Making Sense of Scènes à Faire Through the Lens of *Feist*

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Scènes à faire: what is it, and why do we need a French name for it? Because when we explain it in English it doesn't make any sense at all. Scènes à faire, *Black's Law Dictionary* says, means "standard or general themes that are common to a wide variety of works and therefore are *not copyrightable*."[1] A number of other definitions of the term similarly deny copyrightability. For example, this is from a First Circuit case: the court "denie[d] copyright protection to elements of a work that are for all practical purposes indispensable, or at least customary, in the treatment of a given subject matter."[2] So again, we deny copyright protection. As Dale Cendali spoke to moments ago,[3] most courts don't look at it that way. The majority view is that it does not invalidate the copyright; it's not a question of copyrightability. It's a question of what is infringing activity and whether sharing this element actually rises to the level of infringement or not, not whether the scène à faire is copyrightable.

Examples of scènes à faire are obvious plot elements, character types—we talk about the scope of protection in a literary work and it's often this list of total concept and feel, theme, characters, plot sequence, pace, setting. Scènes à faire can be any of those elements that would otherwise be considered part of the copyrightable expression of a literary work. And it's not limited to literary works; as we've heard, it can be music, it can be software, it can be visual works. Any works that are part of a genre or tradition that has certain common elements can give rise to a scènes à faire argument.

I think it's easier and it's less metaphysical than the merger doctrine, because to do the merger question, you have to say: Here's the expression, what idea is it expressing, and how many different ways are there to express that idea? And that makes you do a lot of subjective, metaphysical thinking about what idea is this expressing. The scènes à faire analysis is a lot simpler: How many of the works of this type have this expressive element in them? And it's really about counting how many other things are out there that share this expressive element.

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1. *Scènes À Faire*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added).
2. Coquico, Inc. v. Rodríguez-Miranda, 562 F.3d 62, 68 (1st Cir. 2009).
3. *See* Dale Cendali, *Litigating Scènes à Faire*, 43 COLUM. J.L. & ARTS 415, 415–16 (2020).

Just to give you some of the caselaw that has talked about examples of scènes à faire: In the genre of police fiction, we see "[f]oot chases and the morale problems of policemen, not to mention the familiar figure of the Irish cop."[4] If you've got any of those things and the defendant's work has those things, that doesn't count against the defendant because those are scènes à faire in the genre of police fiction. And so, in a Second Circuit case, the court wrote that "[e]lements such as drunks, prostitutes, vermin and derelict cars would appear in any realistic work about . . . policemen in the South Bronx."[5]

The historical origin of the term scènes à faire, as used in U.S. copyright law, was in the 1940s with Judge Yankwich. Short historical footnote: Leon Yankwich was appointed by FDR, wrote a book on libel in the 1950s, was very concerned about literary matters—and is the first to have introduced the term "scènes à faire" into American jurisprudence, in a 1942 case called *Cain v. Universal*, in the Southern District of California.[6] In *Cain*, the plaintiff claimed that a church sequence that appeared in defendant's film *When Tomorrow Comes* was copied from a similar scene from the plaintiff's novel called *Serenade*. In both the film and the novel, two lovers spend an idyllic night in a church choir loft, where they seek shelter from a storm. Judge Yankwich said that the "small details" from events that took place in the church in both works, such as playing the piano, prayer, and hunger, were "inherent in the situation itself."[7] Those types of details were thus unprotectable scènes à faire. This is from 1942. From that day forward we've had situations like that that have been described as scènes à faire and therefore not protectable.

To see the way scènes à faire works in a music case, a good example is *Swirsky v. Carey*, from the Ninth Circuit. The question was about a Mariah Carey song called "One Of Those Love Songs" ("*One*") and an expert witness testified that there was no infringement because the defendant's work was more similar to "For He's a Jolly Good Fellow" ("*Jolly Good*") than it was to the plaintiff's work. According to the expert, this melodic phrase that was in both works was actually *Jolly Good*, and therefore it was scènes à faire.[8] The Ninth Circuit wasn't buying it:

> The evidence does not support the district court's ruling that the first measure of *One* is a *scene a faire* as a matter of law. The songs *One* and *Jolly Good* are not in the same relevant "field" of music; *One* is in the hip-hop/R&B genre and *Jolly Good* is in the folk music genre. Thus, comparing the first measure of *One*'s chorus to the first measure of *Jolly Good* does not tell the court whether the first measure of *One*'s chorus is an indispensable idea within the field of hip-hop/R&B.

So, this is not a novelty standard, this is not saying "has anything ever had this element in it"—but another work *in the genre*, that's really the relevant question. Also, it has to be more than two works. Something can't be commonplace if it is shared only by the plaintiff's work and the defendant's work—this is *Swirksy v.*

4. Walker v. Time Life Films, 784 F.2d 44, 50 (2d Cir. 1986).
5. *Id.*
6. Cain v. Universal Pictures Co., 47 F. Supp. 1013 (S.D. Cal. 1942).
7. *Id.* at 1017.
8. Swirksy v. Carey, 376 F.3d 841 (9th Cir. 2004).

Carey. A musical measure cannot be commonplace, by definition, if it is shared only by two songs.

Does it have to be identical? Do you have some lesser level of similarity required, or is a more stringent amount of similarity required? And the court in *Swirsky* seems to say the latter. The expert witness had testified that these two measures were "almost identical," but the court says that "almost identical" is not the same as "identical."[9] They are not equivalent. Before looking at scènes à faire we have to see a much more direct correspondence.

Dale Cendali spoke about the role in the analysis[10]—the majority view is that scènes à faire is an affirmative defense to an infringement claim and not a copyrightability question. Nimmer agrees with that. Nimmer takes the position that it shouldn't be a question of copyrightability.[11] Where you do see it come up in copyrightability cases tends to be in the software world, where it really is tied in more with functionality. *Engineering Dynamics* in the Fifth Circuit, *Lexmark*—that's where you tend to see this idea that it actually goes to copyrightability rather than just whether the defendant's work is infringing.[12]

You know, for a real profile in courage, see the Clarida book: "The author does not subscribe to either bright line position as to the proper procedural classification of this doctrine, nor in the vast majority of cases should it make any difference in the result."[13] The Eighth Circuit has a case involving Christmas-themed greeting cards called *Taylor v. Four Seasons Greetings*, and that's what the Eighth Circuit says: Well, if we apply it at the infringement level, or if we apply it at the copyrightability level, it really doesn't matter, we're going to come out in the same place anyway.[14] There is this filtration that you have to do—and again, a lot of the software cases dwell on this a lot—we have to filter out scènes à faire. It's not something that we can consider in the infringement analysis. Specifically, in this 2001 case called *Fleener v. Trinity Broadcasting*, the district court in California says, "Scenes a faire are not uncopyrightable, *per se*, but they are excluded from the extrinsic analysis."[15] The Ninth Circuit has this extrinsic-intrinsic idea, and the court in that case said: We exclude them from consideration in the extrinsic analysis, but they could be considered by a jury as part of the intrinsic analysis, the "total concept and feel" analysis that a jury is entitled to hear.[16]

So we've a pretty good idea about what scènes à faire is and how courts have looked at it, and they're all over the place in different ways. But the whole idea to

9. *Id.* at 850 (9th Cir. 2004) ("'[A]lmost identical' and 'identical' are not equivalents[.]").

10. *See* Cendali, *supra* note 3, at 415–16.

11. *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[B][4] (Matthew Bender rev. ed. 2019) ("Labeling certain stock elements as 'scenes a faire' does not imply that they are uncopyrightable; it merely states that similarity between plaintiff's and defendant's works that are limited to hackneyed elements cannot furnish the basis for finding substantial similarity.")

12. Eng'g Dynamics, Inc. v. Structural Software, Inc., 26 F.3d 1335 (5th Cir. 1994); Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522 (6th Cir. 2004).

13. ROBERT W. CLARIDA, COPYRIGHT LAW DESKBOOK 397 (Har/Cdr 2d ed., BNA Books 2016).

14. Taylor Corp. v. Four Seasons Greetings, LLC, 403 F.3d 958 (8th Cir. 2005).

15. Fleener v. Trinity Broad. Network, 203 F. Supp. 2d 1142, 1150 (C.D. Cal. 2001)

16. *Id.* at 1151.

me seems like a very odd fit with copyright doctrine, because it seems to say that an element can be protectable if it's used in a work in *this* genre, but not if it's used in a work in *that* genre. And that's kind of a strange concept for copyright. It's really, in a way, very similar to the idea of a generic term in trademark law: You can't say whether the term Apple is generic unless you are asking "what is it used in connection with?" Apple for apples is generic. Apple for computers is not; it's a very highly protectable trademark. That's just not a concept that we do very much in copyright law, and it seems odd to me. If we have one of these scènes à faire that the courts talk about—let's say we have a derelict car with some prostitutes and drunks in it, and they're having a conversation, their *conversation* is copyrightable. That dialogue is protectable, but the decision to have prostitutes and drunks in a derelict car is *not*, if it's a work of a particular kind. Why is that?

What I'm going to propose here is that it's about selection. This is really kind of a *Feist* idea about selection and arrangement, and the decision to include this element—the selection of prostitutes, drunks, and derelict cars in a film of a certain type—is not an original selection. That's not authorship, to make that selection. It's been selected for other works of this same type, so that selection isn't original, it's just what's done in a work of that type.

And if we look at *Feist*, that's what *Feist* calls a "garden-variety" selection,[17] right? I went back and re-read *Feist* last night, and it's really all about this. It's really all about how the selection is commonplace in the genre of telephone books. *Feist* actually says the selection of listings in the telephone directory "could not be more obvious."[18] This is "'selection' of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression."[19] And then a couple paragraphs later, right at the very end of *Feist,* it says that the alphabetical arrangement of the names "is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. . . . It is not only unoriginal, it is practically inevitable."[20] So the court is talking about commonplace and inevitable selections and arrangements in *Feist,* and in *Feist* it goes to copyrightability. It's saying it's not copyrightable. It's not saying, "oh well, it could be protectable, but it won't be infringement if you copy it." It goes to copyrightability.

So my modest proposal is that maybe we could make more sense of scènes à faire if we discard all of this caselaw that goes in all sorts of different directions and try to really anchor it in *Feist*. If we do that, we might find out that it's got more to do with copyrightability than the courts have been saying.

17. Feist Publ'ns, Inc. v. Rural Tel. Serv., 499 U.S. 340, 362 (1991).
18. *Id.*
19. *Id.*
20. *Id*. at 363.