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Expression is the name of the game in reality TV

By Andrew J. Thomas and Farnaz M. Alemi

"Reality,' it turns out, is hard to copy," noted Judge Gary A. Feess in his June order denying CBS Broadcasting's bid for a temporary restraining order to prevent ABC from airing its new reality television series "Glass House." *CBS Broadcasting, Inc. v. American Broadcasting Companies*, CV 12-04073 GAF (C.D. Cal. filed June 21, 2012) (*CBS v. ABC*). CBS filed its lawsuit against ABC in May complaining that "Glass House" mimics the structure and style of CBS's long-running voyeuristic series "Big Brother" — through the use of similar settings, casting, competition rules and production techniques. The court denied the TRO request, however, describing the elements central to "Big Brother" — contestants, who are confined to a fake house built on a sound stage, are taped day and night, and take part in challenges to see who can outlast other house members — as "generic" ideas outside the protection of copyright law.

Content Matters

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For CBS ultimately to prevail on its infringement claim, it will have to prove that ABC copied more than the general concepts behind "Big Brother." As Judge Feess explained, copyright law "does not protect abstract ideas but rather the concrete expression of those ideas." Unprotectable elements include "basic plot ideas and 'scenes a faire,' which are scenes that flow naturally from unprotectable basic plot premises and remain forever the common property of artistic mankind." Thus, CBS must establish that ABC copied protectable aspects of "expression" embodied in the "Big Brother" program.

In the absence of "dear diary" admissions or other direct evidence of copying by the defendant, liability for copyright infringement typically is established circumstantially by showing that the defendant had access to the plaintiff's work and that there is "substantial similarity" in protected expression between the two works.

In the 9th U.S. Circuit Court of Appeals, this substantial similarity inquiry entails a two-part test, divided into "extrinsic" and "intrinsic" components. The extrinsic test is an objective analysis of concrete expressive elements. It focuses on "articulable similarities" between the plot, themes, dialogue, mood, setting, pace, characters and sequence of events in the two works. The intrinsic test is a subjective analysis, almost always reserved for the trier of fact, that focuses on the "total concept and feel" of the works and whether the "ordinary, reasonable audience" would recognize the defendant's work as a "dramatization" or "picturization" of the plaintiff's work. *Funky Films v. Time Warner Entertainment*, 462 F.3d 1072, 1077 (9th Cir. 2006); *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994).

Judge Feess grounded his "Glass House" ruling on two threshold determinations. First, he discounted CBS's argument that its techniques and processes for producing "Big Brother" — such as the number and placement of cameras, live video streaming to the Internet, the size of the production crew, the timing and scope of the production work, and the fact that the finale is not shot until the shows have aired — constitute protectable elements that it could prevent ABC from using in developing "Glass House." "While these various procedures and processes may ultimately have an impact on the expressive elements of the show," the court held, "they are not within the ambit of copyright protection."

Second, the court gave little weight to CBS's argument that "Glass House" copied the plot, characters, dialogue, themes, setting and sequence of events of "Big Brother." Judge Feess noted that although these elements may be protectable in a fictional setting — i.e., where there are "specific details of an author's rendering of ideas" and "actual concrete elements that make up the total sequence of events and the relationships between the major characters" — unscripted reality programming "resists this traditional analysis." That is because "Big Brother," "[l]ike most reality programming, ... has no set characters, plot, dialogue or sequence of events." The "drama" that occurs instead "develops, by design, in an unpredictable way."

Ultimately, in the court's view, CBS's copyright claim came down to similarities in the "format" or "template" of the two shows, which the court found to be an idea not subject to copyright protection, and a rather generic idea at that. The court pointed to unscripted shows pre-dating "Big Brother," including the 1970s television series "An American Family," the 1991 Dutch series "Nummer 28," and the long-running MTV series "The Real World," as illustrations that "the idea of putting a group of people into an environment where their every move was observed is not unique or original with "Big Brother."

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The "Glass House" result is consistent with other decisions that have declined to extend copyright protection to unscripted reality show formats — including a widely reported ruling nine years ago in another attempt by CBS to enjoin ABC, based on similarities between "Survivor" and the ABC program "I'm a Celebrity, Get Me Out of Here!" In that case, a New York federal judge denied CBS's preliminary injunction motion, holding that ABC's reality show was not substantially similar to CBS's "Survivor" program because the common elements — a remote jungle location, physical contests, serial elimination — consisted of unprotectable ideas and not copyrightable expression.

In three other recent cases, federal judges in the Central District of California also have turned aside copyright infringement claims based on similarities in the formats of unscripted reality programs. In *Milano v. NBC*

Universal, 584 F. Supp. 2d 1288 (C.D. Cal. 2008), the court rejected the plaintiff's claim that "The Biggest Loser" infringed her idea for a reality show in which people competed to lose weight for prizes; in *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124 (C.D. Cal. 2007), the court denied a copyright infringement claim that asserted that the popular program "Rachael Ray" copied the plaintiff's idea for a celebrity cooking show; and in *Bethea v. Burnett*, CV04-7690 JFW (C.D. Cal. 2005), the court rejected a claim that "The Apprentice" infringed the plaintiff's concept for a reality show in which contestants ran a start-up business together under the direction of Donald Trump.

These decisions — along with the recent *CBS v. ABC* ruling — strongly suggest that it may well be impossible to prevail on a copyright infringement theory grounded in similarities between the basic format, setting and contest rules of unscripted reality programs.

Several times, Judge Feess framed his conclusions in broad language that would appear to foreclose almost any copyright claim based on the format of a reality television show. Reality programming defies traditional substantial similarity analysis, Judge Feess found, because "[u]ntil the cameras begin to record, there is no plot, there is no dialog, there is no pace or sequence of events, and there are no fixed characters because there is no author. There is a setting, which is hardly novel, and some general ideas regarding the structure of the show, but little else."

The court also rejected CBS's argument that copyright law should be found to protect the "combination" of "Big Brother"'s structural elements — an argument derived from the 9th Circuit's 2002 decision in *Metcalf v. Bochco*, 294 F.3d 1069 (9th Cir. 2002), which found copyright protection in the "sequence and arrangement" of otherwise unprotectable story elements. Finding that the similarities highlighted by CBS consisted of commonplace "tropes of the reality television genre," the court held that a plaintiff "cannot merely cobble together a series of structural and conceptual reality television 'elements' having little, if anything to do with 'specific details' or 'concrete elements' of the artwork, and then point to *Metcalf*."

These "reality show" decisions also are likely to inform how courts analyze copyright claims based on similarities in the concepts, settings and rules of play of videogames — particularly games that do not have consistent plots or fully delineated characters.

Earlier this month, for instance, Electronic Arts filed suit against rival videogame maker Zynga, claiming that Zynga copied EA's popular game "The Sims Social" when creating its own new game "The Ville." The EA game, launched on Facebook in August 2011, allows players to create virtual avatars and interact in a fictional town with other avatars. Ten months later, Zynga — creator of the popular Facebook game "Farmville" — launched its Facebook game "The Ville," which also allows players to customize their avatars, build virtual homes and interact with other avatars in an imaginary town. Neither game has a prescribed plot or richly drawn characters, and similarities in the overall concept and rules of the game do not involve copyrightable expression. EA's complaint thus focuses on specific design choices — including the avatars' skin tones, the way they interact with one another, and the layouts of their "starter" homes. The copyright analysis will turn on whether such design elements are sufficiently concrete and creative to constitute protectable expression.

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