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What Is Standard Tomorrow, May Not Have Been Today: An Argument For Claiming Scènes à Faire

Logan Sandler
University of Miami School of Law

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What Is Standard Tomorrow, May Not Have Been Today: An Argument For Claiming Scènes à Faire

LOGAN SANDLER*

Recent lawsuits involving the Pirates of the Caribbean film franchise and the Oscar award-winning movie The Shape of Water required courts to wrestle with the application of the decisive scènes à faire doctrine. In doing so, the Ninth Circuit exposed the doctrine's chief pitfall: the lack of a temporal framework.

The modern scènes à faire doctrine limits the scope of what authors can claim as substantially similar by excluding the standard or stock elements in a given expressive work from copyright protection. Courts will often conclude that a contested element is scènes à faire if it can be demonstrated that certain themes, events, or settings in question belong to a certain genre. To measure what may fall within the scope of unprotected stock, a court focuses on supplementary factors such as the public's perception of genre conventions, which are culturally dependent and drastically evolve over time.

However, many courts fail to consider "timing" when applying the scènes à faire doctrine. Courts do not necessarily evaluate whether certain aspects or elements within a work were "standard or stock" when the copyrighted material was created. For that reason, an infringing work that

* J.D. Candidate 2022, University of Miami School of Law; M.F.A. 2014, American Film Institute; B.A. 2011, Loyola Marymount University. I would like to thank Professor Andres Sawicki for helping me develop this work. I would also like to thank the *University of Miami Law Review* editing team who helped guide this work to completion. Lastly, I would like to dedicate this work to my family and friends who have supported me throughout law school.

becomes popular may use the scènes à faire doctrine as a sword against what was once original singular expression. This inequitable scenario could arise if the scènes à faire doctrine is applied to a work at the commencement of litigation and not at the time of the work's original drafting.

In reasoning that courts should focus a scènes à faire inquiry from the perspective of the writer at the time that the copyrighted material was written, this Comment explores the claiming systems of patent law with a view toward how they may remedy the scènes à faire doctrine's shortcomings. To rectify the doctrine's inadequacies, primarily within the context of screenplays and teleplays, this Comment ultimately proposes an author-drafted copyright registration supplement that details the intricacies of how a genre's conventions were implemented in a work at the time of creation through plot, character, theme, and setting, among other things.

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INTRODUCTION

[I]n Hollywood, as in the life of men generally, there is only rarely anything new under the sun.

—Judge Joseph T. Sneed III¹

On July 22, 2020, the U.S. Court of Appeals for the Ninth Circuit resuscitated a copyright infringement claim brought by two screenwriters who alleged that the Walt Disney Company copied their pirate-themed screenplay to create the first *Pirates of the Caribbean*

¹ Berkic v. Crichton, 761 F.2d 1289, 1294 (9th Cir. 1985).

film.² Previously, the United States District Court for the Central District of California found that much of the works' similarities were unprotectable *scènes à faire* elements because the resemblances were "familiar stock scenes, and characteristics that flow naturally from the works' shared basic plot premise" within the pirate genre.³ In support of its reversal and remand, the appellate panel found that the district court prematurely determined that the shared elements amidst the two works were unprotectable *scènes à faire* common to pirate stories.⁴ Under the *scènes à faire* doctrine, courts will not protect elements like stock characters or standard elements for the genre of the work in question.⁵

Because the work in question was approximately twenty years old and the "*Pirates of the Caribbean* film franchise may itself have shaped what are now considered pirate-movie tropes,"⁶ an important question arises: at what point in time should courts apply the *scènes à faire* doctrine?⁷ At the time of the work's creation, at the moment of alleged infringement, or at the time of the suit's commencement? If the *scènes à faire* doctrine is applied to the literary work at the time of litigation and not at the time of the work's original drafting, a copyrighted work could lose its value and protection upon a potentially infringing work becoming "successful and widely adopted."⁸ To be sure, the Ninth Circuit's decision provides little

² See *Alfred v. Walt Disney Co.*, 821 F. App'x 727 (9th Cir. 2020). On September 7, 2021, Defendant Walt Disney Pictures filed its Motion for Summary Judgment. See Defendant Walt Disney Pictures' Notice of Motion and Motion for Summary Judgment Re Substantial Similarity, *Alfred, II et al. v. Walt Disney Pictures*, No. 2:18-CV-08074-CBM-Asx (C.D. Cal. Sept. 7, 2021). At the time of this Comment's publication, Judge Consuelo B. Marshall had yet to issue a final decision on the Motion for Summary Judgment.

³ See *Alfred v. Walt Disney Co.*, 388 F. Supp. 3d 1174, 1183 (C.D. Cal. 2019).

⁴ See *Alfred*, 821 F. App'x at 729 (indicating that at the pleading stage of litigation, "it is difficult to know whether such elements are indeed unprotectible material" and that "[a]dditional evidence would help inform the question of substantial similarity").

⁵ See *id.*

⁶ *Id.*

⁷ See Dale Cendali, *Litigating Scènes À Faire*, 43 COLUM. J. L. & ARTS 415, 418 (2020).

⁸ Krista S. Schwartz et al., *Software and Scènes à Faire*, COPYRIGHT WORLD 11, 12 (2009).

direction to district courts in adjudicating future infringement claims where temporal issues of such significance may arise.

Although a screenwriter may justifiably conclude that their screenplay or teleplay has been pilfered, proving this belief in a court of law can be an arduous and costly endeavor.⁹ As a threshold matter, copyright law solely protects the “expression of ideas, not the ideas themselves.”¹⁰ While utterly complete originality may not necessarily exist, “[t]his distinction [between protected expressions and unprotected ideas] is at the essence” of many copyright infringement claims.¹¹

To prove copyright infringement, screenwriters must prove that they had copyright ownership and that the alleged infringer had access to the work, while additionally demonstrating substantial similarity between the two screenplays.¹² Typically, such copyright infringement actions end with a pretrial ruling maintaining that the litigant-writer failed to show substantial similarity as a matter of law.¹³ For this reason, the “meat and potatoes” of screenplay litigation is substantial similarity.¹⁴ Enveloped within the determination of substantial similarity is the *scènes à faire* doctrine, which is understood to be one of the chief barriers that a writer-turned-plaintiff faces when attempting to demonstrate substantial similarity between works.¹⁵

The modern *scènes à faire* doctrine limits the scope of what authors may claim by excluding the standard or stock elements in a given expressive work from copyright protection.¹⁶ Correspondingly, the doctrine precludes stock and standard elements, standing

⁹ Nick Gladden, *When California Dreamin' Becomes a Hollywood Nightmare: Copyright Infringement and the Motion Picture Screenplay: Toward an Improved Framework*, 10 UNIV. GA. J. INTELL. PROP. L. 359, 360 (2003).

¹⁰ *Cavalier v. Random House, Inc.*, 297 F.3d 815, 823 (9th Cir. 2002) (“Familiar stock scenes and themes that are staples of literature are not protected.”).

¹¹ Richard H. Jones, *The Myth of the Idea/Expression Dichotomy in Copyright Law*, 10 PACE L. REV. 551, 552 (1990).

¹² See Gladden, *supra* note 9, at 360.

¹³ Robert F. Helfing, *Substantial Similarity in Literary Infringement Cases: A Chart for Turbid Waters*, 21 UCLA ENT. L. REV. 1, 2 (2014).

¹⁴ Gladden, *supra* note 9, at 360.

¹⁵ *Id.* at 375.

¹⁶ Robert Kirk Walker, *Breaking with Convention: The Conceptual Failings of Scenes A Faire*, 38 CARDOZO ARTS & ENT. L. J. 435, 436 (2020).

alone, from successfully supporting a copyright infringement claim.¹⁷ For instance, the average audience member likely expects that at the conclusion of a Hollywood detective film, the identity of the wrongdoer will be discovered. For all practical purposes, these necessary scenes or events that are so-called *scènes à faire* have become unprotectable ideas in their own right by virtue of their indispensable character.¹⁸

Similarly, situations and incidents that flow naturally from a basic plot idea are rendered *scènes à faire* and cannot normally sustain an infringement claim.¹⁹ For example, in *Williams v. Crichton*, a finding of infringement could not be sustained since “the common elements of electrified fences, automated tours, dinosaur nurseries, and uniformed workers were scenes-a-faire that flowed from the concept of a dinosaur zoo.”²⁰ Like the merger doctrine and the idea-expression distinction, courts have yet to develop a surefire test to differentiate between protectable, original expression and unprotected stock elements and characters; but, unlike the merger doctrine and the idea-expression distinction, the *scènes à faire* doctrine has received minute consideration from legal scholars.²¹

What is more—the *scènes à faire* doctrine shifts a court’s focus to use ancillary factors such as the public’s perception of genre conventions,²² which are culturally dependent and drastically evolve over time,²³ to measure what may fall within the scope of unprotected stock.²⁴ However, many courts fail to consider “timing” altogether when applying the *scènes à faire* doctrine.²⁵ Specifically, courts do not necessarily evaluate whether certain aspects or

¹⁷ *Id.*

¹⁸ Gavin M. Strube, Comment, *Gotham Skylines: The Intersection of Scènes à Faire and Fictional Facts in Comic Books, Graphic Novels, and their Derivative Works*, 5 PACE INTELL. PROP. SPORTS & ENT. L. F. 54, 64–65 (2015).

¹⁹ *Berkic v. Crichton*, 761 F.2d 1289, 1293–94 (9th Cir. 1985).

²⁰ *Cavalier v. Random House, Inc.*, 297 F.3d 815, 823 (9th Cir. 2002) (citing *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996)).

²¹ Walker, *supra* note 16, at 435.

²² Don M. Tamura, Comment, *Copyright Infringement: An Argument for the Elimination of the Scenes a Faire Doctrine*, 5 HASTINGS COMM. & ENT. L. J. 147, 161 (1982).

²³ Walker, *supra* note 16, at 438.

²⁴ *See id.* at 457.

²⁵ *See, e.g., Alfred v. Walt Disney Co.*, 388 F. Supp. 3d 1174 (C.D. Cal. 2019).

elements within a screenplay or teleplay were “standard or stock” when the copyrighted material was written.²⁶ As explained further herein,²⁷ the lack of a consistent temporal framework not only frustrates the incentives for creating original works, but also results in misunderstanding and repeated misapplication of the *scènes à faire* doctrine in literary copyright infringement cases.²⁸ The Supreme Court has concluded that “[t]he *sine qua non* of copyright is originality,” and “[t]o qualify for copyright protection, a work must be original to the author.”²⁹ To be consistent with this tenet, a court’s *scènes à faire* inquiry must examine the “originality” of a screenplay or teleplay at the time of the work’s creation because gauging originality necessitates an accurate perspective of the creator at the moment of creation—not at a construed moment in the past or future.³⁰

A similar quandary to the circumstances in *Alfred v. Walt Disney Co.* presented itself in a lawsuit concerning the Academy Award-winning film *The Shape of Water*. There, the estate of Paul Zindel alleged that Director Guillermo del Toro plagiarized Paul Zindel’s 1969 play *Let Me Hear You Whisper*.³¹ Both *The Shape of Water* and Zindel’s play concerned plots centered on an aquatic creature imprisoned in a science research laboratory. In June 2020, the U.S. Court of Appeals for the Ninth Circuit found that the “district court erred by dismissing the action because, at this stage, reasonable minds could differ on whether there is substantial similarity between *Let Me Hear You Whisper* and *The Shape of Water*.”³² Notably, the opinion provided that further evidence would “illuminate whether any similarities are mere unprotectable literary tropes or *scènes à*

²⁶ See also Schwartz et. al, *supra* note 8, at 12 (“The absence of an analytical framework including a logical temporal component has resulted in confusion and frequent misapplication of the *scènes à faire* doctrine in computer software copyright cases.”).

²⁷ See *infra* Part III.

²⁸ See Schwartz et. al, *supra* note 8, at 12.

²⁹ Feist Publ’ns v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

³⁰ Cf. Cendali, *supra* note 7, at 418.

³¹ Plaintiff-Appellant David Zindel’s Opening Brief, at 2 Zindel v. Fox Searchlight Pictures, Inc., 815 F. App’x 158 (9th Cir. 2020) (No. 18-56087), 2018 WL 6681697, at *1.

³² Zindel v. Fox Searchlight Pictures, Inc., 815 F. App’x 158, 160 (9th Cir. 2020).

faire.”³³ Earlier, in 2018, the district court dismissed the case, finding any similarities among the works “too general to be protected.”³⁴

The Ninth Circuit, however, did not indicate if it would be proper to evaluate whether the similarities found in *Let Me Hear You Whisper* were standard, stock, or common at the time when Zindel authored the play. Because the play was written roughly fifty-one years ago, an accurate and equitable scènes à faire analysis of the alleged similarities should look to what was generalized stock within this subject at the time of creation in 1969. On April 2, 2021, after more than three years of litigation, the parties stipulated that the action be dismissed with prejudice.³⁵ The matter was set for a July 2021 trial date.³⁶ Although Zindel’s estate purportedly agreed to dismiss the case, the Ninth Circuit’s decisions in *Zindel v. Fox Searchlight Pictures, Inc.* and *Alfred v. Walt Disney Co.* confirm not only the significance of the scènes à faire doctrine for plaintiffs attempting to prove improper infringement, but also that the doctrine’s temporal framework must be reformed.

Though some argue that the scènes à faire doctrine should be eliminated altogether,³⁷ this Comment proposes that an improved copyright registration system can more adequately and successfully guide courts through the necessary measure of the scènes à faire doctrine. With the goal of decreasing frivolous or lengthy litigation, while protecting expression through evidentiary assurance, this Comment will demonstrate that copyright law can be reasonably tweaked by adding supportive claiming elements reminiscent of patent law to clarify the author’s inspiration, intention, and understanding of a given genre as it relates to the plot, theme, mood, setting, pace, and characters in his or her work.³⁸ To that end, this Comment will also maintain that to ascertain whether the scènes à faire

³³ *Id.*

³⁴ *Zindel v. Fox Searchlight Pictures, Inc.*, No. CV18-1435 PA (KSx), 2018 WL 3601842, at *7 (C.D. Cal. July 23, 2018).

³⁵ Stipulation For Dismissal with Prejudice at 2–3, *Zindel*, 815 F. App’x 158 (No. 2:18-CV-01435-PA-KS).

³⁶ Zach Sharf, ‘*Shape of Water*’ Plagiarism Lawsuit Dismissed: Guillermo del Toro Is the ‘True Creator’, INDIEWIRE (Apr. 5, 2021, 11:45 AM), <https://www.indiewire.com/2021/04/shape-of-water-plagiarism-lawsuit-dismissed-guillermo-del-toro-1234627996/>.

³⁷ See, e.g., Tamura, *supra* note 22, at 149.

³⁸ See *infra* Part V.

doctrine precludes copyright protection for a literary work and a dramatic work, courts should assess the debated material from two angles: (1) from the point of view of the author of the copyrighted material and (2) based on other widely known works existing at the time the copyrighted work was created or written.³⁹ This assessment not only advances both the policy and economic aims of copyright protection, but also requires courts to examine the originality of the author's work against the prevailing genre tropes existing when the work was written.⁴⁰

Part II succinctly outlines the necessary elements of an action for copyright infringement and what a plaintiff must prove in order to prevail. In addition, Part II will illustrate how U.S. courts today apply the *scènes à faire* doctrine. Part III discusses the deficiencies inherent in the *scènes à faire* doctrine in light of the circumstances in *Alfred v. Walt Disney Co.* Part III also assesses the potential implications of a *scènes à faire* analysis that evaluates whether the disputed work was original or whether it was standard or stock when the author, namely screenwriters, penned the screenplay or teleplay. Part IV explores the modern claiming systems of U.S. patent law and examines its underlying policies as a means of ascertaining their applicability for copyrighting literary and dramatic works, primarily through the lens of screenplays and teleplays, as these kinds of works are the fictional forms where the *scènes à faire* doctrine is most commonly invoked.⁴¹ Part V resolves said issues, in part by utilizing patent law claiming systems and applying it to the *scènes à faire* doctrine's shortcomings. In doing so, this Comment will demonstrate how the proposed claiming framework will aide a court's application of the substantial similarity test—a test that has evolved to “create[] a confusing and ineffectual body of law”⁴²

³⁹ Schwartz et. al, *supra* note 8, at 12 (establishing parallel test in the context of computer software copyright infringement cases).

⁴⁰ *See id.* (“[T]he purpose of the Copyright Clause is to reward an author's original creation.”).

⁴¹ *See generally* Michael D. Murray, *Copyright, Originality, and the End of the Scenes a Faire and Merger Doctrines for Visual Works*, 58 BAYLOR L. REV. 779 (2006); Torreon Edwards, *Scènes à Faire in Music: How an Old Defense is Maturing, and How it Can Be Improved*, 23 MARQ. INTEL. PROP. L. REV. 105, 108 (2019) (indicating that the *scènes à faire* doctrine was “traditionally reserved for literature, stage works, and later film . . .”).

⁴² Helfing, *supra* note 13, at 3.

Finally, the Conclusion will offer closing thoughts regarding the future of screenplay and teleplay litigation, while dually suggesting what writers can do to protect themselves in the immediate future.

II. CONNECTING PRINCIPLES OF COPYRIGHT INFRINGEMENT TO THE SCÈNES À FAIRE DOCTRINE

A. *Copyright Infringement*

Copyright protection is intended to stimulate creativity and the distribution of creative works so that society may benefit from the efforts of authors.⁴³ The major policy purpose underlying the copyright system is the belief “that if protection were absent, then unauthorized reproduction would impair the economic interest of the author and curtail creation of new works.”⁴⁴ And so, copyright law incentivizes authors to create new works by giving authors “the exclusive right to profit from and control specified uses of their works.”⁴⁵ For our purposes, a motion picture screenplay, teleplay, or novel is a “writing” within the import of the Copyright Clause.⁴⁶

Since direct evidence of copying rarely exists,⁴⁷ courts will “infer” copying when a plaintiff shows that the alleged infringer had access to the plaintiff’s work and created a product that was substantially similar to that work.⁴⁸ In addition to these two requirements, copyright ownership for that work must be proved; however, this element is a “statutory formality easily satisfied prior to the

⁴³ Leslie A. Kurtz, *Copyright: The Scenes A Faire Doctrine*, 41 FLA. L. REV. 79, 83 (1989).

⁴⁴ Tamura, *supra* note 22, at 149.

⁴⁵ Kurtz, *supra* note 43, at 83; *see also* 17 U.S.C. § 106 (providing the set of exclusive rights in copyrighted works).

⁴⁶ *See* Gladden, *supra* note 9, at 361; U.S. CONST. art. I, § 8, cl. 8.

⁴⁷ Edwards, *supra* note 41, at 105.

⁴⁸ Steven G. McKnight, *Substantial Similarity Between Video Games: An Old Copyright Problem in a New Medium*, 36 VAND. L. REV. 1277, 1280 (1983).

institution of litigation.”⁴⁹ As previously mentioned, substantial similarity is often the crucial issue in copyright infringement litigation.⁵⁰

To determine whether works are indeed substantially similar, courts tackle two main types of analysis. First, courts must demarcate the scope of a plaintiff’s copyright to establish what a defendant may or may not copy.⁵¹ Second, courts must weigh the defendant’s work against the plaintiff’s protectable expression to determine whether they are substantially similar.⁵²

Vital to the initial determination of scope is the idea-expression distinction, which provides “that copyright laws protect only expressions of ideas, not the abstract ideas underlying a copyrighted work.”⁵³ The expression of a creative work is therefore the only facet subject to monopoly control, whereas “‘ideas’ may always be freely borrowed.”⁵⁴ In other words, copyright law “protects originality in the *means* of expression.”⁵⁵ This principle consequently “depends upon the distinguishability of the idea from its expression.”⁵⁶ While the line separating idea and expression is not well-defined,⁵⁷ strong trends have materialized within the screenplay and teleplay context regarding what constitutes substantial similarity, predominantly within the elements of character, plot, mood, and

⁴⁹ Stephanie J. Jones, *Music Copyright in Theory and Practice: An Improved Approach for Determining Substantial Similarity*, 31 DUQ. L. REV. 277, 277 (1993); see also 17 U.S.C. § 411 (setting forth the statutory requirement that registration must be made before an action for copyright infringement is initiated).

⁵⁰ See, e.g., *Smith v. AMC Networks, Inc.*, No. 18-CV-03803-LHK, 2019 WL402360, at *5 (N.D. Cal. Jan. 31, 2019) (“Analysis of . . . ‘substantial similarity’ between the works—is the crux of Defendants’ motion to dismiss.”).

⁵¹ McKnight, *supra* note 48, at 1280.

⁵² See generally *Yurman Design, Inc. v. PAJ Inc.*, 262 F.3d 101, 111 (2d Cir. 2001) (“The standard test for substantial similarity between two items is whether an ‘ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard [the] aesthetic appeal as the same.’”). E.g., *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996) (demonstrating that in the “novel and movie” context courts “examine the similarities in such aspects as the total concept and feel, theme, characters, plot, sequence, pace, and setting . . .”).

⁵³ McKnight, *supra* note 48, at 1280.

⁵⁴ *Dellar v. Samuel Goldwyn, Inc.*, 150 F.2d 612, 612 (2d. Cir 1945).

⁵⁵ Leon R. Yankwich, *Legal Protection of Ideas—A Judge’s Approach*, 43 VA. L. REV. 375, 378 (1957).

⁵⁶ McKnight, *supra* note 48, at 1281.

⁵⁷ Gladden, *supra* note 9, at 362.

theme.⁵⁸ With regards to television and film scripts, general concepts and ideas associated with these elements are uncopyrightable, but the particular expression of those ideas is copyrightable.⁵⁹ For example, in *Berkic v. Crichton*, the Ninth Circuit rejected finding substantial similarity based on familiar stock scenes such as “depictions of the small miseries of domestic life, romantic frolics at the beach, and conflicts between ambitious young people on one hand, and conservative or evil bureaucracies on the other.”⁶⁰

In the Ninth Circuit, courts often employ the *Krofft* “extrinsic-intrinsic” filtration test to facilitate an accurate sorting of protectable and unprotectable elements.⁶¹ The intrinsic test, which scrutinizes “an ordinary person’s subjective impressions of the similarities between two works[,]” is exclusively the jury’s domain.⁶² The extrinsic test, employed by courts at the motion to dismiss and summary judgment stage, is “objective in nature” and “focuses on ‘articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events.’”⁶³ When employing the extrinsic test, courts “must filter out and disregard the non-protectible elements in making its substantial similarity determination.”⁶⁴

When the plaintiff’s argument is based on the overall selection and sequencing of unprotectable similarities, the presence of many *scènes à faire* elements may satisfy a court’s application of the extrinsic test.⁶⁵ In implementing what is known as the “selection and arrangement test,” the Ninth Circuit has equally specified that “[i]t is entirely immaterial that, in many respects, plaintiff’s and defendant’s works are dissimilar, if in other respects, similarity as to a

⁵⁸ *Id.* at 366.

⁵⁹ *See id.* at 371.

⁶⁰ *See* 761 F.2d 1289, 1294 (9th Cir. 1985) (“These familiar scenes and themes are among the very staples of modern American literature and film.”).

⁶¹ Gladden, *supra* note 9, at 366.

⁶² *Funky Films, Inc. v. Time Warner Ent. Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006).

⁶³ *Id.*

⁶⁴ *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822–23 (9th Cir. 2002) (“Scenes-a-faire, or situations and incidents that flow necessarily or naturally from a basic plot premise, cannot sustain a finding of infringement.”).

⁶⁵ *Metcalf v. Bochco*, 294 F.3d 1060, 1074–75 (9th Cir. 2002).

substantial element of plaintiff's work can be shown."⁶⁶ *Metcalf v. Bochco* offers an informative example of what is necessary for the selection and arrangement of generic or scènes à faire elements in a narrative work to establish substantial similarity.⁶⁷ The *Metcalf* court assessed a claim concerning a treatment⁶⁸ entitled *Give Something Back* and the CBS television series *City of Angels*.⁶⁹ There, the court described the unprotectable similarities as striking:

Both the *Metcalf* and *Bochco* works are set in overburdened county hospitals in inner-city Los Angeles with mostly black staffs. Both deal with issues of poverty, race relations and urban blight. The works' main characters are both young, good-looking, muscular black surgeons who grew up in the neighborhood where the hospital is located. Both surgeons struggle to choose between the financial benefits of private practice and the emotional rewards of working in the inner city. Both are romantically involved with young professional women when they arrive at the hospital, but develop strong attractions to hospital administrators. Both new relationships flourish and culminate in a kiss, but are later strained when the administrator observes a display of physical intimacy between the main character and his original love interest. Both administrators are in their thirties, were once married but are now single, without children and devoted to their careers and to the hospital. In both works, the hospital's bid for reaccreditation is vehemently opposed by a Hispanic politician.⁷⁰

⁶⁶ L.A. Printex Indus. v. Aeropostale, Inc., 676 F.3d 841, 851 (9th Cir. 2012)(citing 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 (B)(1)(a) (Matthew Bender rev. ed. 2011).

⁶⁷ *Metcalf*, 294 F.3d at 1075.

⁶⁸ Jason Hellerman, *How to Write a Treatment (with Film Treatment Examples)*, NO FILM SCHOOL (Oct. 23, 2018), <https://nofilmschool.com/film-treatment> (“[A film treatment is a] multi-page document written in prose, that tells the story that happens in your screenplay. It is a synopsis, with action, sparse dialogue, and works as a roadmap for the reader, producer, and writer.”).

⁶⁹ *Metcalf*, 294 F.3d at 1072.

⁷⁰ *Id.* at 1073–74.

Beyond merely enumerating generic elements, a plaintiff similarly situated to that of the *Metcalf* plaintiff must contend that the works coordinate or arrange the scènes à faire elements in strikingly similar fashion to satisfy the extrinsic test and avoid dismissal or summary judgment.⁷¹

B. *Modern Application of the Scènes à Faire Doctrine*

As a threshold matter, a litigant will typically present scènes à faire evidence to the court by affixing it to the pleading or incorporating it through reference therein.⁷² Although courts have yet to squarely define the French term,⁷³ many courts today have used the definition set forth in *Alexander v. Haley*, which provides that scènes à faire are “incidents, characters or settings which are as a practical matter *indispensable*, or *at least standard*, in the treatment of a given topic.”⁷⁴ In the literary and cinema context, this analysis underpins the modern scènes à faire doctrine.⁷⁵ And so, after identifying the pertinent distinctions amongst the incidents, characters, or settings—which may be “very subtle and refined, and, sometimes, almost evanescent”⁷⁶—a court must determine whether a given characteristic or component is either standard to a given topic or indispensable.⁷⁷ A court’s determination of indispensability seeks to precisely ascertain whether one of the aforesaid elements naturally flows from a film’s genre or narrative theme or *mise-en-scène*.⁷⁸ If so, any similarities are thereby inherent in the situation and are thus unprotectable.⁷⁹

The other threshold query asks courts to pursue an understanding of whether characters or standard scenes have acquired a “level of cultural familiarity that their existence cannot be attributed to the

⁷¹ See *id.* at 1075.

⁷² Cendali, *supra* note 7, at 416.

⁷³ Kurtz, *supra* note 43, at 81.

⁷⁴ 460 F. Supp. 40, 45 (S.D.N.Y. 1978) (emphasis added).

⁷⁵ See, e.g., *Bernal v. Paradigm Talent & Literary Agency*, 788 F. Supp. 2d 1043, 1060 (C.D. Cal. 2010).

⁷⁶ See *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841).

⁷⁷ See *Funky Films, Inc. v. Time Warner Ent. Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006).

⁷⁸ See Kurtz, *supra* note 43, at 92.

⁷⁹ Gladden, *supra* note 9, at 375.

creativity of any particular author.”⁸⁰ For example, one classic model “is the lack of [copyright] protection in police fiction for ‘drunks, prostitutes, vermin and derelict cars’ and ‘foot chases and the morale problems of policemen, not to mention the familiar figure of the Irish cop.’”⁸¹ Almost inevitably, these so-termed “standard” scenes or incidents arise in every genre.⁸² It is a general precept of copyright law that the protection of fictional works will not extend to stock characters or plots regularly linked to a “particular genre.”⁸³ In addition, courts will conclude that a contested element is *scènes à faire* if it can be demonstrated that certain themes, events, or settings in question belong to a genre.⁸⁴ For instance, the genre of science fiction commonly involves unprotectable “‘stock themes,’” like “space travel, supernatural forces, war games, alien discovery, and adventuring through space.”⁸⁵

Rather vexing is how modern courts apply the *scènes à faire* doctrine, frequently determining that a given element of a work is unprotected “without the need for explanation or supporting evidence.”⁸⁶ Indeed, courts are often apparently “unaware that [a] *scènes à faire* [analysis] requires them to answer complex and taxonomic aesthetic questions.”⁸⁷ To be sure, the *scènes à faire* doctrine demands a detailed “subjective and qualitative assessment[.]”⁸⁸ of the work in question. Support for this contention is buttressed by *Smith v. AMC Networks, Inc.* There, Judge Lucy Koh discounted the

⁸⁰ Walker, *supra* note 16, at 452.

⁸¹ Gladden, *supra* note 9, at 375.

⁸² Kurtz, *supra* note 43, at 92.

⁸³ See *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 102 (2d Cir. 2014) (“[E]lements of a work that are indispensable, or at least standard in the treatment of a given topic—like cowboys, bank robbers, and shootouts in stories of the American West—get no protection.”) (internal quotation marks omitted); *Williams v. Crichton*, 84 F.3d 581, 589 (2d Cir. 1996) (concluding that “electrified fences, automated tours, dinosaur nurseries, and uniformed workers” are standard *scènes à faire* that derive from the uncopyrightable idea of a dinosaur zoo).

⁸⁴ Tamura, *supra* note 22, at 160.

⁸⁵ See *Abdin v. CBS Broad., Inc.*, 971 F.3d 57, 71 (2d Cir. 2020).

⁸⁶ Walker, *supra* note 16, at 456.

⁸⁷ *Id.* at 463.

⁸⁸ See Robert K. Walker & Ben Depoorter, *Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard*, 109 NW. U. L. REV. 343, 346 (2015).

array of cases⁸⁹ that the defendants' argument relied upon because those cases' conclusions of scènes à faire elements "offer[ed] little analysis."⁹⁰

On account of this, courts should aim to thoroughly consider and ascertain the legitimate creative expressive differences between works when applying the scènes à faire doctrine, rather than relying solely on the scènes à faire doctrine as a quick fix exclusionary checklist. The thoroughness and diligence of a court's assessment would be unquestionably bolstered by an author-created informational rubric to guide judges in their analyses. It is the complexity of this analysis, in part, that drives the heart of this Comment's forthcoming proposal.⁹¹ As demonstrated *infra* Part V, this rubric would permit judges to answer the taxonomic aesthetic questions inherent in a scènes à faire analysis without having to rely so heavily on their own aesthetic judgments.⁹²

Akin to a valid copyright registration affording a plaintiff prima facie evidence of ownership,⁹³ adding copyright claiming elements suggestive of patent law can provide courts with prima facie evidence of a work's genre. In practice, this would aid courts in conclusively determining not only what genre the work should be classified as, but additionally would, especially for genre-bending works, assist courts in determining what elements are in fact indispensable or stock when conducting the extrinsic test. Without care and author guidance, judicial decisions assessing genre and/or historical works under the doctrine may be subject to error or may be altogether impossible. This is because many filmmakers, like The Coen Brothers, Paul Thomas Anderson, or Quentin Tarantino, use easily recognizable visual and textual references—i.e., stock

⁸⁹ See, e.g., *Cline v. Reetz-Laoilo*, 329 F. Supp. 3d 1000, 1015 (N.D. Cal. 2018); *Heusey v. Emmerich*, CV 14-06810-AB (Ex), 2015 WL 12765115, at *1 (C.D. Cal. April 9, 2015); *DuckHole Inc. v. NBC Universal Media LLC*, No. CV 12-10077 BRO (CWx), 2013 WL 5797279, at *2 (C.D. Cal. Sept. 6, 2013).

⁹⁰ *Smith v. AMC Networks, Inc.*, No. 18-CV-03803-LHK, 2019 WL 402360, at *6 (N.D. Cal. Jan. 31, 2019).

⁹¹ See *infra* Part V.

⁹² Cf. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

⁹³ Walker, *supra* note 16, at 467.

elements—re-contextualized for dramatic or comedic effect.⁹⁴ In this light, a significantly greater aesthetic analysis than the scènes à faire standard or stock inquiry provides is needed to accurately assess the expressive function of elements within a work.⁹⁵

Precision is crucial to a court’s assessment, as the motion picture and television business continues to rapidly evolve like never before.⁹⁶ This evolution has triggered the rapid development of genre conventions both narratively and aesthetically. For example, with the proliferation of streaming television services like Netflix, Amazon, and Hulu, critics and journalists alike have contended that the “streaming series” is a new genre in and of itself due in part to new narrative conventions, aesthetic possibilities, and output methods.⁹⁷ On that account, the impossibility of predicting the new genre of tomorrow does not appear to be losing steam.

In sum, the scènes à faire doctrine assumes that an artistic or literary genre possesses “discrete, persistent, and readily identifiable conventions, i.e., devices ‘that flow naturally and necessarily from the choice of a given concept.’”⁹⁸ This assumption, however, does not track reality. On the contrary, it has been rightly argued that “genre conventions are unstable social constructs that continually evolve, arising and disappearing as audience tastes and temperaments change over time.”⁹⁹ In other words, determining what conventions were standard at one point in time provides slight knowledge about the conventions of a different time, even for writings of identical genres.¹⁰⁰ For this reason, courts must evaluate a work’s originality at the time of creation, as an author’s perception

⁹⁴ See *id.* at 453–54.

⁹⁵ See *id.*

⁹⁶ Kelsey Sutton, *Analysts Explain What This Year’s Seismic TV Changes Mean for 2021*, ADWEEK (Dec. 28, 2020), <https://www.adweek.com/convergent-tv/analysts-explain-what-this-years-seismic-tv-changes-mean-for-2021/>.

⁹⁷ See, e.g., James Poniewozik, *Streaming TV Isn’t Just a New Way to Watch. It’s a New Genre.*, N.Y. TIMES (Dec. 16, 2015), <https://www.nytimes.com/2015/12/20/arts/television/streaming-tv-isnt-just-a-new-way-to-watch-its-a-new-genre.html>.

⁹⁸ Walker, *supra* note 16, at 438 (citing *Bill Diodato Photography, LLC v. Kate Spade, LLC*, 388 F. Supp. 2d 382, 392 (S.D.N.Y. 2005)).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

of genre conventions assuredly evolves alongside a genre's perpetual transformation.¹⁰¹

In doing so, a court would reduce the risk of assessing elements within the work that indeed pre-dated or post-dated what was “stock” or “standard” at the time of creation.¹⁰² Relatedly, this temporal framework would ensure that any expert testimony would help educate the judge and potentially a jury as to what was truly common in the industry at that time. Evaluating originality without a temporal framework would, more notably, overthrow the goal of rewarding an author's ingenuity.¹⁰³ This belief makes intuitive sense: an infringing work that becomes popular should not be permitted to use the *scènes à faire* doctrine as a sword against what was once original singular expression.

III. A DISNEY FRANCHISE: THE DEFICIENCIES OF THE SCÈNES À FAIRE DOCTRINE DEMONSTRATED

The Ninth Circuit's opinion in *Alfred v. Walt Disney Co.*¹⁰⁴ validates the contention that the lack of a sound temporal framework may ultimately lead to an inequitable result based on an inapposite justification for how or why certain elements are *scènes à faire*. Current and future analytical methods would benefit immensely from an *ex-ante* author-drafted supplement that details the complexities of how a genre's conventions were used in a work at the time of creation.¹⁰⁵

A. *A Writer's Dream Come True*

In October 1999, Tova Laiter introduced screenwriters Arthur Lee Alfred II (“Alfred”) and Ezequiel Martinez, Jr. (“Martinez”) to Brigham Taylor (“Taylor”), Josh Harmon (“Harmon”), and Michael Haynes (“Haynes”) at the Walt Disney Company (“Disney”).¹⁰⁶

¹⁰¹ See generally *id.*

¹⁰² See generally *Alfred v. Walt Disney Co.*, 388 F. Supp. 3d 1174 (C.D. Cal. 2019).

¹⁰³ See Schwartz et. al, *supra* note 8, at 12.

¹⁰⁴ See 821 F. App'x 727, 729 (9th Cir. 2020).

¹⁰⁵ See *infra* Part V.B.

¹⁰⁶ Appellants' Corrected Opening Brief at 1, *Alfred v. Walt Disney Co.*, No. 19-55669, 2019 WL 4889768, at *1 (9th Cir. 2020).

Thereafter, Alfred and Martinez presented an original screenplay *Red Hood* to Taylor, Harmon, and Haynes (together, the “Disney Creative Team”).¹⁰⁷ While collaborating with the Disney Creative Team on *Red Hood*, Alfred and Martinez alleged that they developed a new idea for an original screenplay entitled *Pirates of the Spanish Main*.¹⁰⁸ Prior to pitching the film to Disney, Alfred and Martinez retitled their screenplay *Pirates of the Caribbean*, which was the name of a theme park ride at Disneyland.¹⁰⁹ Alfred and Martinez alleged that the title was an “inspired” change because the “name of the Disney Ride . . . had no story.”¹¹⁰ The final draft, which centered on an “original supernatural element of a story about a rivalry between pirates,” was submitted to Taylor on August 9, 2000.¹¹¹

Weeks passed without correspondence from Taylor as to whether Disney was at all interested in the screenplay.¹¹² Alfred and Martinez claimed that during a creative meeting concerning *Red Hood*, the *Pirates of the Caribbean* screenplay was visible in Taylor’s office along with artwork that Alfred and Martinez had provided.¹¹³ According to the two screenwriters, upon mentioning the screenplay, they “were quickly ushered out of Taylor’s office.”¹¹⁴ After returning to Taylor’s office a “short time later, all materials that been on the coffee table had been removed and the meeting ended abruptly.”¹¹⁵

On November 26, 2002, the *Pirates of the Caribbean* screenplay was finally returned to Martinez via U.S.P.S Priority Mail.¹¹⁶ The first *Pirates of the Caribbean* film, *Pirates of the Caribbean: The Curse of the Black Pearl*,¹¹⁷ would go onto premiere some seven

¹⁰⁷ *Id.* at *1–2.

¹⁰⁸ *Id.* at *2.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at *3.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Pirates of the Caribbean: The Curse of the Black Pearl* was released in 3,416 theatres and ultimately grossed US \$654,264,015. *Pirates of the Caribbean:*

months later, on July 9, 2003.¹¹⁸ Upon viewing the blockbuster hit, it was clear to Alfred, Martinez, and Laiter that there were substantial similarities between their original screenplay and the film.¹¹⁹

B. *Sunk by the District Court*

Alfred, Martinez, and Laiter brought suit against “The Walt Disney Company, et al. in the United States District Court for the District of Colorado on November 14, 2017.”¹²⁰ The case was then transferred on September 18, 2018, to the United States District Court for the Central District of California.¹²¹ Nearly two months later, the Defendants filed a Motion to Dismiss.¹²² Thereafter, Judge Consuelo B. Marshall applied the extrinsic test by assessing the “articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters and sequence of events” in the parties’ works.¹²³ In so doing, the court noted the well settled precept of copyright law: “[s]cenes-à-faire, or situations and incidents that flow necessarily or naturally from a basic plot premise, cannot sustain a finding of infringement.”¹²⁴ As detailed below, the court ultimately found that the works were “not substantially similar as a matter of law.”¹²⁵

First, Judge Marshall concluded that the single claimed similarity as to the plot of the screenplays—“supernatural ‘cursed’ pirates or ‘skull faced’ pirates”—was scènes à faire.¹²⁶ Unfortunately, the judge did not give any reasoning as to why. However, Disney did state in their Answering Brief that “[s]upernatural pirates’ are scènes à faire for pirate works (appearing in countless works, from Richard Wagner’s 1843 opera *The Flying Dutchman* to William Hope Hodgson’s 1909 [novel] *The Ghost Pirates*) and are a key

The Curse of the Black Pearl, BOX OFFICE MOJO, <https://www.boxoffice Mojo.com/release/rl4134045185/> (last visited Jan. 4, 2021).

¹¹⁸ Appellants’ Corrected Opening Brief, *supra* note 106, at *3.

¹¹⁹ *Id.* at *3–4.

¹²⁰ *Id.* at *7.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Alfred v. Walt Disney Co., 388 F. Supp. 3d 1174, 1183 (C.D. Cal. 2019).

¹²⁴ *Id.* at 1181 (citations omitted).

¹²⁵ *See id.* at 1190.

¹²⁶ *Id.* at 1183.

element of the Pirates of the Caribbean Ride.”¹²⁷ Even so, “a new treatment of a common subject may be protected by copyright,”¹²⁸ and while Disney did identify specific works to demonstrate that a particular element has been previously presented in literature and theatre, it remains to be seen as to whether that is sufficient for a finding of generic stock.¹²⁹ Moreover, the absence of any analysis measuring how prevalent these elements are in modern works, along with the fact that the novel and opera were 109 and 175 years old,¹³⁰ respectively, leads to a reasonable inference that the court did not necessarily look to what was truly standard or stock when the Plaintiffs’ screenplay was written.

Next, Judge Marshall assessed the Plaintiffs’ contention that the works were similar because they both included, “treasure maps, ghost ships, the ‘undead,’ the supernatural, ships flying black sails, skeletons, privateers, naval attacks, dark fog, the ‘pirate code,’ ghosts, and sea monsters.”¹³¹ He reasoned that the elements were unprotectable because they were “familiar stock scenes, and characteristics that flow naturally from the works’ shared basic plot premise” about pirates.¹³² In other words, the elements were *scènes à faire*.¹³³ Upon contrasting the main characters in the works, all similarities—ranging from cockiness, bravery, and drunkenness,¹³⁴ to wearing dark pirate clothing and having facial hair¹³⁵—were found by the court to be generic and unprotectable.¹³⁶ The similar themes between the works (mutiny and betrayal and a prologue that occurs ten years prior to the main story) and the similarities in mood (“dark scenes involving pirate battles and sea monsters”), along with

¹²⁷ Appellees’ Answering Brief at 27, *Alfred v. Walt Disney Co.*, No. 19-55669, 2019 WL 749605, at *27 (9th Cir. 2020).

¹²⁸ *Universal Pictures v. Harold Lloyd Corp.*, 162 F.2d 354, 360 (9th Cir. 1947) (“Copying and infringement may exist, although the work of the pirate is so cleverly done that no identity of language can be found in the two works.”).

¹²⁹ See Appellee’s Answering Brief, *supra* note 127, at *27.

¹³⁰ See *id.*

¹³¹ *Walt Disney Co.*, 388 F. Supp. 3d at 1183.

¹³² *Id.* at 1183.

¹³³ See generally *Alfred v. Walt Disney Co.*, 821 F. App’x 727, 729 (9th Cir. 2020).

¹³⁴ *Walt Disney Co.*, 388 F. Supp. 3d at 1185.

¹³⁵ *Id.* at 1186.

¹³⁶ *Id.* at 1185.

similarities in setting (ships, port towns, and the Caribbean generally), were held unprotectable because they all flowed “naturally from unprotectable basic plot premises” concerning pirates.¹³⁷

C. *Set Afloat by the Ninth Circuit*

On appeal, the Ninth Circuit concluded that the screenplay shared sufficient similarities with the film to survive a motion to dismiss, as the selection and arrangement of the similarities was “more than de minimis.”¹³⁸ The Ninth Circuit reasoned that the district court’s dismissal of the action mainly rested upon the belief that similar elements were “unprotected generic, pirate-movie tropes.”¹³⁹ For that reason, the Ninth Circuit disagreed with the district court’s conclusion because

“expert testimony would aid in determining whether the similarities Plaintiffs identify are qualitatively significant[,] . . . [which would be] useful in this circumstance, where the works in question are almost twenty years old[,] and the blockbuster *Pirates of the Caribbean* film franchise may itself have shaped what are now considered pirate-movie tropes.”¹⁴⁰

Despite the recognition that expert testimony would be helpful, the Ninth Circuit did not expressly clarify what the appropriate temporal framework *is* or *should be* for applying the scènes à faire doctrine to screenplays.¹⁴¹ Courts *should* evaluate what was standard and existing when the author wrote the screenplay. As demonstrated in this Comment, the work’s elements that may have been unique and inventive in 1999 could in fact be the genre tropes of present day.¹⁴² If courts applied the scènes à faire doctrine by focusing on the genre tropes existing at the time of litigation, which it appears the district court in *Alfred v. Walt Disney Co.* may have done, the incentive to create original works will be discouraged.¹⁴³ For

¹³⁷ *Id.* at 1187–89.

¹³⁸ *Alfred*, 821 F. App’x at 729.

¹³⁹ *See id.*

¹⁴⁰ *See id.*

¹⁴¹ *See generally id.* at 729.

¹⁴² *See supra* Part III.B.

¹⁴³ *See Schwartz et. al, supra* note 8, at 12.

instance, if an infringer's screenplay becomes commercially successful as to define the modern tropes of that genre, a *scènes à faire* analysis that assesses the existence of present genre tropes to determine if the original copyrighted screenplay is "common or stock" produces an illogical "scenario in which the copyrighted work loses its value by" the infringing work becoming successful and widely adopted.¹⁴⁴

Similarly, if a copyrighted screenplay becomes widely clichéd upon its success, a *scènes à faire* inquiry that evaluates the existence of current genre tropes to decide if the original copyrighted screenplay is "common or stock" creates an irrational situation whereby the copyrighted work loses its value by becoming popular and extensively adopted.¹⁴⁵ To what extent should a creator's copyrighted work become so popular that the work itself converts to *scènes à faire*?¹⁴⁶ Put differently, does it make sense to have a rule that works can become *scènes à faire* merely on the basis of their own popularity?¹⁴⁷ Indeed, this perverse scenario would likely stymie the incentives for creating original works.¹⁴⁸

IV. PATENT LAW PRINCIPLES PRESENT A WORKABLE SOLUTION TO A NECESSARY BUT FLAWED DOCTRINE

The chief ambition of the American patent system is to encourage innovation, as demonstrated in the Constitution's articulation of Congress's power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Writings and Discoveries."¹⁴⁹ The patent system stimulates advancement by "rewarding inventors with a time-limited exclusive patent right for taking two steps they likely would not otherwise take: to invent in the first instance and to reveal

¹⁴⁴ *See id.*

¹⁴⁵ *See id.*

¹⁴⁶ Cendali, *supra* note 7, at 417.

¹⁴⁷ *Id.*

¹⁴⁸ *See* Schwartz et. al, *supra* note 8, at 12.

¹⁴⁹ U.S. CONST. art I, § 8, cl. 8.

information to the public about these inventions, thereby enriching society with the invention and the ability to build on the invention.”¹⁵⁰

A. *The Specification and Obviousness*

As a general matter, modern patents contain both a specification and a set of claims.¹⁵¹ The patent’s claims are located at the conclusion of the patent document; this portion sets forth the legal boundaries through articulating “precisely what it is that the inventor wants to prevent others from making, using, or selling.”¹⁵² The specification is a description in words and illustrations of what the invention is, how it works, what complications it aims to resolve, and what distinguishes it from what existed previously.¹⁵³ The opening paragraph of section 112 of the Patent Act, 35 U.S.C. § 112, provides that the specification “shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains . . . to make and use the same”¹⁵⁴

In the seminal case of *Ariad Pharmaceuticals, Inc. v. Eli Lilly & Co.*, the United States Court of Appeals for the Federal Circuit provided that “[c]laims define and circumscribe,” whereas “the written description discloses and teaches.”¹⁵⁵ And so, the specification is best understood as the part of the patent application that educates in words and pictures as to what the invention is, and how it differs from the prior art references.¹⁵⁶ In other words, a commonsense assessment of the written description should indicate whether the inventor is the one responsible for the underlying contribution as the description should illuminate the invention’s distinguishable

¹⁵⁰ Jeanne C. Fromer, *Claiming Intellectual Property*, 76 U. CHI. L. REV. 719, 731 (2009).

¹⁵¹ Andres Sawicki, *The Central Claiming Renaissance*, 103 CORNELL L. REV. 645, 653 (2018).

¹⁵² *Id.* at 653–54.

¹⁵³ *Id.* at 653.

¹⁵⁴ 35 U.S.C. § 112 (2020).

¹⁵⁵ *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1347 (Fed. Cir. 2010) (en banc).

¹⁵⁶ 35 U.S.C. § 112 (2020).

features from what society already knew.¹⁵⁷ From the vantage point of the Federal Circuit, the written description inquiry should confirm whether “the inventor actually invented the invention claimed.”¹⁵⁸ The other demand, known as the enablement requirement, necessitates “that the specification teach a skilled artisan how to make and use the claimed invention.”¹⁵⁹ However, “in practice[,] the enablement and written description requirements are basically coextensive.”¹⁶⁰

Although patentable inventions are frequently difficult or expensive to describe and define clearly, the patent system’s inclusion of a specification requirement provides inspiration for a possible solution to the failings of the *scènes à faire* doctrine.¹⁶¹ A copyright version of the written description requirement could afford a platform for applicants to explain the essential “objective” elements and features of their invention, i.e., original screenplay or teleplay.¹⁶² This perspective reveals a better way for copyright registration to function: to allow creators to distinguish and assert fundamental elements for determining *scènes à faire at the time of creation*.

The appropriateness of anchoring the *scènes à faire* inquiry to the date when the copyrighted work was made likewise finds support in the arena of patent law, specifically its obviousness inquiry.¹⁶³ In the patent law context, courts resolve the validity of a claimed invention by “cast[ing] the mind back to the time the invention was made” to determine whether the invention was obvious.¹⁶⁴ To that end, patent law cautiously warns against using the phrase “is obvious” because it “improperly focuses on the present” and “may also lead to an improper approach in which the judge determines whether the invention is presently obvious.”¹⁶⁵ All in all, allowing creators to characterize and proclaim fundamental elements at the

¹⁵⁷ Sawicki, *supra* note 151, at 686.

¹⁵⁸ *Ariad Pharms., Inc.*, 598 F.3d at 1351.

¹⁵⁹ Sawicki, *supra* note 151, at 719.

¹⁶⁰ Tun-Jen Chiang, *The Levels of Abstraction Problem in Patent Law*, 105 NW. U. L. REV. 1097, 1113 (2011).

¹⁶¹ *See* Fromer, *supra* note 150, at 755.

¹⁶² *See id.*

¹⁶³ Schwartz et. al, *supra* note 8, at 12.

¹⁶⁴ *In re Fine*, 837 F.2d 1071, 1075 (Fed. Cir. 1988) (citations omitted).

¹⁶⁵ *Rosemount, Inc. v. Beckman Instruments, Inc.*, 727 F.2d 1540, 1543 n.3 (Fed. Cir. 1984).

time of (or in close proximity to) creation would aide courts in determining *scènes à faire* and, subsequently, substantial similarity by effectively providing a temporal window to the author's perceived originality and genre landscape when the work was made.

* * * *

Before turning to this Comment's proposed solution, it is useful to briefly view the different claiming approaches and application requirements of patent and copyright law. Balancing these approaches against each other illuminates the underpinning principles inspiring this Comment's proposal of a "written supplement"—an extra-textual inclusion to be made available at the time of copyright registration.

B. *Claiming Systems of Patent Law and Copyright Law*

Copyright law has a procedure of "central claiming by exemplar," requiring the delivery only of an ideal member of the set of protected works in tangible form,¹⁶⁶ e.g., a completed screenplay. Copyright protection then extends past the copyrighted work itself to substantially similar works—that is, "a set of works to be enumerated only down the road"¹⁶⁷ in the event of infringement litigation. There, the author's work is used as the prototype against which all purportedly infringing works are compared to determine "if they share sufficient salient characteristics to fall within the scope of the copyright holder's rights."¹⁶⁸

Hence, one can view the copyright system as not requiring "formal claims[,] as the work itself is "protectable immediately upon fixation."¹⁶⁹ Consequently, the timing of copyright claiming manifests relatively late, and claims can be tactically fashioned to suit the contours of certain disputes.¹⁷⁰ Because the characteristics of the claimants' work and its precise periphery are not further specified until, and unless, there is copyright litigation, claiming can be advantageously directed to cover the defendant's allegedly infringing

¹⁶⁶ Fromer, *supra* note 150, at 721.

¹⁶⁷ *Id.*

¹⁶⁸ Jeanne C. Fromer & Mark P. McKenna, *Claiming Design*, 167 U. PA. L. REV. 123, 161 (2018).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 169.

works.¹⁷¹ Unlike patent law registrations, copyright applications are not deeply assessed, nor do they contain any critical information about the claimed aspects of the copyrighted work.¹⁷² Rather, the registrations for copyright are comprised largely of “administrative data like information about the registrant, the work’s title, its completion date, and publication date (if any).”¹⁷³ For the majority of works generated after 1977, the copyright endures for the author’s lifetime plus seventy years,¹⁷⁴ whereas the life of a patent generally spans a twenty-year term.¹⁷⁵

Patent law has often embraced a system of peripheral claiming in which patentees must thoroughly articulate their invention’s outer bounds, typically by providing its “necessary and sufficient characteristics.”¹⁷⁶ In addition to peripheral claiming, patent law has also embraced central claiming approaches.¹⁷⁷ There, the scope of the patent is measured by “the contribution the inventor made to the art.”¹⁷⁸ In a central claiming patent analysis, the specification’s comprehensive explanation of what the inventor did, rather than merely “the language used in the claims at the end of the patent,” forms the basis and focus of the patentable subject matter inquiry.¹⁷⁹

In the context of this Comment’s proposed written supplement, patent law’s central claiming dogma lays a functional groundwork for the proposal’s utility because “it demands a case-by-case analysis of the proximity between the inventor’s contribution and some object of inquiry.”¹⁸⁰ Contribution, in this sense, relates to the principle that in a central claiming patent analysis, the specification’s inclusive description necessitates that parties identify the *more germane* characteristics in an exemplar.¹⁸¹ In this light, the potential form and substance of “central claiming by exemplar” in copyright law is more akin to peripheral claiming, whereby claims can be

¹⁷¹ *Id.* at 162.

¹⁷² *Id.* at 161.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 160.

¹⁷⁵ 35 U.S.C. § 154(a)(2) (2020).

¹⁷⁶ Fromer, *supra* note 150, at 719.

¹⁷⁷ Sawicki, *supra* note 151, at 649.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 683.

¹⁸¹ *See* Fromer & McKenna, *supra* note 168, at 186–87.

written with greater ambiguity to make them broader and strategically overinclusive.¹⁸² And so, the proposal strives—in part—to provide a copyright claiming methodology, which upon implementation would diminish the opportunity for “strategic behavior that can lead to a free-for-all in copyright claiming.”¹⁸³

V. DECONSTRUCTING A SCREENPLAY OR TELEPLAY

Some commentators have sought a “bookshelf rule”¹⁸⁴ as a *scènes à faire* remedy that requires a court to establish a work’s genre and consider its conventions after reviewing a modified copyright registration, whereby “claimants also provide bibliographic information that identifies comparable works already in the collection of the Library of Congress.”¹⁸⁵ Nevertheless, notwithstanding the *scènes à faire* doctrine’s limitations, this would be a misstep, as it fails to utilize what most authors possess to write a screenplay or teleplay: a comprehensive, detailed compilation of not only title references, but also images, notes, designs, and descriptions regarding their work and the many elements comprising it.¹⁸⁶ That is not to say that the sole inclusion of an author’s inspirational title references would not aid a court’s assessment of *scènes à faire*. However, without more concrete specificity regarding the various expressive elements of a screenplay, a court’s search for substantial similarity may still fall victim to an overly broad classification or misguided conception of an author’s work.

A. *A Work’s Development: The Writer’s Reality*

The ease of completing a thorough disclosure that teaches one about the tangible work is anything but onerous for serious applicants. Therefore, the copyright registration procedure ought to adopt

¹⁸² See Sawicki, *supra* note 151, at 685 (“[A shift to] central claiming can . . . be understood as a . . . preemptive response to potential overinclusiveness.”).

¹⁸³ Fromer & McKenna, *supra* note 168, at 162.

¹⁸⁴ Walker, *supra* note 16, at 468.

¹⁸⁵ *Id.*

¹⁸⁶ See, e.g., Jason Hellerman, *How Do Professional Screenwriters Outline Their Projects?*, NO FILM SCHOOL (May 8, 2020), <https://nofilmschool.com/professional-outline>.

a requirement inspired by the objectives underpinning patent law's specification requirement.¹⁸⁷ Under the current copyright system, artists and writers are forced to “define” and “describe” their works upon litigation commencing.¹⁸⁸ Such defining or describing manifests through the creator asserting crucial elements for determining substantial similarity or defining “the heart of the work for ascertaining fair use.”¹⁸⁹ This suggests that a writer's ability to demarcate their creations, while not necessarily an activity approached without reluctance, is possible.

Of course, many who believe their screenplay has been stolen are in fact “victims of synchronicity, not plagiarism,”¹⁹⁰ and the coincidence of any screenplay's element is exacerbated when the similarity is seen in finished form on the big screen or television set. Thus, a concern lies in an author's *ex post* characterizations as a debated work's artistic and commercial effect on the world may be unscrupulously incorporated into the work's depiction in litigation.¹⁹¹ Because litigation always commences sometime after the work's creation, regardless of the creator's intent, the effect of a work onto the marketplace may change what is alleged as protected expression or not.¹⁹² Given the task's complexity and potential for hindsight bias,¹⁹³ examination of a copyright claim in this fashion does not adequately assess copyright validity, that is, the actual originality of the claim itself may be skewed. Rather, administrative *ex ante* mechanisms should be in place to aide courts in determining *scènes à faire* and ultimately substantial similarity.

What some commentators have overlooked, especially in the context of screenplays and teleplays, is that authors: (1) must virtually always utilize a “pitch deck” or “lookbook” when attempting to sell a feature film screenplay or raise finances to make a feature

¹⁸⁷ See *supra* Part IV.

¹⁸⁸ Fromer, *supra* note 150, at 790.

¹⁸⁹ *Id.*

¹⁹⁰ Gladden, *supra* note 9, at 383.

¹⁹¹ Fromer, *supra* note 150, at 790.

¹⁹² *Id.*

¹⁹³ See Liz McKenzie, Comment, *Drawing Lines: Addressing Cognitive Bias in Art Appropriation Cases*, 20 UCLA ENT. L. REV. 83, 85 (2013).

film,¹⁹⁴ and (2) must more than likely have a “series bible” to sell and market a pilot television script.¹⁹⁵ A film “pitch deck” allows authors to share two narratives to a potential financier or production company.¹⁹⁶ On the one hand, it presents the characters and story of the film, while, on the other hand, it allows the author to detail their inspiration and overriding vision.¹⁹⁷ There, a film’s author frequently will provide comparable film projects—both creatively and budgetarily.¹⁹⁸ In addition, the “pitch deck” will habitually include the exact genre of the screenplay.¹⁹⁹ This defining of genre is crucial; for instance, if the film is described as within the horror genre, potential financiers would likely want to assess if the script invokes feelings of fear, dread, and terror.²⁰⁰ Beyond this, the visual elements included aim to express the spirit and essence of the film—it is here that the genre’s aesthetic convention may also be ascertained.²⁰¹ Within the realm of fiction publishing, a budding author will commonly provide publishers with a query letter to hopefully catch an editor’s attention.²⁰² The content of a query letter is not materially dissimilar to the substance of a film’s pitch deck, except for the fact that a query letter is not accompanied by tonal imagery.²⁰³

In the context of television (i.e., teleplays), a “series bible” will typically include a series logline, the genre of the show, comparable

¹⁹⁴ See Meredith Alloway, *On Decks: The Art (and Necessity) of the Independent Film Lookbook*, FILMMAKER MAG. (Mar. 14, 2019), https://filmmakermagazine.com/107189-on-deck/#.X_SUrmRKgUY.

¹⁹⁵ See Valerie Kalfrin, *How to Create the Perfect Show Bible*, SCREENCRAFT (May 8, 2017), <https://screencraft.org/2017/05/08/create-perfect-show-bible/>.

¹⁹⁶ See Nick Sadler, *What is a Pitch Deck and Why Should You Create One?*, SCRIPT MAG. (Jul. 18, 2018), <https://scriptmag.com/features/what-is-a-pitch-deck-and-why-should-you-create-one>.

¹⁹⁷ *Id.*

¹⁹⁸ See Adam Blakemore, *Perfect Pitch: What a Pitch Can Do for Your Indie Film Project*, RAINDANCE (Aug. 19, 2020), <https://www.raindance.org/perfect-pitch-what-a-pitch-deck-can-do-for-your-indie-film-project/>.

¹⁹⁹ *See id.*

²⁰⁰ *See generally id.*

²⁰¹ *See id.*

²⁰² *See How to Pitch Your Book to an Agent: Step-by-Step Guide*, MASTERCLASS, <https://www.masterclass.com/articles/how-to-pitch-your-book-to-an-agent#what-to-include-in-the-pitch> (last updated Aug. 9, 2021).

²⁰³ *See id.*

show references, detailed character biographies for all main characters, and episodic summaries for the entire first season.²⁰⁴ Often, a thorough series bible will provide summaries for future seasons, along with an explanation of how the show will conclude.²⁰⁵ Other elements regarding pacing, themes, and visual style or mood will be set out in the document.²⁰⁶ Essentially anything established on screen will likely have been reflected in the series bible in some way.²⁰⁷

B. *The Written Supplement*

Just as the Supreme Court in *Ariad Pharmaceuticals, Inc.* sought review of a patent’s specification as a way to inform the meaning of a claim and subsequent invention, here too, a written supplement offered at the time of registration will afford a court valuable insight into the circumstances surrounding a work’s formation at the time of creation.²⁰⁸ As mentioned,²⁰⁹ a court’s application of an extrinsic analysis to determine substantial similarity among the parties’ works typically assesses “the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events,” and, therefore, a court may preclude *scènes à faire* elements at all said junctures.²¹⁰ Since many authors have established these different guiding facets of a given work—more than likely prior to copyright registration and certainly prior to litigation—these elements weigh heavily in the construction of the individual segments of the proposed written supplement.²¹¹ Accordingly, the written supplement submission for literary and dramatic works, namely screenplays, teleplays, novels, and theatrical plays, should include six basic categories: (1) Genre; (2) Plot;

²⁰⁴ See generally Ken Miyamoto, *21 Series Bibles That Every TV Screenwriter Should Read*, SCREENCRAFT (Aug. 12, 2019), <https://screencraft.org/2019/08/12/21-series-bibles-that-every-tv-screenwriter-should-read/>.

²⁰⁵ See *id.*

²⁰⁶ See *id.*

²⁰⁷ See *id.*

²⁰⁸ See generally *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336 (Fed. Cir. 2010).

²⁰⁹ See *supra* Section II.A.

²¹⁰ See, e.g., *Alfred v. Walt Disney Co.*, 388 F. Supp. 3d 1174 (C.D. Cal. 2019).

²¹¹ See, e.g., SYD FIELD, *THE SCREENWRITER’S WORKBOOK* 1–25 (2006); MARC BLAKE & SARA BAILEY, *WRITING THE HORROR MOVIE* 181–88 (2013).

(3) Character; (4) Theme; (5) Setting; and (6) Mood and Pace. Although literary works differ from works of the performing arts (i.e., screenplays, teleplays, and theatrical plays) in that they are solely intended to be read, these categories are inherently a part of these mediums of expression.²¹²

While there may be apprehension about the cost and viability of the administrative and legal support necessary to institute such an inclusion, this proposal does not seek to implement an *ex ante* examination of copyright claims. Instead, this proposal will provide vital guidance to a court regarding a copyright's validity, only should there be later litigation regarding copyright infringement. This result is beneficial, in large part, because the supplementary materials would indeed reflect the artistic view of the author's originality at the time of creation.²¹³ Although it is certainly imaginable that film studios would work with lawyers to create a robust written supplement, it is also plausible that a capable writer could successfully complete a supplement without the assistance of a legal team. As a result, completing the proposed supplement would not always be a costly endeavor, and therefore, the supplement would not deter creation. Nonetheless, the specification inspired disclosure would demand that the author's inclusion be in "full, clear, concise, and exact terms as to enable any person skilled in the art"²¹⁴ to which the creation pertains to garner understanding and appreciation of the author's envisioned work. This ask finds an analog in patent law's enablement requirement because effective "series bibles" and "pitch decks" are given to collaborators to help in producing and making the product with the creator.²¹⁵

In the end, the problem of copyright seeker overreaching would largely be diminished in light of the supplement demonstrating the writer's perception of the work's many elements at the approximate time of registration.²¹⁶ To reduce the potential that the written supplement was dishonestly created to advantageously support a party's

²¹² See generally 17 U.S.C. § 101.

²¹³ Cf. 35 U.S.C. § 103 (2020).

²¹⁴ 35 U.S.C. § 112.

²¹⁵ See Kalfrin, *supra* note 195.

²¹⁶ See generally Fromer, *supra* note 150, at 790 ("As litigation typically happens some time after the work's creation, the work's artistic effect on the world can be incorporated into the work's depiction in litigation.").

interests, this proposal contends that the supplement should be submitted at the time of registration. This proposal leaves open a future scenario where a copyright infringement action could proceed between a new work (accompanied by the written supplement) and an older work (not accompanied by the written supplement). Under this scenario, a court should still strive to employ a *scènes à faire* analysis that assesses if the disputed work was original or whether it was standard or stock when the author created the work.²¹⁷

Although some writers may renounce this supplement out of fear of having their “magic recipe” known, it should be stressed that this supplement would not only be discovered as a means to support litigation but would also serve to provide effective notice to the public of a set of protected embodiments or rights. In any event, such an overbearing want for secrecy is arguably misplaced. One only needs to turn their attention to Quentin Tarantino’s words during the release of his debut film *Reservoir Dogs*.²¹⁸ In describing his inspiration, Tarantino stated, “I didn’t go out of my way to do a rip-off of ‘The Killing,’ but I did think of it as my ‘Killing,’ my take on that kind of heist movie.”²¹⁹ He furthered divulged, “Although it’s not exactly ‘Rashomon,’ you do get a sense of the characters’ different perspectives when they talk about what happened.”²²⁰

1. GENRE

As demonstrated, some writers craft genre-bending pieces that may leave courts unable to properly classify a work into an applicable genre.²²¹ At a minimum, this inclusion will allow an author’s conception of their work and the genre or genres in which it falls under to be precisely matched.²²² Rather than relying solely on

²¹⁷ See *supra* Part III.C.

²¹⁸ John Hartl, ‘Dogs’ Gets Walkouts and Raves, SEATTLE TIMES (Oct. 29, 1992), <https://archive.seattletimes.com/archive/?date=19921029&slug=1521437>.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ See *supra* Section Part II.B.

²²² But see Walker, *supra* note 16, at 466–67 n.201 (“[A]n author’s understanding of the genre of their work may not be in sync with either popular or expert notions of what the work’s genre *actually* is. For instance, while an author may believe that they wrote a horror story, the readers of that work may instead consider it to be a comedy. However, the risk of an author misclassifying their

courts to determine the conventions within a certain genre, and then ascertain which of these conventions are shared with the work,²²³ this section of the supplement will seek the author's exacting genre classification, along with specific genre reference titles and inspirational films. Furthermore, this segment will afford the author an opportunity to provide a thorough understanding of whether a subversive or expressive treatment of genre tropes or stock elements have been built into the work.

Like patent law's specification requirement, whereby an inventor distinguishes their invention from what existed previously,²²⁴ this segment of the inclusion empowers authors to distinguish their new writing from particular genre titles. This offers authors a way to characterize what elements are in fact *scènes à faire*. Some may fear that this approach may result in an underinclusive depiction; however, the innate connection between all of the supplement's elements would make it difficult to mislead without misstep.²²⁵ Nevertheless, taken together, these inclusions would bring greater clarity as to what genre conventions and elements, if any, were intended and utilized in the work at the time of creation.

2. PLOT

Defined as "the plan of events in a screenplay," plot is equivalently understood as the cause-and-effect relationship amongst events in a screenplay.²²⁶ It is this unique arrangement of events that aggregates to expression.²²⁷ With greater frequency than any other noted element, a screenplay's plot initiates the bulk of copyright infringement actions.²²⁸ Analogous to the other elements of a screenplay, sufficiently demonstrating "substantial similarity in plot hinges upon the idea/expression dichotomy."²²⁹ The extrinsic test

work is likely to be less harmful overall than leaving the classification undetermined until litigation arises.").

²²³ *Id.* at 467.

²²⁴ *See, e.g.*, 37 C.F.R. § 1.71(b) ("The specification must set forth the precise invention for which a patent is solicited, in such manner as to distinguish it from other inventions and from what is old.").

²²⁵ *See infra* Part V.B.4.

²²⁶ *See* Gladden, *supra* note 9, at 373.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

centers “not [on] the basic plot ideas for stories,” which are not shielded by copyright law, but on “the actual concrete elements that make up the total sequence of events and the relationships between the major characters.”²³⁰ Thus, a court may define plot as a sequence of events by which an author expresses their ideas and theme.²³¹ This means that even scenes that are not distinctive or well-defined can be rendered substantially similar if they *advance* in a similar fashion or pattern within the two screenplays.²³² That said, the pattern may be found to be unprotectable *scènes à faire* if it is not sufficiently tangible or “concrete.”²³³

When a writer “plots,” he or she partakes in the art of creating relationships between scenes, juxtaposing them to make the story points more potent and momentous.²³⁴ In so doing, a writer turns the story’s structural considerations that concern conflict and meaning into (hopefully) dynamic moments that “convey exposition, build suspense, reveal character[,] and expose emotion” to strengthen the audience’s immersion in the world of the story.²³⁵ Often, the type of dramatic question presented by a screenplay dictates the plot and informs what kind of story it will be.²³⁶ To that end, many have held that a definite number of plot ideas exist—some set that number at seven,²³⁷ others at twenty-nine.²³⁸ Because it is impossible to predict how plot issues may manifest in an infringement action, the most reasonable demand is that writers attempt to render their stories into one of the known tenets of plot ideas.²³⁹ In that event, a court will be more faithfully guided in its assessment of whether “incidents,

²³⁰ Berkic v. Crichton, 761 F.2d 1289, 1293 (9th Cir. 1985).

²³¹ Shipman v. R.K.O. Radio Pictures, Inc., 100 F.2d 533, 537 (2d. Cir. 1938).

²³² Gladden, *supra* note 9, at 375.

²³³ *Id.*

²³⁴ Linda Cowgill, *The Art of Plotting Your Story & Screenplay Structure*, MOVIE OUTLINE, <http://www.movieoutline.com/articles/the-art-of-plotting-your-story-and-screenplay-structure.html> (last visited Jan. 12, 2021).

²³⁵ *Id.*

²³⁶ *How To Write Story Plot: Tips, Tricks, and Margaret Atwood’s Writing Prompts*, MASTERCLASS, <https://www.masterclass.com/articles/everything-you-need-to-know-about-writing-plot#7-types-of-plots> (last updated Nov. 8, 2020).

²³⁷ *See id.*

²³⁸ *See* Gladden, *supra* note 9, at 360 (citing RON SUPPA, *THE BUSINESS OF SCREENWRITING* 66 (1999)).

²³⁹ *How To Write Story Plot: Tips, Tricks, and Margaret Atwood’s Writing Prompts*, *supra* note 236.

characters[,] and settings” are, as a “practical matter[,] indispensable, or at least standard, in the treatment” of that plot idea.²⁴⁰ Moreover, this understanding will especially aide courts when wrestling with a screenplay whose plot and genre pairing is arguably atypical; for instance, coming-of-age horror films, e.g., *Carrie*.²⁴¹

3. CHARACTER

Although there is not a specific test for comparing and contrasting two characters, a very useful way to assess two characters is by scrutinizing character background, personal attributes, and motivation.²⁴² A well-rounded supplement would consider all three of these elements for its main character(s).²⁴³ This element overlaps with the element of plot as a character’s background and specific motivation informs where a character “has been and where he [or she] is trying to go.”²⁴⁴ The less specific, transcendent, and dynamic a character is, the greater the chance that that character or characteristics will be found to be unprotectable *scènes à faire*.²⁴⁵ That said, differences in the traits and personalities of the major characters operating in a substantially similar plot may be enough for the infringer to escape liability.²⁴⁶

4. THEME

Although there is some intersection between plot, theme, and mood, each is a distinct and inimitable element of expression that merits individual analysis.²⁴⁷ Still, this masks a deeper complexity, which demonstrates its utility within the written supplement: *theme is a great tool to separate similar plots from one other*.²⁴⁸ That is, it is extremely doubtful that two screenplays are going to have “substantially similar plots, yet maintain substantially different

²⁴⁰ Chase-Riboud v. Dreamworks, Inc., 987 F. Supp. 1222, 1227 (C.D. Cal. 1997).

²⁴¹ See *CARRIE* (Red Bank Films 1976).

²⁴² Gladden, *supra* note 9, at 372.

²⁴³ See *id.*; Herzog v. Castle Rock Ent., 193 F.3d 1241, 1258 (11th Cir. 1999) (utilizing all three elements in analyzing similarity amongst characters).

²⁴⁴ See Gladden, *supra* note 9, at 373.

²⁴⁵ See generally *id.* at 384.

²⁴⁶ *Id.* at 377.

²⁴⁷ *Id.* at 380.

²⁴⁸ *Id.*

themes.”²⁴⁹ As a general proposition, if the two themes are indeed substantially different, the plot similarities are likely “not concrete” and consist only of the same common or generic ideas, i.e., *scènes à faire*.²⁵⁰

Even so, a concern may arise as to whether the described theme and its characteristics could capture the work’s artistic essence.²⁵¹ One thing that might ameliorate this concern is that a director, in the course of preparing a film for festival release and subsequent distribution, often will provide a director’s statement to the public.²⁵² The director’s statement is a written description in which the director explains the themes, vision, and inspiration for the film.²⁵³ For example, when it was announced that Jim Jarmusch’s film *Only Lovers Left Alive* would be presented in competition at the Cannes Film Festival, this director’s statement was released:

Only Lovers Left Alive is an unconventional love story between a man and a woman, Adam and Eve. (My script was partially inspired by the last book published by Mark Twain: *The Diaries of Adam and Eve*—though no direct reference to the book is made other than the character’s names.)

These two lovers are archetypal outsiders, classic bohemians, extremely intelligent and sophisticated—yet still in full possession of their animal instincts. They have traveled the world and experienced many remarkable things, always inhabiting the shadowed margins of society. And, like their own love story, their particular perspective on human history spans centuries—because they happen to be vampires.

²⁴⁹ *Id.*

²⁵⁰ *See id.*

²⁵¹ *See* Fromer, *supra* note 150, at 790.

²⁵² *See, e.g.,* Kevin Jagernauth, “*It Is A Mad Time To Be Alive*”: Darren Aronofsky’s ‘*Mother!*’ Director’s Statement’s Plus New Images, THE PLAYLIST (Aug. 29, 2017), <https://theplaylist.net/mother-directors-statement-20170829/>.

²⁵³ *See* Elena Alston, *The Director’s Statement: What to Write*, INT’L MOVING IMAGE SOC’Y, (July 28, 2017), <https://www.societyinmotion.com/2017/07/directors-statement/>.

But this is not your usual vampire story. Set in the very distinct cities of Detroit and Tangier, and taking place almost entirely at night, Adam and Eve must have human blood to survive. But they now live in the world of the 21st century where biting the neck of a stranger would be reckless and regressive—for survival, they must be certain the blood that sustains them is pure and free of disease or contamination. And, almost like shadows, they have learned long ago to deftly avoid the attention of any authorities.

For our film, the vampire is a resonant metaphor—a way to frame the deeper intentions of the story. This is a love story, but also the story of two exceptional outsiders who, given their unusual circumstances, have a vast overview of human and natural history, including stunning achievements and tragic and brutal failures. Adam and Eve are themselves metaphors for the present state of human life—they are fragile and endangered, susceptible to natural forces, and to the shortsighted behavior of those in power.²⁵⁴

While only some films brave the festival circuit, the established practice of drafting a director's statement demonstrates that a scriptwriter could indeed write, as Jarmusch's statement reflects, an informative supplement for theme (and plot) that is both succinct and effective.²⁵⁵ In fact, it is wholly plausible that a supplement for theme may be explored through plot and vice versa. If that be the case, each section would disclose an identical written description.

5. SETTING

By itself, a physical geographic setting will not typically be a protectable element of expression.²⁵⁶ Still, differences in geographic

²⁵⁴ SONY PICTURES CLASSICS, ONLY LOVERS LEFT ALIVE PRESS KIT (2013), available at https://www.sonyclassics.com/onlyloversleftalive/onlyloversleftalive_presskit.pdf.

²⁵⁵ See *id.*

²⁵⁶ See *Sinicola v. Warner Bros., Inc.*, 948 F. Supp. 1176, 1189 (E.D.N.Y. 1996) (concluding that New York City as a setting was not an element of protectable expression).

setting between two scripts may themselves speak to larger differences in plot and theme or may inform a court's application of the *scènes à faire* doctrine, as the settings may naturally flow from a common theme or, conversely, the theme may naturally derive from a certain setting.²⁵⁷ Clearly, most script thieves have “enough common sense”²⁵⁸ to change the geographic setting within a work. Even so, the setting category still has significant utility because it warrants an author to describe how setting is used within the work.²⁵⁹ For example, a “small town” may be used to serve a comedic function or a “big town” may help to spotlight a fish-out-of-water story line.²⁶⁰ Therefore, the use of setting may illuminate a larger pattern of infringement or the existence of *scènes à faire*.²⁶¹ Understanding how setting is being used will assist courts in analyzing “setting in terms of where specific scenes [physically] occur in a screenplay.”²⁶² Plaintiffs frequently provide a “laundry list of setting common to both scripts (i.e., both scripts have scenes that take place in restaurants, theatres, bars, etc.).”²⁶³ Therefore, the “setting” segment of the supplement may equally benefit an alleged infringer seeking to disprove substantial similarity. If the physical location of these “common scene settings” serves no particular function, without similarity of dialogue or plot within those locales, a court will likely dismiss the settings as generic or *scènes à faire* and thus, unprotectable.²⁶⁴

6. MOOD AND PACE

A screenplay's mood may often dictate the pace, which will help a court comprehend how a genre convention is being used in its application of the *scènes à faire* doctrine.²⁶⁵ For example, a more thoughtful and reflective mood may give way to a slower paced film, indicating that the script is a character-driven drama, whereas a

²⁵⁷ See Gladden, *supra* note 9, at 380.

²⁵⁸ *Id.*

²⁵⁹ *See id.*

²⁶⁰ *See id.* at 380–81.

²⁶¹ *See id.* at 381.

²⁶² *Id.* at 281.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *See generally id.*

tension-filled rapidly paced film likely demonstrates that the screenplay is a thriller.²⁶⁶ While the mood of a screenplay is swayed by plot and theme, it does stand individually in a court's analysis as its own concrete element of expression—"a combination of the tone and feel of the work."²⁶⁷ Unprotectable similarities in mood may be found when these resemblances are common to a given genre.²⁶⁸ At the same time, if a plaintiff is unable to demonstrate substantial similarity in plot, substantial similarity as to character, theme, and mood may adequately demonstrate infringement.²⁶⁹ Notably, the element may prove most useful for a plaintiff if they do not succumb to dismissal or summary judgment, as "it is ultimately going to fall to a jury to determine if the total concept and feel of the two works are the same."²⁷⁰

VI. CONCLUSION

At its best, the *scènes à faire* doctrine ensures that necessary scenes or situations and stock elements or plots remain unprotectable. Yet, at its worst, the *scènes à faire* doctrine is an expansive and subjectively applied bar to protection that may spell disaster for creative works that feature original expression. My proposal is not a remedy that cures all that upsets copyright law's objective; however, a humane compromise is suitable here to balance the competing interests of authors and the active goals of copyright. If a written supplement is to be based in part on section 112 of the Patent Act, it should be centered on patent law's requirement that the "specification shall contain a written description *of the invention*."²⁷¹

To best inform the supplement's guidelines, the proposal's disclosure considers both a court's substantial similarity analysis and what information an author likely possesses about their own

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 377.

²⁶⁸ *See, e.g.,* Olson v. Nat'l Broad. Co., Inc., 855 F.2d 1446, 1451 (9th Cir. 1988) (concluding that similarities in terms of mood were common to the genre of action-adventure television series and movies and therefore did not demonstrate substantial similarity).

²⁶⁹ *See* Gladden, *supra* note 9, at 380.

²⁷⁰ *Id.* at 384.

²⁷¹ *In re Ruschig*, 379 F.2d 990, 996 (C.C.P.A. 1967) (emphasis added).

work.²⁷² The purpose and applicability of such adequate disclosure is as simple as it is beneficial. Satisfaction of the written supplement ensures that a tangible fixed work at the time of registration is sufficiently disclosed, so that the elements of protectable expression are more distinctly and accurately established by a reviewing court if litigation ever commences.²⁷³ An adequate description of the tangible fixed work guards against author overreaching by insisting that the work be recounted in detail at the time of registration as to transcend the four corners of the work.²⁷⁴ Thus, an author's future claims and conduct can potentially be shaped by what was truly encompassed within his original creation. The fear that an author would intentionally categorize or substantiate their work to carve out more protective rights is largely displaced due to the demonstrated interplay of elements.²⁷⁵ Assuredly, any chicanery by a claimant would be readily discerned because the elements and the tangible work itself serve as a rational check on what was additionally provided in the supplement.

Legendary film director Robert Altman previously said, "I don't think screenplay writing is the same as writing—I mean, I think it's blueprinting."²⁷⁶ Indeed, screenplays and teleplays are "literary blueprints" on which feature narrative films and television shows are based.²⁷⁷ Dissimilar to the novel, where detailed prose fills the page and the express direct exploration of theme is possible, screenplays and teleplays are written with cinematic and visual description to further a story.²⁷⁸ For this reason alone, the very nature of screenwriting necessitates deep consideration of a supplementary proposal to aide courts in determining and understanding similarities from

²⁷² See *supra* Section V.A.

²⁷³ Cf. Walker, *supra* note 16, at 467.

²⁷⁴ See generally Fromer, *supra* note 150, at 790.

²⁷⁵ See *supra* Section V.B.

²⁷⁶ *Quote of the Day: Robert Altman*, LA SCREENWRITER, <https://www.la-screenwriter.com/2011/07/15/quote-of-the-day-robert-altman/> (last visited Oct. 8, 2021).

²⁷⁷ See Ken Miyamoto, *7 Signs That You're Overwriting Your Screenplay*, SCREENCRAFT (Dec. 12, 2019), <https://screencraft.org/2019/12/12/7-signs-that-youre-overwriting-your-screenplay/>.

²⁷⁸ *Writing a Screenplay vs. Writing a Novel: Learn the 4 Key Differences*, MASTERCLASS, <https://www.masterclass.com/articles/writing-a-screenplay-vs-writing-a-novel> (last updated Aug. 27, 2021).

what may be absent or pared-down on the page.²⁷⁹ Although a registration supplement asking authors to specify extra-textual descriptions and inspirations of new works would be unprecedented as a timely procedural mechanism, courts have utilized artists' statements as evidence in copyright infringement suits, often in fair use matters.²⁸⁰ Accordingly, the change would not only be reasonable, but it would also serve to promote a more thorough and confident review of scènes à faire elements.²⁸¹

For now, writers should register their screenplays with the Writers Guild of America and with the U.S. Copyright Office.²⁸² Writers should likewise keep detailed accounts of when and to whom they have submitted their written works.²⁸³ Because the "line between inspiration and unlawful copying is remarkably thin,"²⁸⁴ writers should also strive to make their works as distinct as possible.²⁸⁵ As a result, the work will become harder for an infringer to misappropriate.²⁸⁶

In the end, copyright registration must empower courts to venture further in their infringement analyses. Until then, courts will continue to be enabled to function as vague identifiers of similarities, potentially masking originality under the guise of the scènes à faire doctrine.²⁸⁷ And so, it is time to continue the dialogue on how to delicately reform copyright for the modern day—for what is standard tomorrow, may not have been today.²⁸⁸

²⁷⁹ See, e.g., SIDNEY LUMET, MAKING MOVIES 34 (1995) ("I'd estimate that [sixty] percent of the screenplay was improvised. But we faithfully followed [Frank] Pierson's construction scene by scene. He won an Academy Award for the screenplay.").

²⁸⁰ See Walker, *supra* note 16, at 468 n.210 (citing *Cariou v. Prince*, 714 F.3d 694, 702 (2d Cir. 2013)).

²⁸¹ See *Smith v. AMC Networks, Inc.*, No. 18-CV-03803-LHK, 2019 WL 402360, at *6–7 (N.D. Cal. Jan. 31, 2019) (demonstrating that a court's scènes à faire analysis is often cursory).

²⁸² Gladden, *supra* note 9, at 384.

²⁸³ *Id.*

²⁸⁴ See McKenzie, *supra* note 193, at 85.

²⁸⁵ Gladden, *supra* note 9, at 384.

²⁸⁶ *Id.*

²⁸⁷ See *supra* Part III.

²⁸⁸ See Walker, *supra* note 16, at 471.