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NARELL V. FREEMAN: THE NINTH CIRCUIT HAS DELUSIONS ABOUT "ILLUSIONS OF LOVE."

I. INTRODUCTION

"Hard work pays off," "cheaters never prosper," "everyone gets what they deserve." These expressions have been ingrained in our minds since youth, and we have come to believe them as true. We have been taught that hard work will be rewarded and "cheaters" will eventually be punished. However, the decision by the Ninth Circuit Court of Appeals in *Narell v. Freeman*¹ demonstrates that these principles are not always followed. In this case, one person's hard work did not pay off, and another person's cheating was rewarded, rather than punished. In *Narell*, the parties got quite the opposite of "what was deserved."

Because we are a society of advanced information and technology, copyright is a very important area of the law.² Consequently, issues regarding which works are copyrightable and what constitutes infringement of a copyright are becoming increasingly complex as modern technology creates more avenues for authors to express their works.³

In *Narell v. Freeman* the court addressed a unique issue of alleged copyright infringement.⁴ The Ninth Circuit held that Cynthia Freeman, a popular romance novelist,⁵ did not infringe upon the copyright of an historical novel when she copied several phrases directly and closely paraphrased other sections of Irena Narell's novel in writing her own

1. 872 F.2d 907 (9th Cir. 1989).

2. "With today's new reproductive technologies anyone can reproduce and transmit a copyrighted work cheaply and inexpensively." Several examples include photocopiers, VCR's, and, in more recent years, FAX machines. M. LEAFFER, UNDERSTANDING COPYRIGHT LAW 304 (1989).

3. For example, copyright law is at the forefront of computer hardware and software issues. The Semiconductor Chip Protection Act of 1984 was enacted to protect the copyrights of semiconductor chips. Additionally, more and more courts are now being called upon to interpret copyright law in relation to computer software. A key example is *West Publishing Company v. Mead Data Central, Inc.*, 799 F.2d 1219 (8th Cir. 1986), a case which involved the copyrightability of automated data bases. In its holding, the court found Mead in violation of copyright law when it copied the protected page numbering system of Westlaw.

4. *Narell*, 872 F.2d 907 (9th Cir. 1989).

5. Freeman's novels are available everywhere books are sold, including bookstores, drug stores, airports and department stores. Some of Freeman's best sellers include: "A World Full of Strangers," "Seasons of the Heart," "Portraits," "Come Pour the Wine," and most recently, "The Last Princess." Freeman passed away on October 22, 1988, during the time period of this case. She was 73 years old and died after a long bout with cancer. ORLOFSKY, THE FACTS ON FILE YEARBOOK: THE INDEXED RECORD OF WORLD EVENTS VOL. XLVIII at 800 (1988).

romance novel.⁶ The court primarily based its ruling upon three distinct legal theories. First, the portions copied were not literary expression, but were ordinary phrases and historical facts.⁷ Second, the two works in question did not meet the requirement of substantial similarity.⁸ Finally, even if the works were substantially similar, the defendant's copying would be allowed by the fair use doctrine defense.⁹

This note examines the *Narell v. Freeman* decision in light of current copyright law and concludes that the court did not reach the correct results for the following reasons: summary judgment was inappropriate, the substantial similarity analysis was unnecessary, the substantial similarity test was misapplied, and the fair use analysis was misconstrued.

The first issue addressed by the court is that of summary judgment. Based on precedential cases and the leading trend in the law, cases like *Narell v. Freeman* should be tried by a jury. The *Narell* court dispensed with the case by granting Freeman summary judgment. Secondly, the *Narell* court's analysis of the substantial similarity test is unnecessary in such a case, where the defendant has already admitted copying portions of the plaintiff's work. Even if conducting the substantial similarity test¹⁰ were appropriate here, however, the conclusion was incorrect, for the two works are inherently substantially similar. Finally, this note addresses the court's error in applying the four factors of the fair use doctrine.

6. *Narell*, 872 F.2d at 915.

7. *Id.* at 907.

8. Substantial similarity is very difficult to define. This is partly because courts have used the term "substantial similarity" in different contexts, and thus, the phrase has several different meanings. Additionally, many judges are not well versed in the area, and, as a result, use terms inconsistently (e.g. substantial similarity should be distinguished from striking similarity, which implies more of a *kind* of similarity rather than a quantity of similarity). In the context of *Narell v. Freeman*, the requirement of substantial similarity is used to prove copyright infringement. Generally, to say that two works are substantially similar is to say that the second work embodies a substantial amount (an excessive appropriation) of the first work's protected expression. A defendant can produce a work that is substantially similar to the plaintiff's work by either copying portions verbatim or by taking the overall pattern and arrangement of the work. [These two terms are commonly referred to as "verbatim similarity" and "pattern similarity." However, Professor Nimmer in his treatise "Nimmer on Copyright," uses more complex terminology — "fragmented literal similarity" for verbatim similarity and "non-fragmented comprehensive similarity" for pattern similarity. More and more Nimmer's terminology is being seen in case law]. Several tests have been proposed and adopted to help the courts determine whether two works are substantially similar. Some of these tests (e.g. the intrinsic/extrinsic test) are discussed in this casenote. M. LEAFFER, *supra*, note 2, at 268-70.

9. *Narell*, 872 F.2d at 907.

10. *See supra* note 8 for a discussion of substantial similarity.

II. BRIEF HISTORY OF CURRENT COPYRIGHT LAW

Copyright law encourages the creation of literary and other works.¹¹ Moreover, copyright law functions as a mechanism to protect the works of authors, musicians and other creative artists from having their works copied by others.¹² The notion of copyright protection in America dates back to the adoption of the United States Constitution. The Copyright Clause in the Constitution states that "Congress shall have the power . . . to promote the Progress of Science and Useful Arts, but securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."¹³ Current copyright law is governed primarily by the Copyright Act of 1976.¹⁴ When certain requirements are satisfied,¹⁵ the Act grants the copyright owner a private monopoly on the work for a limited time¹⁶ as well as the exclusive right to print, reprint, amend, adapt, publish, copy and perform the copyrighted work.¹⁷

III. FACTS OF THE CASE

In 1981, Irena Narell published "Our City: The Jews of San Francisco" ("Our City"), an historical novel about the immigration of Jewish families from Europe to California.¹⁸ Narell claimed her work was not merely an historical novel because it embodied her own interpretation of that period of immigration, offering her own experiences and family his-

11. Interview with Lionel Sobel, Professor of Law at Loyola Law School in Los Angeles (Aug. 23, 1990).

12. In a sense, it could be said that *everything* is copied from something else and nothing is original (e.g. a painting or a picture is copied from the original work). Thus, there must be special meanings assigned to the word copying and particular rules to govern such situations. Otherwise, every work would violate copyright laws. *Id.*

13. U.S. CONST. art. I, § 8, cl. 8.

14. Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1990). However, the Copyright Act of 1909 still governs works that were published before the 1976 Act was enacted. Copyright Act of 1909, 17 U.S.C. §§ 1-216 (1977).

15. Such as notice and registration. Requirements were modified by the United States' admission to the Berne Convention in March, 1989. In order to become a member of Berne, the largest international copyright law convention, the U.S. had to modify the 1976 Act to eliminate the requirements of notice and registration in order to comply with the Berne requirements. Interview with Lionel Sobel, Professor of Law at Loyola Law School in Los Angeles (Oct. 28, 1990).

16. The current duration of a copyright is generally the life of the author plus fifty years, regardless of the date of publication of the work. However, the duration of copyright for works published before 1978 and works made for hire is different. Since the works in *Narell* are not works made for hire and were not published before 1978, the durations for those works are omitted in this article. 17 U.S.C. § 302(a).

17. 17 U.S.C. § 106.

18. IRENA NARELL, *OUR CITY: THE JEWS OF SAN FRANCISCO* (1981).

tory as a background.¹⁹ In the story, Narell outlined Jewish immigration to San Francisco, the creation and development of Jewish businesses and industries, and the involvement of Jews in civic and cultural affairs.²⁰ Written in an anecdotal and narrative style, "Our City" has been described as a "stunning social history and penetrating mass biography of the Jewish families who since gold-rush days have left their mark on virtually every facet of Bay area life."²¹ Narell copyrighted her book because she thought that it would protect her work from being subsequently used by anyone else.²² Narell was mistaken.²³

Three years after the publication of "Our City," Cynthia Freeman, a well known romance novelist, also wrote a book about the immigration of Jewish families from Europe to California.²⁴ Although her novel "Illusions of Love" was purportedly fictional,²⁵ Freeman based the story on the factual history of Jewish immigration, much like the subject matter of "Our City."²⁶ In fact, Freeman admitted that "Our City" became the historical foundation for "Illusions of Love," and that she consulted no other source when writing her novel.²⁷ Freeman's novel relates the story of a fictional character, Ephraim Rothenberger, by tracing his life history from his journey from Paris to San Francisco, where he ultimately became a wealthy banker.²⁸ The primary focus of the novel is the conflict Rothenberger faces when he has to choose between his obligations to his wife and family and his passion for a rediscovered lover from his past.²⁹ However, the novel also includes a detailed history of Rothenberger's

19. *Id.*

20. *Narell*, 872 F.2d at 909.

21. *Id.*

22. *Presumably* this is what Narell thought. An author complies with the rules proscribed by copyright law in order to protect his or her work from future infringement. Every author relies on the fact that if they comply with the copyright laws, their works are protected against infringement.

23. Obviously Narell was mistaken, as the court ruled in Freeman's favor, and Freeman was allowed to copy portions of Narell's copyrighted work in the writing of her own novel.

24. C. FREEMAN, *ILLUSIONS OF LOVE* (1984).

25. In contrast with Narell's non-fictional work.

26. C. FREEMAN, *ILLUSIONS OF LOVE* (1984). For example, Chapters Two, Three and Four (pages 15-44 of the paperback edition) describe the family background of Martin Roth, the protagonist of the novel. In these chapters Freeman tells the life story of Ephraim Rothenberger, Martin Roth's great-grandfather. She describes his immigration to America from Paris, his participation in the Gold Rush, and his establishment of a wealthy family in San Francisco.

27. Appellant's Opening Brief at 6, *Narell v. Freeman*, 872 F.2d 907 (9th Cir. 1989) (No. 88-2491) (quoting from Freeman's Response to Interrogatory No. 5 of Plaintiff's First Set of Interrogatories).

28. C. FREEMAN, *ILLUSIONS OF LOVE* (1984).

29. *Narell*, 872 F.2d at 909.

immigration, which forms the foundation of his character, and recurs throughout the entire novel.³⁰

IV. PROCEDURAL HISTORY OF THE CASE

Narell filed suit for copyright infringement in July of 1987, alleging that Freeman had violated the Copyright Act of 1976 by copying portions of "Our City" verbatim and by closely paraphrasing other portions of the work.³¹ Freeman moved for summary judgment, maintaining that no reasonable trier of fact could find her guilty of copyright infringement.³² On March 18, 1988, the district court granted her motion for summary judgment on two separate grounds: 1) that the two works were not substantially similar; and 2) that the use of the material from "Our City" was protected by the fair use doctrine.³³

Narell appealed the decision to the Ninth Circuit Court of Appeals in January of 1989.³⁴ The court of appeals upheld Freeman's motion for summary judgment.³⁵ The court also concluded that Freeman had not infringed upon Narell's copyright to "Our City" in the writing of her novel "Illusions of Love."³⁶

V. SUMMARY OF THE COURT OF APPEAL'S REASONING

The court of appeals based its ruling upon three separate and distinct legal theories.³⁷ First, the court held that there was no copyright infringement because the portions that Freeman had copied from "Our City" were not protected expression, but were merely ordinary phrases and factual statements.³⁸ Secondly, the court found that no substantial similarity existed between the two works.³⁹ Finally, the court affirmed

30. C. FREEMAN, *ILLUSIONS OF LOVE* (1984).

31. *Narell v. Freeman*, 872 F.2d 907, 909 (9th Cir. 1989).

32. *Id.* at 909-10.

33. *Id.* at 909.

34. *Narell*, 872 F.2d at 907.

35. *Id.*

36. *Narell v. Freeman*, 872 F.2d 907, 909 (9th Cir. 1989).

37. The basis for the three theories was twofold: first, the district court had focused upon all three issues — that of protected expression, substantial similarity and fair use — so the court of appeals felt compelled to address all three issues. Second, the court believed that the discussions of substantial similarity and fair use would offer additional support for the holding that Freeman had not infringed upon Narell's work. In a special concurrence, Circuit Judge Cynthia Holcomb Hall agreed that no protected expression was copied by Freeman, but felt it was "unnecessary to reach the issues of substantial similarity and fair use." *Id.* at 915.

38. *Narell*, 872 F.2d at 911. It is commonly accepted that ordinary phrases and factual statements are not protected by copyright law. See discussion *infra*.

39. *Id.* at 913.

the district court's position that Freeman's copying was protected by the fair use doctrine.⁴⁰

A. Basic Test for Copyright Infringement

Copyright infringement occurs when a third party violates one or more of the copyright owner's exclusive rights as enumerated in Section 106 of the Copyright Act of 1976.⁴¹ These rights include the right to reproduce the work, prepare adaptations and derivative works, distribute and import the work, perform the work publicly, and display the work publicly.⁴² The plaintiff in a copyright infringement case must prove that the plaintiff owned the copyright for the work and that the defendant copied the work.⁴³ Courts generally accept circumstantial evidence of copying,⁴⁴ because there is rarely direct evidence of copying.⁴⁵ In order to make a circumstantial case for copying, the plaintiff must prove that the defendant had access⁴⁶ to the work and that the two works are sub-

40. *Id.* at 915.

41. The Act states:

Subject to sections 107 through 119, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based on the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106 (1990).

42. *Id.* There are also many limitations on the five basic exclusive rights. These limitations are set forth in the Copyright Act of 1976 in §§ 110-117. However, as none of the limitations on the exclusive rights apply to this case, they are neither discussed in the opinion of the court nor this casenote.

43. M. LEAFFER, *supra* note 2, at 265-66. The word "copying" is confusing, for it refers to more than one would expect. For example, the word "copying" also means unauthorized distribution or display of a work, in addition to the traditional meanings one would expect. *Id.*

44. The circumstantial case is made by proving: (1) access and (2) substantial similarity. If a sufficient circumstantial case is made, the burden of proof then shifts to the defendant to disprove copying. M. LEAFFER, *supra* note 2, at 266.

45. Direct evidence would be where the defendant actually admits copying, as in *Narell v. Freeman* (discussed *supra*), or where there is a witness that can attest to the fact that the defendant copied. Direct evidence is rarely apparent, however, because it is uncommon for someone to witness another person physically copying a work. *Id.*

46. To prove access, the plaintiff must show that the defendant had a "reasonable opportunity to view" the work. A good example of this is *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976). In this case, Bright Tunes claimed that Harrisongs had infringed a popular song, "He's So Fine," which had been played extensively on the radio. Although Harrisongs denied copying, the court ruled in favor of Bright Tunes, finding a case of infringement. The court reasoned that Harrisongs had access to the copy-

stantially similar. In *Narell v. Freeman*, the issues of Narell's ownership of the copyright and Freeman's access to Narell's work are not in dispute.⁴⁷ Therefore, in order to sustain a successful action for copyright infringement, Narell only needed to prove that Freeman copied protected portions of "Our City" in writing "Illusions of Love."

B. Portions Copied Were Not Protected Expression

Narell v. Freeman is one of the rare cases where direct evidence of copying existed, because Freeman admitted using portions of "Our City" in writing "Illusions of Love."⁴⁸ Therefore, the court turned directly to an analysis of the second issue: whether Freeman copied protected portions⁴⁹ of Narell's work.

The landmark case of *Harper & Row Publishers v. Nation Enterprises*⁵⁰ establishes that copyright law only protects an author's literary expression, and not the facts and ideas within a work.⁵¹ In that case, more commonly known as the "Ford Memoirs case," Nation Enterprises obtained, through an undisclosed source, a stolen, unpublished manuscript of former President Gerald Ford's autobiography, "A Time to Heal."⁵² *Time Magazine* ("Time") had already negotiated a contract to publish an excerpt from the autobiography, but Nation Enterprises published their article before *Time's* scheduled publication.⁵³ As a result, *Time* subsequently cancelled its contract.⁵⁴ Although much of the court's opinion centered around the correct application of the fair use doctrine, the opinion established that historical facts and theories may, in fact, be copied.⁵⁵

The opinion of *Harper & Row* has been followed by other courts, which have held that the extension of copyright protection to historical works is very narrow.⁵⁶ Consequently, the only elements protected in

righted work because of its popularity as a hit song. Thus, a defendant's alleged innocence is not a defense where there is a "reasonable opportunity to view."

47. *Narell*, 872 F.2d at 910.

48. During a deposition, Freeman was asked: "[D]id some of the language [in "Illusions of Love"] come from Ms. Narell's book?" Freeman answered: "Possibly, probably . . . undoubtedly, possibly, I don't know . . . of course . . . some of it, sure . . . yes . . ." *Narell*, 872 F.2d at 910.

49. See *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109, n.3 (9th Cir. 1970), where it was held that non protected material may be copied with impunity.

50. 471 U.S. 539 (1985).

51. *Id.* at 547-48.

52. *Id.* at 542.

53. *Id.* at 543.

54. *Id.* at 539.

55. 471 U.S. 539 (1985).

56. "The trend of the law is the erosion of protection for copyright owners, particularly in

such historical works are the author's original expression of particular facts and ideas which have already entered the public domain.⁵⁷ In *Narell*, the court evaluated the portions of Narell's work copied by Freeman and found that the portions were predominantly factual and, thus, were not entitled to copyright protection.⁵⁸ Moreover, the court found that the phrases which Freeman did copy directly were ordinary phrases which were also not entitled to copyright protection.⁵⁹

Thus, the court held that Freeman only took facts and ordinary phrases from "Our City" and did not copy any protected expression.⁶⁰ The court found this conclusion to be adequate to support the district court's ruling of summary judgment for the defendant.⁶¹ However, the court still addressed the issues of substantial similarity and fair use since those issues were central to the matter before the district court.⁶² The court also believed that such a discussion would "provide more support for [their] holding."⁶³

C. *No Substantial Similarity Existed Between the Two Works*

The *Narell* court found that even if the portions of "Our City" that Narell copied were found to be protected elements, the claim of copyright infringement would still be unsuccessful because the two works are not substantially similar.⁶⁴ Determining substantial similarity of two works is very difficult. Often, it is hard to determine when two works are so alike that they are substantially similar.⁶⁵ Also, it is difficult to distinguish between ideas, which are not protected, and expressions of ideas,

the area of non-fiction works." Hartnick, "Does Copyright Really Protect Nonfiction? Occasionally Yes, but Mostly No!" *Publisher's Weekly*, Dec. 9, 1983 at 28-29. See also *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 974 (2d Cir. 1980), where the court held that "the scope of copyright in historical accounts is narrow indeed, embracing no more than the author's original expression of particular facts and theories already in the public domain."

57. See *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 489 (9th Cir. 1984), cert. denied, 469 U.S. 1037, and *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 974 (2d Cir. 1980), cert. denied, 449 U.S. 481.

58. *Narell*, 872 F.2d at 911. For example, the court found that Freeman copied the reasons why the Jews emigrated to America as well as the hardships they encountered. Additionally, she copied details regarding the journey of Adolph Sutro, the distinguishing features of San Francisco at the time of the emigration, and the established character of the Jewish religious and social functions. *Id.*

59. *Id.* Examples include: "rekindle old memories," "staggering network," "river wound its way between muddy banks crawling with alligators," etc. *Id.*

60. *Narell*, 872 F.2d at 912.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Narell v. Freeman*, 872 F.2d 907, 913 (9th Cir. 1989).

65. M. LEAFFER, *supra* note 2, at 270.

which are protected.⁶⁶ Several tests have been established to aid courts in such a determination.⁶⁷ In *Narell*, the court adopted the test established in *Sid & Marty Krofft Television Productions v. McDonald's Corp.*,⁶⁸ which embodies two parts: an extrinsic test — the objective element, as well as an intrinsic test — the subjective element.⁶⁹

1. Extrinsic Test

In conducting the extrinsic test, or objective element, the trier of fact determines whether the works are substantially similar with regard to the general ideas embodied in the work.⁷⁰ The extrinsic test compares both works, to determine similarities in such areas as plot, theme, dialogue, mood, setting, pace, characters and sequence of events.⁷¹ The focus is not merely on basic plot ideas, which are usually not copyrightable, but rather, on specific elements of the two works that comprise the sequence of events and the relationships between the characters.⁷² Additional elements which can be considered include: “[t]he type of artwork involved, the materials used, the subject matter, and the setting for the subject . . . since it is an extrinsic test, analytic dissection and expert testimony are appropriate.”⁷³

In *Narell*, the court found that there was no substantial similarity between the two works, as, on the whole, they bore only a “slight resemblance” to each other.⁷⁴ *Narell*’s “Our City” was a factual work focusing on historical facts of a particular time period.⁷⁵ By contrast, Freeman’s “Illusions of Love” was a romance novel, with the central theme being a

66. The principle that there is no copyright protection for ideas in a work is codified in § 102(b) of the Copyright Act of 1976, which denies copyright protection to:

Any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. § 102(b).

67. See *supra* notes 64 to 93 and accompanying text for a more detailed analysis of the history of the substantial similarity test.

68. 562 F.2d 1157 (9th Cir. 1977).

69. *Id.* at 1164. In *Sid & Marty Krofft*, Sid & Marty Krofft, who owned the copyright to “H.R. Pufnstuf,” a childrens’ television show, brought a copyright infringement suit against McDonald’s. Sid & Marty Krofft alleged that McDonald’s had infringed upon “H.R. Pufnstuf” in the production of “McDonaldland” television commercials. *Id.* at 1160-61.

70. *Narell v. Freeman*, 872 F.2d 907, 912 (9th Cir. 1989).

71. *Id.* These elements are aspects of a work which, when identical in two works, show a high degree of similarity between the two works.

72. *Narell*, 872 F.2d at 912.

73. Sid & Marty Krofft v. McDonald’s Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).

74. *Narell*, 872 F.2d at 912.

75. *Id.*

love story.⁷⁶ Primary emphasis in "Illusions of Love" was placed upon the thoughts, feelings and actions of the characters.⁷⁷ Accordingly, the *Narell* court held that "[t]he fact that both books touch upon the movement of the Jews from Europe to San Francisco and the social relations of wealthy Jewish families in the Bay Area⁷⁸ is not enough to establish substantial similarity."⁷⁹

2. Intrinsic Test

Having found that the works were not substantially similar under the extrinsic test, the court applied the intrinsic, or subjective test.⁸⁰ This test is applied to determine whether the forms of expression of two works are substantially similar, depending on the response of an ordinary, reasonable reader.⁸¹ Neither expert testimony nor detailed dissection of the works is a proper basis for the intrinsic analysis.⁸² Rather, the trier of fact should rely on spontaneous initial reaction to the works.⁸³ To constitute infringement, the "total concept and feel" of the works must be substantially similar,⁸⁴ according to *Roth Greeting Cards v. United Card Co.* ("*Roth*").⁸⁵

In *Roth*, both the plaintiff and defendant were corporations that produced and distributed greeting cards.⁸⁶ Roth brought suit against United Card Company, which allegedly infringed upon the design of seven different greeting cards.⁸⁷ The district court ruled for Roth, but the appellate court reversed and remanded the case for further proceedings.⁸⁸ The appellate court held that the greeting cards subsequently produced by United were substantially similar because of the "remarkable resemblance" between the two works.⁸⁹

In *Narell*, however, the court found that the "total concept and feel" of the two works was completely different — one work being a fictional

76. *Id.*

77. *Id.* at 912.

78. The Bay Area is a term used to describe San Francisco and surrounding areas.

79. *Narell v. Freeman*, 872 F.2d 907, 912 (9th Cir. 1989).

80. *Id.* at 913.

81. *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985).

82. M. LEAFFER, *supra* note 2, at 273.

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

84. *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).

85. 429 F.2d 1106 (9th Cir. 1970).

86. *Id.* at 1107.

87. *Id.*

88. *Id.* at 1111.

89. *Id.* at 1107 and 1110.

romance novel and the other being a non-fictional historical account.⁹⁰ The court found that while Freeman may have incorporated some of the historical facts from "Our City" into her own novel, she neither used the material in the same manner, nor prominently featured such material.⁹¹ Thus, the court held that "because of the fundamental differences between the two works and the insubstantial nature of the copied passages, no reasonable reader could conclude that the works were substantially similar."⁹² Accordingly, summary judgment on the issue of substantial similarity was affirmed.⁹³

D. Fair Use Doctrine

Under certain circumstances, the fair use doctrine allows copying or adopting copyrighted material in a reasonable manner, without the consent or permission of the copyright owner.⁹⁴ This doctrine is the most common and important equitable defense to an action for copyright infringement.⁹⁵ While the doctrine has long been recognized in common law copyright cases,⁹⁶ it was not defined by statute until the Copyright Act of 1976.⁹⁷

Section 107 of the Copyright Act does not actually attempt to define the doctrine; it merely lists four factors that *may* be considered in evaluating whether or not a particular instance of copying falls under the doctrine. These four factors include:

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁹⁸

90. *Narell v. Freeman*, 872 F.2d 907, 913 (9th Cir. 1989).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. M. LEAFFER, *supra* note 2, at 294.

96. 3 M. NIMMER, *NIMMER ON COPYRIGHT* § 13.05, at 13-62.43 (1990). The doctrine was first articulated in 1841 in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841). In *Folsom*, the court identified several criteria to be used to determine if a fair use defense was appropriate. Interestingly, the criteria set forth in this case were the same factors listed by the Copyright Act of 1976. M. LEAFFER, *supra* note 2, at 295.

97. 17 U.S.C. § 107.

98. 17 U.S.C. § 107.

The wording of the Act implies that the list of four factors is meant to be illustrative, not exhaustive.⁹⁹ Thus, a court has the discretion to decide which factors should be weighed more heavily, and whether additional factors should be considered. Consequently, the fair use doctrine has been interpreted in an illogical and inconsistent manner.¹⁰⁰

The *Narell* court evaluated the infringement claim in light of the fair use doctrine in order to support their position that Freeman was not liable for copyright infringement.¹⁰¹ First, the court evaluated the purpose and character of the use.¹⁰² This first factor is similar to the preamble of the fair use doctrine,¹⁰³ in that it emphasizes the distinction between commercial¹⁰⁴ and non-profit or educational use.¹⁰⁵ This factor weighed strongly in favor of *Narell* because Freeman's use of the copied material was obviously commercial, and "commercial use of copyrighted material is presumptively unfair."¹⁰⁶ The doctrine favors those who use the copied material for education or non-profit purposes,¹⁰⁷ but this was not the case in *Narell*.

Secondly, the court considered the nature of the copyrighted work.¹⁰⁸ The policy underlying this second factor is to support the interest of the public and afford the public greater access to some kinds of works than others, such as scientific, biographical or informational works.¹⁰⁹ This is in contrast to works for purely entertainment or commercial purposes. The *Narell* court followed the rule that the scope of

99. M. LEAFFER, *supra* note 2, at 298. Consequently, the trier of fact may take into account other factors such as "lack of good faith . . . [and] industry custom or practice." *Id.*

100. For example, consider *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539 (1985). In that case, Justice O'Connor's majority opinion applies the fair use doctrine very differently from Justice Brennan's dissent. This demonstrates that different judges interpret the criteria differently, which leads to a lack of continuity in the results.

101. *Narell*, 872 F.2d at 913.

102. *Id.* at 913-14.

103. The preamble states, in pertinent part: "The fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107 (1990).

104. A commercial use is one which earns a profit.

105. M. LEAFFER, *supra* note 2, at 299.

106. *Narell*, 872 F.2d at 913, (quoting *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 449-51 (1984)). "If the intended use is for commercial gain, that likelihood of future harm may be presumed." *Id.*

107. This would include use in a classroom or other learning environment. For a good example, see *Sony Corporation of America v. Universal City Studios, Inc.* (the "Betamax case," 464 U.S. 417 (1984)). In that case, private non-commercial taping of "free" television programming for time shifting purposes was found to be a fair use.

108. *Narell v. Freeman*, 872 F.2d 907, 914 (9th Cir. 1989).

109. M. LEAFFER, *supra* note 2, at 301.

permissible fair use is greater with an informational work than a creative work.¹¹⁰ Thus, the court weighed the nature of the work factor slightly in Freeman's favor, but found Narell's "Our City" to contain enough creative expression that any use of it was not presumptively fair.¹¹¹

The court then considered the amount and substantiality of copied portions used.¹¹² This third factor "focuses on whether the defendant has taken more [of the plaintiff's work] than is necessary to satisfy the specific fair use purpose."¹¹³ To determine the amount and substantiality of portions used, an analysis very similar to the substantial similarity analysis is applied.¹¹⁴ Therefore, the court simply repeated its analysis of the substantial similarity test and determined that no substantial similarity exists between the two works.¹¹⁵ This factor strongly favored Freeman's position.¹¹⁶

Finally, the court considered the effect on the market, which is generally regarded by courts as the most important element of fair use, and gave it the most weight.¹¹⁷ The plaintiff bears the burden of proving that the defendant's alleged copyright infringement will have an adverse effect on the value or marketability of the plaintiff's work.¹¹⁸ The court found that this factor weighed significantly in favor of Freeman, as it could not be proven that Freeman's use of some portions of "Our City" would have any bearing on the future marketability of the work.¹¹⁹ It can be inferred that Narell believed that the use of portions of "Our City" in "Illusions of Love" might have an adverse effect on the future marketability of "Our City," however, the court felt that this proposition was unsubstantiated.¹²⁰ In fact, the court even found that the use of "Our City" in "Illusions of Love" might actually enhance the marketability and sales of

110. *Narell*, 872 F.2d at 914.

111. *Id.*

112. *Id.*

113. M. LEAFFER, *supra* note 2, at 302.

114. The key distinction is that the fair use defense only arises after infringement has been proven, whereas the substantial similarity analysis is used to actually prove infringement.

115. *Narell v. Freeman*, 872 F.2d 907, 914 (9th Cir. 1989).

116. *Id.*

117. *Id.* (quoting *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 566 (1985)).

118. *Id.* This is implied from the following statement of the court: "Given Freeman's commercial use of Narell's material, the likelihood of future harm may be presumed . . . the *copyright owner* [plaintiff] need only show that should the challenged use become widespread, it would adversely affect the potential market for the work." (emphasis added) *Id.*

119. *Narell v. Freeman*, 872 F.2d 907, 914 (9th Cir. 1989).

120. *Id.*

"Our City."¹²¹ Thus, the court weighed all four factors to find that the copied portions of Narell's work in Freeman's novel fell under the protection of the fair use doctrine.¹²²

VI. ANALYSIS

1. The Granting of Summary Judgment was Inappropriate

Granting summary judgment in *Narell* was an inappropriate method of resolving the dispute. Rather, the case should have been tried by a jury. Many Ninth Circuit decisions substantiate this position.¹²³ The leading case disfavoring summary judgment in copyright infringement actions is *Arnstein v. Porter*.¹²⁴ In *Arnstein*, the court held that it would limit summary judgment based on lack of similarity to obvious cases of similarity, such as where "Ravel's 'Bolero' or Shostakovitch's 'Fifth Symphony' were alleged to infringe 'When Irish Eyes Are Smiling.'"¹²⁵

In *Twentieth Century-Fox Film Corp. v. MCA, Inc.* ("*Twentieth Century Fox*"), the court held that summary judgment was inappropriate because reasonable minds could differ as to whether the television series "Battlestar Galactica" infringed on the motion picture *Star Wars*.¹²⁶ Specifically, the court held that "since substantial similarity is usually an extremely close question of fact, summary judgment has traditionally been disfavored in copyright litigation."¹²⁷ *Twentieth Century Fox* is analogous to *Narell*, in that both cases involve complex issues centered around the extent of similarity. In *Twentieth Century Fox*, the trier of fact had to determine whether two science fiction movies were similar.¹²⁸ It was a difficult task, as at first appearance the works seemed similar. But, whether they were *substantially* similar required a more in-depth analysis. In *Narell* both works are novels. Both works involve story lines about the immigration of Jews from Europe to California. However, to determine whether or not "Our City" and "Illusions of Love" are substantially similar would require a more detailed analysis. This intricate analysis should be conducted by a jury.

121. *Id.* "If an author of a novel used Narell's work and was honorable enough to acknowledge sources, such a use might *enhance* sales of 'Our City.'" *Id.* (emphasis added).

122. *Id.* at 915.

123. See *infra* notes 124 to 152 and accompanying text.

124. 154 F.2d 464 (2d Cir. 1946).

125. 3 M. NIMMER, NIMMER ON COPYRIGHT § 12.10, at 12-75, n.15.

126. *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1329 (9th Cir. 1983).

127. *Id.* at 1330 n.6.

128. *Id.* at 1328.

A similar view was espoused in *Frybarger v. International Business Machines Corp.* ("*Frybarger*").¹²⁹ In *Frybarger*, the court of appeals affirmed the district court's award of summary judgment.¹³⁰ However, it is evident from the holding that:

[S]ummary judgment on the issue of substantial similarity is only appropriate if, after viewing the evidence and drawing every inference in the light most favorable to the non moving party, the court concludes that no reasonable *jury* could find substantial similarity of both ideas and expression between the works at issue. (Emphasis added).¹³¹

In *Narell*, a reasonable juror might have found that substantial similarity existed because of the nature of the two works and the direct copying. Freeman's admissions of direct copying¹³² in her deposition directly establish that portions of "Our City" were reproduced verbatim in "Illusions of Love."¹³³ A juror could easily find these instances to support substantial similarity. Additionally, Narell's argument that Freeman copied protected expressive elements of "Our City" deserves closer attention from a jury. During argument at trial, Narell's counsel quoted lines from "The Ride of Paul Revere" to demonstrate that history can be recounted expressively.¹³⁴ The court agreed that the history recounted in the poem was expressive, and, consequently, that the direct copying of the lines of the poem would constitute infringement, if the original work held a valid copyright registration.¹³⁵ The court obviously felt that the expression of historical facts in "Our City" was not identical to that of "The Ride of Paul Revere."¹³⁶ However, a determination of whether historical facts are being described expressively or not constitutes a material issue of fact. Thus, this issue alone merits a jury trial in this case. Therefore, summary judgment was clearly inappropriate.¹³⁷

129. 812 F.2d 525 (9th Cir. 1987).

130. *Id.* at 527.

131. *Id.* at 528.

132. See *infra* note 154 (excerpt from Freeman's deposition).

133. *Narell v. Freeman*, 872 F.2d 907, 910 (9th Cir. 1989).

134. Narell's counsel quoted:

Listen, my children, and you shall hear,
Of the midnight ride of Paul Revere,
On the eighteenth of April, in Seventy-five;
Hardly a man is now alive
Who remembers that famous day and year.

Id. at 912 (quoting Longfellow, H.W. *The Landlord's Tale (Paul Revere's Ride)* in POEMS OF HENRY WADSWORTH LONGFELLOW 310 (1943)).

135. *Id.*

136. *Id.*

137. See *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984), which held that "Sub-

Several cases have implied that the substantial similarity test is better conducted by a jury than by the court. In *Baxter v. MCA*,¹³⁸ the plaintiff, Leslie Baxter, had composed a collection of seven songs that were intended to portray different emotions.¹³⁹ One of the songs was entitled "Joy," and was recorded and published by Capitol Records in 1954, on an album entitled "The Passions."¹⁴⁰ In 1982, John Williams, a successful composer and conductor of music, composed the theme song for the movie *E.T.*¹⁴¹ Baxter filed suit against Williams for copyright infringement, alleging that the theme from *E.T.* was largely copied from the song "Joy" to which Williams had access and knowledge.¹⁴² Although the district court granted summary judgment for Williams, the court of appeals reversed, holding that summary judgment was precluded in such a copyright action.¹⁴³ Specifically, the court emphasized that:

determinations of substantial similarity of expression are subtle and complex. No bright line rule exists as to what quantum of similarity is permitted before crossing [the line] into the realm of substantial similarity . . . [thus], the ear of the court must yield to the ears of *jurors* . . . [E]ven if a copied portion be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity. (emphasis added).¹⁴⁴

A more recent ninth circuit decision, *Levine v. McDonald's* ("*Levine*")¹⁴⁵ (decided after *Narell*) substantiates the position that cases such as *Narell* should be tried by a jury.¹⁴⁶ In *Levine*, the plaintiffs brought a copyright infringement action against McDonald's, alleging that McDonald's used Levine's song "Life Is a Rock" in a McDonald's commercial.¹⁴⁷ The court held that summary judgment should be denied because

stantial similarity is usually an extremely close issue of fact and summary judgment has been disfavored [in such a case]." See also *Worth v. Selchow & Righter Co.*, 827 F.2d 569, 571 (9th Cir. 1987), where the court maintained that "summary judgment is disfavored on the substantial similarity issue in copyright cases."

138. 812 F.2d 421 (9th Cir. 1987).

139. *Id.* at 422.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Baxter v. MCA*, 812 F.2d 421, 425 (9th Cir. 1987).

144. *Id.* at 424-25.

145. 735 F. Supp. 92 (S.D.N.Y. 1990).

146. Although the case is not a ninth circuit decision, it can be applied to *Narell* by analogy.

147. 735 F. Supp. at 93.

triable issues of fact existed.¹⁴⁸ Specifically, the court found that “a court must resolve all ambiguities and draw all reasonable inferences against the moving party.”¹⁴⁹ Similarly, in *Narell*, several triable issues of fact existed, such as whether Freeman copied enough of “Our City” to constitute substantial similarity. Because there were inherent ambiguities in *Narell*, a jury should have been entitled to resolve the dispute.

Therefore, summary judgment in a copyright infringement case is only appropriate if the court can conclude that no reasonable jury could find substantial similarity of both ideas and expression between the works at issue.¹⁵⁰ The court erred in making this conclusion in *Narell*. There are undeniably similarities between “Our City” and “Illusions of Love.” The question is whether the similarities are substantial. There were too many instances of direct copying and strong paraphrasing to conclusively determine that the two works were not substantially similar.¹⁵¹ This point is further exemplified by the wording of the majority opinion. The court stated: “Most of the phrases Freeman copied from *Narell* are commonly used expressions.”¹⁵² Most, but not all? The court’s failure to state conclusively, that the only portions of “Our City” which Freeman copied directly were ordinary expression, indicates a lack of certainty. With such an obvious lack of certainty, the court was wrong in granting summary judgment; rather, such a decision would have been better evaluated by a jury. A jury may have found that the two works were or were not substantially similar, but it is erroneous to conclude that *no* reasonable juror could find substantial similarity. It was fundamentally unfair to deny *Narell* her inherent right to a jury trial. The fact that the court continued to engage in an analysis of the fair use doctrine indicates that they were uncertain about whether there was no substantial similarity, and, thus, sought further support for their ruling.

2. The Court’s Analysis of Substantial Similarity was Misplaced

Courts have held that where there is direct evidence of copying copyright infringement is automatically found and the substantial similarity test is not required.¹⁵³ In this case, Freeman admitted in her deposition that she “took” portions of “Our City” and incorporated such

148. *Id.*

149. *Id.*

150. *Frybarger v. International Business Machines Corp.*, 812 F.2d 525, 528 (9th Cir. 1987).

151. *Narell*, 872 F.2d at 911.

152. *Id.*

153. *See infra* notes 155 to 168 and accompanying text.

portions into "Illusions of Love."¹⁵⁴ Thus, a *prima facie* case of infringement has been established in *Narell* by Freeman's own concessions; any further analysis is unnecessary. This proposition is strongly supported by case law.

In *Rural Telephone Service Co. v. Feist Publications, Inc.* ("Rural Telephone"),¹⁵⁵ a public utility providing telephone service brought a copyright action against a telephone directory publisher, alleging copying of Rural Telephone's "white pages."¹⁵⁶ In *Rural Telephone*, as in *Narell*, Feist Publications admitted in their deposition that they had copied the work of Rural Telephone.¹⁵⁷ The district court in *Rural Telephone*, accepting this admission as concrete evidence of copying, ruled in favor of Rural Telephone.¹⁵⁸ Thus, the *Rural Telephone* court held that: "the 'substantial similarity' test is used when there is no direct evidence of copying."¹⁵⁹ Because there was direct evidence of copying in *Rural Telephone*, we need not resort to an analysis of whether there was substantial similarity between the two directories."¹⁶⁰

Broderbund Software, Inc. v. Unison World, Inc. ("Broderbund")¹⁶¹ also supports this position. Broderbund Software, Inc., was the copyright holder and exclusive licensee of "The Print Shop," a computer

154. This excerpt was obtained from Freeman's deposition, taken on Sept. 11, 1987, at 37-39:

Q: Did some of the language [in "Illusions of Love"] on page 25 come from Ms. Narell's book?

A: Possibly, probably.

Q: [referring to page 28] Did some of the language on the top half of that page come from Ms. Narell's book?

A: Of course.

Q: And the bottom half of that page, did some of the language on the bottom half come from Ms. Narell's book?

A: Some of it, sure.

Q: Turning to page 34, did some of that language come from Ms. Narell's book?

A: Of course, yes, um-hum.

Q: And referring to the bottom paragraph on page 35 [that continues to the top of page 36], did that language come from Ms. Narell's book?

A: Yes.

Q: Is there any *other* language in your book that came from Ms. Narell's book?

A: Absolutely not.

Q: Those are the only passages?

A: That's correct.

155. 663 F. Supp. 214 (D.Kan. 1987).

156. *Id.* at 216.

157. *Id.* at 218.

158. *Id.*

159. *Rural Telephone Service Co. v. Feist Publications, Inc.*, 663 F. Supp. 214, 218 (D.Kan. 1987).

160. *Id.*

161. 648 F. Supp. 1127 (N.D.Cal. 1986).

software printing program.¹⁶² Unison World, Inc., marketed a similar software program called "Printmaster."¹⁶³ Broderbund sued Unison for infringement, alleging that "Printmaster" infringed Broderbund's copyright on "The Print Shop."¹⁶⁴ Broderbund argued that the overall appearance, structure and sequence of the "Printmaster" program were substantially similar to that of "Printshop."¹⁶⁵ The court held that the case was "exceptional" in that the plaintiff produced sufficient direct evidence of copying to establish substantial similarity and, in turn, infringement.¹⁶⁶ The court recognized that such direct evidence was enough to constitute a successful claim for copyright infringement, but nevertheless engaged in a substantial similarity analysis, merely "[i]n the interest of creating a comprehensive record."¹⁶⁷ It is not important that the court conducted a substantial similarity test, however, because it did not change the court's decision that infringement had occurred.¹⁶⁸ In contrast, the *Narell* court completely disregarded the fact that the direct evidence of copying proved infringement.¹⁶⁹ Freeman should have been found guilty of infringement based on this direct evidence; the substantial similarity test was unnecessary.¹⁷⁰

3. The Court Erred in Applying the Substantial Similarity Analysis

A different two step process for determining substantial similarity

162. *Id.* at 1129-30.

163. *Id.* at 1130.

164. *Id.* at 1129-30.

165. *Id.* at 1130.

166. *Broderbund Software, Inc. v. Unison World, Inc.*, 648 F. Supp. 1127, 1135 (N.D.Cal. 1986).

167. *Id.* at 1136.

168. *Id.*

169. This is evidenced by the fact that although the court conceded, based on Freeman's own admissions, that Freeman had copied portions of "Our City," the court still found no infringement. *Narell v. Freeman*, 872 F.2d 907, 910-11 (9th Cir. 1989).

170. See *M. Kramer Mfg. Co., Inc. v. Andrews*, 783 F.2d 421, 445 (4th Cir. 1986), where the court reversed a district court decision that ignored the direct evidence of copying presented at trial. After applying the substantial similarity test, the district court held that there was no infringement. In reversing the lower court decision, the court of appeals stated that "[t]he district court, however, lost sight of the ultimate issue — whether defendant copied the plaintiff's game. If there was clear proof of actual copying by defendant, that is the end of the case." *Id.* at 445. See also *Koontz v. Jaffarian*, 617 F. Supp. 1108, 1115 (E.D.Va. 1985), *aff'd*, 787 F.2d 906, 910 (4th Cir. 1986) (infringement was found where copying was admitted; the court did not engage in a substantial similarity analysis because the evidence presented was more than sufficient to support a finding of copyright infringement); and *Southwestern Bell Telephone Co. v. Nationwide Independent Directory Service, Inc.*, 371 F. Supp. 900, 906 (W.D.Ark. 1974) (evidence of copying was held to be sufficient for finding of infringement; the substantial similarity test was not applied).

has been proposed in other circuits.¹⁷¹ The first step is to decide whether there is a similarity of protectable material.¹⁷² The second step asks if those similarities are excessive.¹⁷³ Thus, in order for there to be substantial similarity, there must be an excessive appropriation of protectable expression.¹⁷⁴

The court in *Narell* held that “[b]ecause of the fundamental differences between the works and the insubstantial nature of the copied passages, no reasonable reader could conclude that the works [were] substantially similar.”¹⁷⁵ In *Narell*, there were elements both of verbatim¹⁷⁶ and of pattern similarity.¹⁷⁷ Thus, the substantial similarity of the two works should depend upon the quantity of what was copied as well as the importance of what was taken.¹⁷⁸ In this case there is a similarity of protected material, as Freeman admittedly copied several portions of “Our City.”¹⁷⁹ Moreover, the similarities between “Our City” and “Illusions of Love” are excessive.¹⁸⁰ Finally, the portions copied by Freeman were qualitatively significant, as they spanned the entire theme of *Narell*’s novel. Accordingly, a closer look at the two works and the case law governing such actions suggests that the court was incorrect in its analysis of substantial similarity and its conclusion that none existed.

The test for substantial similarity has undergone many radical changes since its inception.¹⁸¹ The original test for substantial similarity was the *abstractions test*, made famous by Judge Learned Hand in *Nichols v. Universal Pictures Corp.*¹⁸² The abstractions test was used to draw the line between idea and expression.¹⁸³ When it became apparent that the abstractions test was insufficient for determining substantial similarity,¹⁸⁴ the courts adopted an *ordinary observer* or *audience test*.¹⁸⁵ In

171. Interview with Lionel Sobel, Professor of Law at Loyola Law School in Los Angeles (Oct. 18, 1990).

172. Thus, if the only material copied is unprotected material, then there is no substantial similarity. *Id.*

173. *Id.*

174. *Id.*

175. *Narell v. Freeman*, 872 F.2d 907, 913 (9th Cir. 1989).

176. Where the second work exactly copied a little bit of the first work.

177. Where the second work embodies a lot of the first work, but not exactly.

178. Interview with Lionel Sobel, Professor of Law at Loyola Law School in Los Angeles (Oct. 23, 1990).

179. *Narell*, 872 F.2d at 910.

180. *See infra* note 198.

181. *See supra* note 8 for a brief definition of substantial similarity, and notes 64 to 93 and accompanying text.

182. 45 F.2d 119 (2d Cir. 1930).

183. M. LEAFFER, *supra* note 2, at 271.

184. Generally, the abstractions test is insufficient because it often does not clearly indicate

applying this test, the court neither hears expert testimony, nor dissects the two works.¹⁸⁶ Rather, the test is based solely on the subjective reactions of lay observers.¹⁸⁷ However, because there were also significant problems with this test,¹⁸⁸ courts adopted the bifurcated tests which are currently used in the substantial similarity analysis.¹⁸⁹ Although this two-part approach to the substantial similarity analysis originated in *Arnstein v. Porter*,¹⁹⁰ the current test is a modified version of the test proposed in *Sid & Marty Krofft v. McDonald's Corp.*¹⁹¹

The portions of "Our City" admittedly copied by Freeman encompass the entire theme of Narell's book: the immigration of the Jews from European ghettos to positions of prominent wealth and status in San Francisco.¹⁹² Many courts have held that the qualitative significance of the portions of plaintiff's work copied by the defendant controls, not merely the quantity.¹⁹³ Thus, the fact that portions of "Our City" are only included in three chapters of "Illusions of Love" is insignificant.

This position is supported by *Harper & Row Publishers v. Nation Enterprises* ("Harper & Row").¹⁹⁴ In *Harper & Row*, the Supreme Court held that copying may not be excused merely because it is insubstantial with respect to the infringing work.¹⁹⁵ As Judge Learned Hand cogently remarked, "no plagiarist can excuse the wrong by showing how much of

the difference between taking ideas and taking expression. The test is especially inadequate when applied to visual works, music, factual works and computer programs. M. LEAFFER, *supra* note 2, at 271-72.

185. *Id.* at 273.

186. *Id.*

187. *Id.*

188. M. LEAFFER, *supra* note 2, at 274, where the author discusses some problems known to exist when the court relies on this test. Examples include:

- (1) Expression of an author's work in a different medium often hides resemblances between the two works to an untrained eye.
- (2) The trier of fact may not distinguish between the copying of ideas and the copying of expression.
- (3) The trier of fact may fail to analyze properly whether a work was independently created.

189. The bifurcated tests are two-part analyses which first examine the works from an objective point of view and then from a subjective point of view. M. LEAFFER, *supra* note 2, at 274-76.

190. 154 F.2d 464 (2d Cir. 1946).

191. 562 F.2d 1157 (9th Cir. 1977). See *supra* notes 68 to 93 and accompanying text for a thorough discussion of how the *Narell* court applies the *Krofft* extrinsic/intrinsic test. The purpose of this section is to show how the test was misapplied.

192. *Narell*, 872 F.2d at 909.

193. Interview with Lionel Sobel, Professor of Law at Loyola Law School in Los Angeles (Oct. 23, 1990).

194. 471 U.S. 539 (1985). See *supra* notes 50 to 57 and accompanying text.

195. *Id.*

his work he did not pirate."¹⁹⁶ Moreover, when the expression of one author is qualitatively copied by another, a shift in genre does not excuse the copier from liability. Freeman cannot escape liability for infringement merely by reworking "Our City" into a romance novel. Several cases have affirmed this view that a change in medium of expression is no defense to infringement.¹⁹⁷

In addition to Freeman's use of the theme of "Our City," Freeman also closely paraphrased substantial portions of Narell's book.¹⁹⁸ The portions of "Our City" copied by Freeman were more than mere historical facts. Rather, these portions entered the realm of protected literary expression.¹⁹⁹ Since a plagiarist cannot escape liability by paraphrasing and rearranging another author's words,²⁰⁰ the court's analysis that there was no substantial similarity was misconstrued here.

Often elements of dissimilarity are sometimes actually evidence of

196. *Id.* at 565 (quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56, *cert. denied*, 298 U.S. 669 (1936)).

197. *See Horgan v. MacMillan, Inc.*, 789 F.2d 157 (2d Cir. 1986) (ballet infringed by still photographs); *King Features Syndicate v. Fleischer*, 299 F.2d 533 (2d Cir. 1924) (cartoon character infringed by toy doll); *Filmvideo Releasing Corp. v. Hastings*, 509 F. Supp. 60 (S.D.N.Y.), *aff'd* in part, *rev'd* in part, 668 F.2d 91 (2d Cir. 1981) (books infringed by movies).

198. The following demonstrates examples of such close paraphrasing:

"From petty shopkeepers they soon transformed themselves into department store magnates, international bankers, real estate developers," became "they elevated themselves from petty shopkeepers to department store magnates, from smalltime lenders to international bankers, from tentmakers to real estate developers;"

"The river wound its way between muddy banks crawling with alligators," became "the shallow river wound its way between muddy banks crawling with alligators;" "Marriages among the pioneer clans produced a staggering network of intricate interconnection," became "marriage among these pioneers produced a staggering network of family connections;"

"Freed from the ghettos by the French Revolution . . . but still barred from . . . owning land, subject to stringent regulations," became "Freed from the ghetto by Napoleon after the French Revolution . . . they were forbidden to own land . . . and were subjected to even more rigid regulations;"

"America already spelled Freedom," became "America was a word called Freedom;" "In spite of warnings from those who had found the voyage unbearable," became "this in spite of the warnings of those who said the ordeals of the voyage were beyond endurance;"

"Mosquitoes feasted on his flesh," became "mosquitoes ravished his flesh;"

"Tents, shanties, and corrugated steel shacks were crowded together . . . the beach was strewn with boxes, bales, trunks, suitcases and barrels of flour," became "tents, shanties and corrugated-iron shacks were crowded together . . . the beach was strewn with boxes, bales of cotton, barrels of sugar and sacks of flour and cornmeal."

All excerpts were taken from Narell's "Our City" and Freeman's "Illusions of Love." My special thanks to Daniel H. Bookin of Farella, Braun & Martel in San Francisco, attorney for Narell, whose assistance was invaluable in locating such passages. (Excerpts were obtained from Bookin's Appellant's Opening Brief at 15-16, *Narell v. Freeman*, 872 F.2d 907 (9th Cir. 1989) (No. 88-2491)).

199. *Id.*

200. *See M. NIMMER, NIMMER ON COPYRIGHT*, § 13.03[B][1][b] at 13-50 (1990).

copying. According to Nimmer: “[w]here the language used in two works is the same but for the inversion of certain words or the substitution of one word for another, it has been held that this crude effort to give the appearance of dissimilarity is itself evidence of copying.”²⁰¹

Freeman obviously paraphrased a great deal of “Our City.”²⁰² Her concerted effort to disguise the similarities demonstrates her awareness that she knew she was copying, and more importantly, that she knew she was wrong.

The famous case *Salinger v. Random House* (“*Salinger*”)²⁰³ exemplifies the point that fragmented paraphrasing can constitute copyright infringement. In *Salinger*, J.D. Salinger, a well known author, claimed that his unpublished memoirs were copied without permission by Random House, who published an article on Salinger’s life.²⁰⁴ The court of appeals reversed the district court’s holding for Random House.²⁰⁵ It found that copying of more than a minimal amount of expressive content constituted infringement.²⁰⁶ The court of appeals rejected the district court’s conclusion that Random House had merely employed cliches or word combinations that were so ordinary that they did not qualify for protection.²⁰⁷ Rather, it concluded that copyright protection should be afforded to an author’s analysis or interpretation of events and the way an author structures his materials, facts and choices of words.²⁰⁸ It is this structuring of facts, interpretation of events, and unique presentation of historical information for which Narell seeks protection. This is a question for a jury to decide at trial, not for a judge to decide on a motion for summary judgment.²⁰⁹

4. The Court Misconstrued the Fair Use Doctrine Defense

a. Purpose & Character of the Use

The application of the fair use doctrine as a defense for Freeman’s copying was inappropriate in *Narell*.²¹⁰ The first factor — the purpose

201. *Id.*

202. *See supra* note 198 for proof of direct evidence of copying by Freeman.

203. 811 F.2d 90 (2d Cir.), *cert. denied*, 108 S. Ct. 213 (1987).

204. *Id.*

205. *Id.*

206. *Id.* at 98.

207. *Id.*

208. *Salinger v. Random House*, 811 F.2d 90 (2d Cir.), *cert. denied*, 108 S. Ct. 213 (1987) (citing *Wainright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 95-96 (2d Cir. 1977)).

209. *See supra* notes 123 to 152 and accompanying text.

210. *See supra* notes 94 to 122 and accompanying text for a detailed account of the history

and character of the use — weighs strongly in Narell's favor.²¹¹ The purpose of the fair use doctrine is to promote research and scholarly work.²¹² Freeman's novel does not fall under the category of research or scholarly work.²¹³ Rather, Freeman's novel is a romance novel, written solely for entertainment, as well as profit, purposes.²¹⁴ Thus, Freeman's novel was undisputably commercial in nature. Because courts are not required to give sole consideration to the factors outlined in Section 107 of the Copyright Act,²¹⁵ many courts have considered aspects other than whether the use is a commercial or non-profit educational use.²¹⁶ One factor commonly considered is whether the use of the plaintiff's work was made in good faith.²¹⁷ Bad faith has been found where the defendant has engaged in copying without any effort to obtain permission from the copyright owner or to cite the copyright owner as the source of the material.²¹⁸

In *Marcus v. Rowley*,²¹⁹ a public school teacher, who was the owner of a registered copyright to a book on cake decorating, filed a suit for copyright infringement against a teacher who used some of the copyrighted material in preparing an instruction book for a class on cake decorating.²²⁰ The court found that defendant's work was used for the same purpose as plaintiff's and it was bad faith for the defendant to neglect to obtain permission for use of the material.²²¹ Specifically, the court held: "Because fair use presupposes that the defendant has acted fairly and in good faith, the propriety of the defendant's conduct should also be weighed in analyzing the purpose and character of the use."²²²

Similarly, Freeman's use of "Our City" was in bad faith. Freeman admittedly used Narell's work, without attempting to contact Narell to ask for permission. Moreover, Freeman failed to cite Narell as the

of the fair use doctrine, the factors of the doctrine, and the manner in which the court applied the doctrine in *Narell v. Freeman*.

211. *Narell v. Freeman*, 872 F.2d 907, 913 (9th Cir. 1989).

212. Interview with Lionel Sobel, Professor of Law at Loyola Law School in Los Angeles (Oct. 23, 1990).

213. 17 U.S.C. § 107. The preamble lists several examples of cases where the fair use defense should play a role. These examples include "criticism, comment, news reporting, teaching, scholarship or research." *Id.*

214. *Narell*, 872 F.2d at 914.

215. 17 U.S.C. § 107.

216. M. LEAFFER, *supra* note 2, at 300.

217. *Id.*

218. *Id.*

219. 695 F.2d 1171 (9th Cir. 1983).

220. *Id.* at 1173.

221. *Id.* at 1175-76.

222. *Id.*

source of the material, which would have been very easy for her to do. Furthermore, the court's opinion stated that: "If an author of a novel used Narell's work and was *honorable enough* to acknowledge sources, such a use might enhance sales of 'Our City.'" (emphasis added).²²³ Consequently, the decision in *Narell* implies that it is honorable to acknowledge sources used in the creation of a work.²²⁴ However, the court neglects to mention that it was dishonorable for Freeman to fail to mention Narell as a source for "Illusions of Love," even when she admitted that it was the only work she consulted in writing her novel.

b. *Nature of the Copyrighted Work*

The position that historical facts are not copyrightable is widely accepted.²²⁵ However, the position that the *original expression* of such an idea, fact, principle or discovery is protected by copyright law also has support.²²⁶ The *Narell* court found that Freeman had only copied facts and ordinary phrases from Narell, but not protected expression.²²⁷ However, a closer examination of the two works indicates that Freeman copied a substantial portion of expression, in addition to historical fact.²²⁸ Moreover, the court ignored the fact that "Our City" was not written as a purely historical novel, but rather, was "written in an anecdotal, narrative style."²²⁹ Therefore, although Freeman was entitled to appropriate the historical facts found in "Our City," she was not entitled to present Narell's unique expressions as her own.

In an analogous case, *Radji v. Khakbaz*,²³⁰ an Iranian newspaper translated and published excerpts of an autobiography of the Shah of Iran's ambassador to Great Britain.²³¹ The court held that the unique

223. *Narell v. Freeman*, 872 F.2d 907, 914 (9th Cir. 1989). The court mentioned this in reference to the fact that Freeman's use of "Our City" might actually foster the marketability of "Our City." *Id.*

224. *Id.*

225. Under § 101(b) of the Copyright Act of 1976, there is no copyright protection for an idea, concept, fact, principle or discovery. 17 U.S.C. § 101(b). See also *Mazer v. Stein*, 347 U.S. 201, 217-18 (1954), *Baker v. Selden*, 101 U.S. 99, 102-03 (1879), and 1 M. NIMMER, NIMMER ON COPYRIGHT § 2.03[d] (1980).

226. See *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 489 (9th Cir. 1984) (where the court held that historical facts and theories may be copied, as long as the defendant does not "bodily appropriate" the expression of the plaintiff), and *Rubin v. Boston Magazine Co.*, 645 F.2d 80, 82 (1981) (where the court held that there may be a valid copyright on an original form of expression of an idea, concept or discovery).

227. *Narell v. Freeman*, 872 F.2d 907, 912 (9th Cir. 1989).

228. See *supra* note 198.

229. *Narell*, 872 F.2d at 909.

230. 607 F. Supp. 1296 (D.D.C. 1985).

231. *Id.* at 1299.

expression of historical fact in the autobiography precluded a fair use defense.²³² The court stated:

To be sure, many entries in plaintiff's book contain factual and historical information which is not copyrightable, but the expression of that information is [copyrightable], particularly in a case such as this where the expression of those facts is highly anecdotal. Thus, while the defendants were free to recount historical and biographical facts described in plaintiff's book, . . . they could not [appropriate] plaintiff's expression.²³³

Radji is similar to the situation in *Narell* in that Freeman did not merely copy the factual information about the immigration of the Jews. Rather, she copied Narell's unique expression of those historical facts.²³⁴ *Radji* is only a district court opinion, so the *Narell* court was not obligated to follow the *Radji* court's ruling. However, because the situation in *Radji* is directly applicable to that in *Narell*, the court should have followed the logical reasoning found in *Radji*.

c. Amount & Substantiality of the Portion Used

The third factor in the fair use analysis is the amount and substantiality of the portion used in relation to the copyrighted work as a whole.²³⁵ In analyzing this factor, the *Narell* court found that because there was no substantial similarity, this factor favored Freeman.²³⁶ However, this conclusion was incorrect. The factor's unstated principle is that verbatim copying invariably exceeds the purpose of the use.²³⁷ Thus, because Freeman admittedly copied over three hundred words verbatim, the court was wrong to find fair use. In *Meeropol v. Nizer*,²³⁸ the court held that even small takings of a work can preclude a finding of fair use if the essence of the work was copied.²³⁹ In *Meeropol*, defendant's popular book on the Rosenberg trial used verbatim portions of twenty-eight copyrighted letters, for a total of 1,957 words.²⁴⁰ The court considered this to be substantial even though the section comprised less than one percent of defendant's total book.²⁴¹

232. *Id.* at 1301.

233. *Id.*

234. *See supra* note 198.

235. 17 U.S.C. § 107 (1990).

236. *Narell v. Freeman*, 872 F.2d 907, 914 (9th Cir. 1989).

237. M. LEAFFER, *supra* note 2, at 302.

238. 560 F.2d 1061 (2d Cir. 1977).

239. *Id.* at 1069.

240. *Id.* at 1070-71.

241. *Id.* at 1071. *See also* *Craft v. Kobler*, 667 F. Supp. 120 (S.D.N.Y. 1987), where the

d. *Effect on the Market*

The fourth factor to be considered in determining fair use — the effect on the market — has been characterized by case law as being the most important element.²⁴² This is primarily because “if the market for the copyright owner’s work is harmed, the incentives for creativity that the copyright monopoly is designed to encourage will not work.”²⁴³ The *Narell* court found that “the publication of ‘Illusions’ or books like it has not had, and is not likely to have, any effect on the value or marketability of ‘Our City.’”²⁴⁴ However, the court apparently did not consider other relevant consequences. For instance, *Narell* could have sold or licensed “Our City” to other authors, such as Freeman, who may have wished to write stories based on the theme of “Our City.”

Freeman admitted that she consulted *Narell*’s work in writing “*Illusions of Love*,” and that it was the only source she had used; hence, it is evident that there is a market for such historical narratives. Moreover, the fact that Freeman encompassed so much of the basis of “Our City” in “*Illusions of Love*,” limits the likelihood of another author seeking to license or buy the rights to “Our City.” Finally, Freeman’s unauthorized use of “Our City” may prevent *Narell* from trying to sell the rights of her novel to a different medium, such as a movie, paperback release, or a documentary film.²⁴⁵

The *Narell* court correctly found that Freeman’s use of “Our City” was commercial.²⁴⁶ However, the court incorrectly implied that *Narell* had the burden of proving that Freeman’s commercial use of “Our City” had an adverse effect on the market of “Our City.” Rather, such a burden of proof belonged to Freeman. Harm to potential markets for “Our City” should have been presumed by the court. Freeman failed to prove that potential markets would not be affected, and this factor weighs against a finding of fair use. In *Sony Corporation of America*,²⁴⁷ the

biographer of the musician Igor Stravinsky used excerpts from copyrighted material written by the composer Robert Craft. Even though the takings were only a small portion of Stravinsky’s biography, they were qualitatively too important to justify the fair use defense.

242. *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 566 (1985).

243. M. LEAFFER, *supra* note 2, at 303.

244. *Narell v. Freeman*, 872 F.2d 907, 914 (9th Cir. 1989).

245. See *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977) (where the court held that the fact that copyrighted letters had been out of print for over 20 years did not necessarily mean that they had no future market potential which could be injured) and *Craft v. Kobler*, 667 F. Supp. 120 (S.D.N.Y. 1987) (where the court found that the potential harm to the market was the same, despite the fact that the plaintiff’s work had been out of print for a number of years).

246. *Narell*, 872 F.2d at 914.

247. 464 U.S. 417 (1984).

Supreme Court maintained that immediate or great effect on a market was not required. The Court instead held:

What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed.²⁴⁸

Freeman failed to establish that there was no possible chance that the potential market for "Our City" would be unharmed and this supports Narell's position. Thus, the court misapplied the fair use doctrine analysis to incorrectly determine that Freeman's use of "Our City" in "Illusions of Love" was a fair use.

5. Should Historical Research be Copyrightable?

In *Narell* the court failed to address whether historical research can be copyrighted.²⁴⁹ This issue usually arises in cases where a second work is based upon facts uncovered in the creation of an earlier work.²⁵⁰ Generally, copyright protection has been denied to historical research, for the discovery of a *fact* is not an original work of authorship.²⁵¹ The rationale behind this rule is that historical research is merely the reporting of facts.²⁵² Since an historical researcher does not discover the information, he is not an "author" in a constitutional or statutory sense.²⁵³ Consequently, courts have continued to deny copyright protection to facts in histories, biographies, news accounts, and other nonfiction works.²⁵⁴ However, compelling arguments can be made to support the position that historical research *should* be copyrightable.²⁵⁵ There is a tension in the case law between protection of the labor and efforts of the researcher and the need to allow dissemination of historical knowledge.²⁵⁶ Thus, the law is not settled on this point.

A key example of this tension is found in *Miller v. Universal City*

248. *Id.* at 451 (emphasis in original).

249. This is presumably because Narell does not argue the issue. However, it is an issue which the court could, and should, have addressed.

250. For example, a movie based on a book.

251. M. LEAFFER, *supra* note 2, at 53 (quoting *Rubin v. Boston Magazine Co.*, 645 F.2d 80 (1st Cir. 1981)).

252. Interview with Lionel Sobel, Professor of Law at Loyola Law School in Los Angeles (Oct. 28, 1990).

253. *Id.*

254. Shipley and Hay, *Protecting Research: Copyright, Common-Law Alternatives, and Federal Preemption*, 63 N.C. L. REV. 125, 127 (1984).

255. *Id.* at 126 (emphasis added).

256. *Id.* at 128-29.

Studios, Inc. ("Miller").²⁵⁷ In *Miller*, the plaintiff had spent approximately 2,500 hours preparing a book entitled "83 Hours Till Dawn" about a notorious Georgia kidnapping whose victim was imprisoned in an underground coffin.²⁵⁸ The defendant, Universal City Studios, was sued for copyright infringement when it based a movie entirely on the subject of the book.²⁵⁹ The district court held for Miller, declaring itself in favor of the copyrightability of research.²⁶⁰ The court's rationale was primarily to reward the effort and ingenuity involved in discovering historical facts.²⁶¹ The Fifth Circuit Court of Appeals reversed, however, maintaining that since there was no appropriation of original expression there was no infringement.²⁶² The court ruled that "[t]o hold that research is copyrightable is no more or no less than to hold that the facts discovered as a result of research are entitled to copyright protection."²⁶³

The position that historical research should be copyrightable is further exemplified by the cases dealing with directories and compilations. Courts have granted protection to the research required to produce such items as telephone directories and indexes.²⁶⁴ In *Leon v. Pacific Telephone & Telegraph Co.*,²⁶⁵ the Ninth Circuit Court of Appeals found infringement where the defendants copied the plaintiff's telephone directory and merely rearranged the listings to be in numerical, rather than alphabetical order.²⁶⁶ By stressing the act of acquiring facts and the labor required to produce a directory, the court isolated research as the basis for copyright protection.²⁶⁷

Irena Narell presumably spent a great amount of time and effort in producing "Our City." Because the subject spanned an entire era, many themes and many individuals, her research on the history of Jewish immigration was obviously expansive. In fact, it is likely that Narell's research may have been more extensive than what would be required to compile a telephone directory. Thus, the court should have, at a minimum, addressed the issue of the copyrightability of historical research. To hold that Freeman had infringed upon Narell's copyright by appro-

257. 460 F. Supp. 984 (S.D.Fla. 1978).

258. *Id.* at 985.

259. *Id.*

260. *Id.* at 987-88. The trial court judge instructed the jury that, while facts cannot be copyrighted, an author's research of factual matters should be protected. *Id.* at 987.

261. *Id.* at 988.

262. *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1372 (5th Cir. 1981).

263. *Id.* at 1372.

264. SHIPLEY AND HAY, *supra* note 254, at 126 n.6.

265. 91 F.2d 484 (9th Cir. 1937).

266. *Id.* at 486-87.

267. *Id.*

priating her extensive research would make a substantial impact on the future of copyright law.

VII. CONCLUSION

The decision of *Narell v. Freeman* will have a substantial impact on future ninth circuit decisions involving copyright infringement. The far-reaching implications of the decision signify that future authors will be able to use substantial portions of other authors' works when drafting their own literary creations, but yet not be held liable for copyright infringement. This contravenes the fundamental purpose of copyright law, which is to prevent unfair appropriation of an author's creativity and expression.²⁶⁸ Moreover, such a ruling could thwart the desire of future authors to create literary works because authors may become unwilling to expend vast time and effort to research and produce a work which can be copied by someone else. Such a consequence would be very unfortunate, especially because one of the primary goals of copyright law is to encourage the production of creative works.

The competing goals of copyright law are very difficult to reconcile. On one hand, courts strive to encourage the creation of works. On the other hand, courts do not wish to limit the use of facts and ideas. The court in *Morrison v. Solomons*²⁶⁹ expressed this balance of policy best when it stated:

If the protectable scope of an author's writings is too narrowly defined he will be discouraged from further writing. If, however, the protectable scope of the original author's work is too broadly defined, creative work by other authors will be discouraged.²⁷⁰

Currently, copyright law attempts to accommodate these competing interests by protecting an author's expression, but not the underlying facts which are expressed.²⁷¹ This solution may not be ideal; perhaps another

268. Interview with Lionel Sobel, Professor of Law at Loyola Law School in Los Angeles (Oct. 28, 1990).

269. 494 F. Supp. 218 (S.D.N.Y. 1980).

270. *Id.* at 225.

271. Sometimes protection is even more limited. The doctrine of *Baker v. Selden* holds that where an idea can be expressed in only one way, then even the *expression* of that idea cannot be protected by copyright. An example is directions found on a package of picture hangers. There is basically only one way to describe how to hang a picture (i.e. mark the spot on the wall, hold the nail, etc.). Thus, a company who produces packaged picture hangers may not obtain copyright protection for the accompanying directions. Interview with Lionel Sobel, Professor of Law at Loyola Law School in Los Angeles (Aug. 28, 1990).

one should be established where an author may receive protection for his research, unique expression of historical facts or sequencing of events.

Nevertheless, the decision in *Narell v. Freeman* seems wrong, unless, of course, you are the Ninth Circuit Court of Appeals who believe that cheaters should prosper and that hard work can go unrewarded.

*Barbara Wendy Stearns**

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