenes which necessarily result from identical situations"; "where a lost child is the protagonist, there is likely to be a reunion with parents."[149] In a footnote, *Reyher* credited its use of the term to Judge Yankwich's article on originality, which was by then a quarter century old.[150]

Notably, *Reyher* seemed skeptical about the notoriously indeterminate boundary between idea and expression, noting that the distinction "may not be susceptible to overly helpful generalization."[151] Instead, and following Yankwich's example, *Reyher* inclines towards as practical as possible an application of the infringement analysis, observing that courts had "emphasized repeatedly that the essence of infringement" could be found in the appropriation of "not a general theme but its particular expression through similarities of treatment, details, scenes, events and

143. *Reyher*, 533 F.2d at 88–89, 92.
144. Kurtz, *supra* note 5, at 91–93.
145. *Id.* at 91–92.
146. *Id.* at 91.
147. *Id.*
148. *Id.*
149. *Id.* at 92.
150. *Id.* at 92 n.4.
151. *Id.* at 91.

characterization."[152] In other words, rather than remaining in the abstract realm of idea definition, *Reyher* trained attention on elements of the works that could be discovered through objective or dissective analysis—details, scenes, events, and characterization.[153]

Reyher offered three related definitions for scènes à faire, each of which was reasonably concrete: (1) "scenes which necessarily result from identical situations"; (2) "sequences of events which necessarily follow from a common theme"; and (3) "thematic concepts or scenes which necessarily must follow from certain plot situations."[154] *Reyher* did not follow the "abstractions" approach of *Nichols* but instead grounded its scènes à faire analysis more concretely in "identical situations," "sequences of events" or "scenes . . . [dictated by] certain plot situations." Although *Reyher* did address the idea/expression dichotomy, it spent little to no time defining the idea in metaphysical terms or engaging in the abstractions analysis of *Nichols*. Arguably, because of its emphasis on boundedness and particularized detail, *Reyher's* ruling could stand independently based on the scènes à faire doctrine.

Reyher is now a staple in copyright infringement litigation; at the time of this writing, it has been cited 239 times overall, and ninety-seven times in connection with its application of the scènes à faire doctrine.[155] Subsequent courts over the last half century have continued to build on and refine the doctrine's uses in *Reyher*, along with a handful of other influential cases. Judge Yankwich's once newly labeled doctrine has proven remarkably robust, even if it has not curbed the judicial appetite for abstractions nor the tendency to cite *Nichols*. In its contemporary applications, the scènes à faire doctrine's reach and capacity are both broad. However, at times, courts and commentators narrow the doctrine in ways that are unhelpful and may cause the doctrine to run counter to its purpose. In some cases, inaccuracies lead to the importation of novel and unhelpful requirements. The next Part describes some of the contemporary inaccuracies that have clouded the doctrine's application and reception.

152. *Id.*
153. *Id.*
154. *Id.* at 91–92.
155. Westlaw search results accessed Oct. 26, 2023.

IV. MISPERCEPTIONS OF THE DOCTRINE

Recent accounts have circulated several inaccuracies about the scènes à faire doctrine. First, both courts and scholars at times combine, conflate, or even confuse the limiting doctrines. In addition, scholars have recently posited the need to impose novel requirements when applying scènes à faire. These views of the doctrine both narrow and burden its operation. In what follows, I provide examples of these misperceptions and explain the risks and costs associated with them.

A. Conflation and Confusion.

Judicial combination of limiting doctrines is common, and courts will sometimes "stack" doctrines as though their mere enumeration could produce a conclusion. In some instances, courts employ something of a "throw it at the wall and see if it sticks" approach. Yet the tendency to combine scènes à faire with other limiting doctrines is not necessarily problematic. One of the legitimate roles the doctrine plays is in concert with other doctrines as part of the scoping analysis that must take place during substantial similarity inquiries.

However, in some instances, judges and commentators outright conflate the two doctrines, treating them as though only one existed, or as though the scènes à faire doctrine's purpose was entirely subordinate to idea/expression.[156] Sometimes courts do so carefully, noting that they are proceeding through analogy.[157]

At times, courts confuse one for the other.[158] *Steinberg v. Columbia Pictures Industries, Inc.* featured graphic depictions of New York City from a stylized vantage point designed to emphasize the perspective of a New Yorker who believes the Big Apple is the center of the world.[159] In responding to the defendant's

156. *See,* e.g., Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV., 725, 766–69 (1993) (characterizing scenes à faire, as a "well established . . . principle in copyright, [that] provides a starting point for describing what is apparently at work in copyright's idea/expression dichotomy"); Hebl, *supra* note 32, at 131–33 (referring to "the two major guardians of idea/expression, the merger doctrine and *scenes a faire*" and characterizing these two doctrines as the "constituent enforcers" of the idea/expression distinction).

157. Great Imps., Inc. v. Caffco Int'l, Inc., No. 95 Civ. 0514, 1997 WL 414111, at *4, *6 (S.D.N.Y. July 24, 1997) ("[D]epiction[s] of baby angels as round-cheeked, smiling or bemused, and wearing loose robes or drapery" are "stereotypical attributes of baby angels . . . indispensable to the generalized idea of baby angels, analogous to unprotected scenes a faire . . . .")

158. Samuelson, *supra* note 9, at 447–48.

159. Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706, 710 (S.D.N.Y 1987).

scènes à faire argument that elements in this particular visual framing of the city were customary or expected, the court responded in terms of the idea/expression doctrine. It stated that the plaintiff's rendition of that framing was "expression," as though that resolved the inquiry, but it did not also respond to the theory that this visual take was customary or expected.[160] Under scènes à faire analysis, some elements are "stock" or never sufficiently original to rise to the level of protected expression. Others may well be sufficiently original to count as expressive except they are expected or have become customary and, therefore, to allow property rights in them would award too burdensome a monopoly. The court's response—tailored to the idea/expression distinction—failed to account for the independent effects of the scènes à faire doctrine.

Confusing the doctrines is easy to do; as one court noted, "the various doctrines that limit copyright protection are often barely distinguishable from one another."[161] Conflating them is easier still—given the way they often appear in clusters in judicial reasoning—yet the role, origins, and early adoption of the doctrine as described in Parts II and III show that conflating limiting doctrines represents a departure from the way the doctrine was first envisioned and applied. Yankwich envisioned a domain for scènes à faire that did not simply duplicate merger or idea/expression analysis. As Yankwich applied it, scènes à faire analysis might include ideas but more commonly focused on elements more particular and grounded than that, such as premise, situation, theme, historical setting, and so on.[162]

One might reasonably protest that just because Yankwich coined the doctrine and applied it in a particular way, that does not mean that his original application should control the doctrine's contemporary operation. Yet, preserving an independent role for the scènes à faire doctrine is not just descriptively aligned with Yankwich's earliest uses, it is also normatively desirable. When the limiting doctrines are conflated or confused, the scope of the scènes à faire doctrine's application may be complexified, narrowed, and burdened.

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160. *See id.* at 713–14.

161. Apple Comput., Inc. v. Microsoft Corp., 799 F. Supp 1006, 1022 (N.D. Cal 1992) (citing Apple Comput., Inc. v. Microsoft Corp., 779 F. Supp. 133, 134 (N.D. Cal 1991)).

162. See discussion of *Cain v. Universal Pictures Co.* and *Schwarz v. Universal Pictures Co.*, both of whose scènes à faire analysis focused on particular details inherent in the situation and plot, *supra* Part III.

First, conflating the scènes à faire doctrine with the idea/expression distinction introduces unnecessary complexity and indeterminacy. For instance, the idea/expression distinction has been called "elusive,"[163] and "not . . . a particularly precise or useful tool" that "reformulates rather than solves the problem."[164] It has been said that "the guiding principle to this often impenetrable inquiry" is Judge Learned Hand's abstractions test in *Nichols v. Universal*.[165] Unhappily, and even according to its author, that test is "inevitably . . . *ad hoc*"[166] and "necessarily vague and nothing more definite can be said about it."[167] Perhaps this reported indeterminacy is overstated; it may be difficult without being quite so nihilistically unknowable.[168] Still, the difficulties attendant on the distinction are, to some extent, baked into it because the law does not define "idea" and "expression."[169] Instead, those terms function as legal conclusions reflective of underlying policy goals.[170]

By contrast, the scènes à faire doctrine can be grounded and particularized through focus on the choice of an initial situation, premise, or scene, and the details, sequences, or choices that are entailed as a result. A "situation" can much more easily be pinned down than an "idea" can. A leading copyright expert, Robert Clarida, has affirmatively described scènes à faire as "easier" to apply than the merger doctrine and less metaphysical and subjective than the idea/expression doctrine.[171] Merger first requires framing the expression, differentiating it from the idea it's expressing, and then considering the factors that would lead to

163. Williams v. Crichton, 84 F.3d 581, 587–88 (2d Cir. 1996).

164. Kurtz, *supra* note 5, at 85.

165. *Williams*, 84 F.3d at 588. See *supra* Part II for further discussion of *Nichols* and its abstraction test.

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

167. Shipman v. R.K.O. Radio Pictures, Inc., 100 F.2d 533, 538 (2d Cir. 1938) (L. Hand, J., concurring).

168. Samuelson, *supra* note 54, at 1848 ("Drawing the line between infringement and fair following will never be easy, but it is not 'inevitably *ad hoc*,' as Judge Hand once cleverly opined.").

169. Said, *supra* note 28, at 770.

170. Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information After* Feist v. Rural Telephone, 92 COLUM. L. REV. 338, 346 (1992) ("In copyright law, an 'idea' is not an epistemological concept, but a legal conclusion prompted by notions—often unarticulated and unproven—of appropriate competition. Thus, copyright doctrine attaches the label 'idea' to aspects of works which, if protected, would (or, we fear, might) preclude, or render too expensive, subsequent authors' endeavors." (citations omitted)).

171. Clarida, *supra* note 27, at 419.

a conclusion that the expression and idea have merged.[172] Clarida views scènes à faire as "a lot simpler."[173]

Yankwich also championed the simpler approach of scènes à faire as a practical device and appears to have been writing against that *Nichols*-inspired tradition of complex indeterminacy. Recall Yankwich's opinion in *Bradbury I*, in which he cited to *Shipman's* simplified test for infringement and criticized the abstractions test.[174] Close examination of Yankwich's body of relevant writings reflects his repeated efforts to ground infringement analysis in concrete and accessible terms instead of "ideas," and evinces his reluctance to adopt the abstract doctrinal formulations sometimes employed by other courts, particularly *Nichols*. Most importantly for our purposes, sticking with Yankwich's approach grounds the scènes à faire doctrine in a more practical and streamlined analysis.

Second, conflating the scènes à faire doctrine with the merger doctrine will narrow the former's operation in addition to adding unwarranted complexity. The merger doctrine applies as a function of the idea/expression distinction, which means that conflating scènes à faire with merger would necessarily also implicate idea/expression analysis and, thus, as noted above, add complexity to the doctrine, perhaps unnecessarily. In addition, the merger doctrine is especially tempting to map onto the scènes à faire doctrine because the two doctrines both feature a notion of *need*: merger often involves *necessity*, defined as creative or technical constraints or conditions that limit alternative approaches, and some forms of scènes à faire involve *aesthetic indispensability*. Yankwich, and some subsequent judges, have often taken care to define this indispensability in terms of customs, conventions, and audience expectations.

Indeed, it is important to carefully define the indispensability at the core of the scènes à faire doctrine at the outset. Kurtz argues that Yankwich, in borrowing from French theater critic Sarcey, was intentionally incorporating a broad understanding of indispensability to mean "a scene . . . which the audience expects and desires, without which the logic of the action is harmed and the audience left dissatisfied."[175] Kurtz warns against misreading indispensability to mean a narrower form of necessity and writes:

172. *Id.*
173. *Id.*
174. *See* discussion *supra* Part III.
175. Kurtz, *supra* note 5, at 95.

It "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."[176]

The measure of this satisfaction lies in audience expectations and desires, which means that in some cases, indispensability arises simply because scenes (or details) are expected, or "*flow naturally* from the logic of a solution."[177] To say that something flows naturally is not quite the same as saying it is expected, let alone that it is necessary. Put another way, treating "indispensability" as fully equivalent to "necessity" unhelpfully confuses the inner logic of the scènes à faire and merger doctrines. If permitted, this error could result in distorted outcomes because details might "flow[] naturally from the situation" but not be *necessary* in any literal sense because "other details could have been used without changing the nature of the play or leaving the audience dissatisfied."[178] Kurtz suggests that "necessity" can be better understood to mean "inherent in the scene."[179] To avoid problematic conflations of scènes à faire and merger, the notion of indispensability central to some scènes à faire must be carefully interpreted and applied in a way that is differentiated from the necessity justifications that undergird some applications of merger.

Third, some scholars have recently weighed in on scènes à faire in ways that suggest new elements—proof of prevalence and the production of quantifiable empirical evidence—should be required for the doctrine's application.

These three misconceptions seem to chart a new and unfortunate course for the scènes à faire doctrine. I will take each one in turn.

Scènes à faire are often categorized, for simplicity's sake, in terms of elements that are indispensable, stock, standard, or commonplace.[180] Indispensability, as discussed immediately above, has a defined meaning broader than simply "necessity." Similarly, "stock" is a term long applied in copyright law to signify an element too general to protect as copyrightable expression, such as a stock character or theme, or even "stock elements" more

176. *Id.* (emphasis added).
177. *Id.* (emphasis added) (citation omitted).
178. *Id.* at 80–81.
179. Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706, 710 (S.D.N.Y 1987).
180. Kurtz, *supra* note 5 at 89–90.

generally.[181] The term "standard" is less well defined, but typically refers to an element that is deemed unoriginal to the author, incidental to an earlier choice, or simply customary, and thus expected. Finally, the word "commonplace" refers to something unoriginal.

For instance, in *Rentmeester v. Nike*, a photographer sued the Nike Corporation for its intentional copying and recreation of his famous photograph of Michael Jordan in a ballet leap.[182] In evaluating the originality of the highly original pose at the heart of the copied image, *Rentmeester* distinguished an earlier case in which the pose in question was far less original: a daughter featured riding on her father's shoulders. Not only had the photographer in the earlier case not orchestrated that pose, but it was "so commonplace as to be part of the public domain" even if he had.[183] As a general matter, commonplace means ordinary, uninteresting, hackneyed, very general, or the opposite of special. In copyright terms, and just as *Rentmeester* used it, commonplace means unoriginal or perhaps stock.

However, commonplace is not the same as common. The word "common" may appear in copyright cases to mean an element that appears in both parties' works (perhaps due to copying from a *common* source, for instance). It could mean commonly found or widely available and bear the meaning of uninteresting, not rare, or not special. Yet, the word common, on its own, can also carry a connotation of prevalence that is not necessarily associated with the similar-sounding word "commonplace." Mistaking commonplace for common could lead to the view that only defendants who can prove that elements are *common* or *prevalent* may apply the scènes à faire doctrine.

For instance, Robert Clarida has argued that an element cannot be commonplace if it is "shared only by the plaintiff's work and the defendant's work . . . [a] musical measure cannot be commonplace, by definition, if it is shared only by two songs."[184] If it were true that to qualify as scènes à faire elements must be

181. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (providing no copyright for stock characters); Sinicola v. Warner Bros., Inc., 948 F. Supp. 1176, 1186 (E.D.N.Y. 1996) (providing no copyright for stock themes). More generally, see *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1134 (C.D. Cal. 2007) ("The stock elements of a host, guest' [sic] celebrities, an interview, and a cooking segment can also be characterized as unprotected *scenes a faire* . . . .").

182. Rentmeester v. Nike, Inc., 883 F.3d 1111, 1116, 1126 (9th Cir. 2018), *overruled on other grounds by* Skidmore v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020).

183. *Id.* at 1119.

184. Clarida, *supra* note 27, at 420–21.

provably prevalent ("common"), then it is surely true that the ability to locate the elements only in the parties' works would defeat any claims to scènes à faire. But the premise is mistaken at the outset. Elements could be *commonplace* in the sense of trite or unoriginality even if they only appear in the two works at bar and could qualify as scènes à faire accordingly.

Clarida points to two cases in support of his interpretation. In *Swirsky v. Carey*, the court stated: "*Scenes a faire* analysis requires the court to examine whether 'motive' similarities that plaintiffs attribute to copying could be explained by the common-place presence of the same or similar motives" within the relevant field.[185] A close look at this language supports the distinction in meanings between commonplace (meaning trite or unoriginal) and common (meaning prevalent). *Swirsky* uses commonplace as an adjective meaning "unoriginal" rather than "prevalent"; indeed, the phrase the adjective is modifying is one that itself refers to prevalence ("presence of the same or similar 'motives' within the relevant field").[186] Reading "commonplace" here to mean "commonly found" would render much of the rest of the phrase mere surplusage. Reading it to mean "unoriginal" complies with the spirit of scènes à faire inquiries. The court then reuses the word in the same way, this time to modify "expressions," making clear once again that the word signifies a lack of originality and not prevalence: "Under the *scenes a faire* doctrine, when certain commonplace expressions are indispensable and naturally associated with the treatment of a given idea, those expressions are treated like ideas and therefore not protected by copyright."[187]

In *Feist*, the Court referred to alphabetization of the parties' phone listings as "an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. . . . It is not only unoriginal, it is practically inevitable."[188] Here again, the term commonplace can easily be understood as unoriginal, especially in the context of *Feist*'s ruling that "sweat of the brow" is not copyrightable without a minimum quantum of originality.[189]

185. *Id.* at 420; Swirsky v. Carey, 376 F.3d 841, 850 (9th Cir. 2004), *as amended on denial of reh'g* (Aug. 24, 2004) (citation omitted).

186. *Swirsky*, 376 F.3d at 850.

187. *Id.*

188. Clarida, *supra* note 27, at 422 (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 363 (1991)).

189. *Feist*, 499 U.S. at 341, 363.

The significance of the distinction is not merely academic. If defendants simply must prove a lack of originality to identify some elements as scènes à faire, there are a long line of cases on which to draw that provide guidance about what qualifies as stock, unoriginal, trite, insufficiently distinctively delineated, and so on. But if the defendants are held to a standard of proving the commonality or frequency of appearance of particular elements, they are being asked to provide a different kind of evidence with empirical information about the world well beyond the litigation. This shift would move copyright law towards a patent-like system in which parties would need to canvas the prior art merely to police the scope of copyrightable expression in the work of creators in their field.[190] Clarida seems convinced that scènes à faire is, at least in part, a numbers game that can be proven through precisely this sort of evidence. He states that the driving inquiry for scènes à faire merely requires asking: "How many of the works of this type have this expressive element in them? And it's really about counting how many other things are out there that share this expressive element."[191]

This interpretation departs from Yankwich's framing of the doctrine in terms of originality (or lack thereof), and it diverges from later caselaw consistently interpreting scènes à faire in terms of indispensability and originality or stock-ness, but not in terms of prevalence. Earlier cases did not consistently require evidence of prevalence to apply scènes à faire, and incorporating a new prevalence requirement represents a novel and unjustified burden on defendants.

V. CONCLUSION

The widespread use of the scènes à faire doctrine is appropriate because the doctrine's rationales are firmly rooted in the common law, the Copyright Act, and the Constitution. The recent resurgence in scholarly interest affirms the scènes à faire doctrine's enduring importance in copyright policy and the doctrine's continued utility for parties and courts. Yet, this scholarly conversation also reveals new and persistent misperceptions and omissions about the doctrine, making a course correction appropriate. Conflating and confusing the doctrine with

190. Existing litigation turns to "prior art" or materials that predate the parties' work for a variety of strategic reasons, but this is not the same as saying that such evidence would be required.

191. Clarida, *supra* note 27, at 419.

other limiting doctrines narrows its application and mistakes the doctrine's original scope and purpose. Doing so also threatens to impose novel and doctrinally unjustified requirements, such as a prevalence requirement. The net effect of misconceptualizing scènes à faire is diminishing the independent operation of the doctrine, which is regrettable considering the doctrine's demonstrated utility.

It may seem an exercise in hair-splitting to insist on clarifying the differences between the idea/expression dichotomy and the scènes à faire doctrine (let alone the other limiting doctrines), but there are important reasons to distinguish them, even as we acknowledge that the doctrines do overlap at times and often share underlying justifications. Describing its origins and purposes with more precision could contribute to increased clarity, fairness, and efficiency. By articulating ways in which the discourse has gone astray and the risks undermining the doctrine, the goal is to reaffirm the doctrine's vitality and cohesion as a flexible and practical tool in the judicial toolkit for nonidentical copyright infringement cases. It is also to unencumber the doctrine of some of the unhelpful and distorted characterizations it appears to have accumulated in recent usage.

The scènes à faire doctrine has a particularly important role to play as a doctrine that is judicially created, flexible, adaptable, dynamic, and far more grounded than many other areas of copyright litigation, which is known for its indeterminacy. The scènes à faire doctrine plays an important role in copyright policy and in helping maintain the public domain. Put another way, authors are permitted to keep revisiting strangers' arrivals and heroes' departures for many reasons that get at the very heart of copyright law.