

Revisiting Scènes à Faire

Abstract

Zahr K. Said, Charles I. Stone Professor of Law
University of Washington School of Law

This essay explores the operation and purposes of “scènes à faire”—a copyright limitation whose French label signifies that some elements are so indispensable in expressive works that they “*must be done*” and thus may not be monopolized by any single author. Although the doctrine sometimes overlaps or parallels with other limitations on the exclusive rights, its distinct role deserves clear and discrete recognition as such, as a recent resurgence in scholarly interest in it attests. The essay begins with a taxonomy for types of scènes à faire which illuminates overlaps with statutory and common law limitations on copyright and distinguishes among the numerous ways courts use scènes à faire to calibrate the scope of copyright protection. Building on this descriptive assessment, the essay then identifies a theory of “aesthetic indispensability” at the doctrine’s core and shifts into a more critical consideration of scènes à faire. From whose perspective, for instance, “*must*” a thing “*be done*”? Who gets to say when something is necessary, indispensable, or expected by audiences? By what measure does one evaluate the truth about claims of aesthetic indispensability? While aesthetic indispensability may depend on numerous factors, arguably none is more important than the audience’s expectations. Yet case law far more frequently focuses on authors over audiences, and particular privileged perspectives rather than a work’s actual appeal or reception. The case law sometimes offers evidence of dominant viewpoints that opine about art, identity, and the world, in discernibly sexist or racist fashion. Numerous scènes à faire cases, for instance, implicate cultural or gendered stereotypes and thus draw legal lines around what “belongs” or can be expected in art and in life versus what supposedly doesn’t belong or doesn’t fit “our” cultural framework. Very little scholarship to date has considered this set of questions at the intersection of scènes à faire, identity and the audience, though the essay builds on work by Jasmine Abdel-Khalik on scènes à faire and racial stereotyping. By exploring scènes à faire from both descriptive and critical perspectives, the essay seeks to clarify the way the work the doctrine has done, can do, and indeed, must do, in copyright litigation. It underscores that courts should pay particular attention to audience interests, and it aims to draw attention to the perspectives embedded in or omitted from the doctrine, which become more apparent when scènes à faire are considered through a critical lens.