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2016

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Eva Subotnik

*St. John's University School of Law*

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## The Author Was Not an Author: The Copyright Interests of Photographic Subjects from Wilde to Garcia\*

Eva E. Subotnik\*\*

### INTRODUCTION

Toward the end of his dissent in the Ninth Circuit's en banc opinion in *Garcia v. Google*, Judge Alex Kozinski remarked that "[w]hen modern works, such as films or plays, are produced, contributors will often create separate, copyrightable works as part of the process."<sup>1</sup> Judge Kozinski's characterization of plays (or even films) as "modern works" opens the door to an examination of that claim with respect to another genre of "modern work[]": the photograph.

As I will discuss, Judge Kozinski's claim has not been true of the allocation of rights within that medium. It is therefore surprising that the majority opinion in *Garcia*<sup>2</sup> did not cite the Supreme Court's opinion in *Burrow-Giles Lithographic Co. v. Sarony*.<sup>3</sup> For, as the Ninth Circuit itself had recognized on an earlier occasion, that famous case would seem to be a logical and important precedent for the proposition that, as among multiple potential contributors to an overarching fixed visual work, there is a legally relevant hierarchy.<sup>4</sup> Relatedly, *Burrow-Giles* would seem to stand for the principle that, unlike the differentiable layers of an onion, in many instances there simply are no micro-authored subparts of the whole to which copyright attaches.

### I. NAPOLEON SARONY'S PHOTOGRAPHIC SUBJECT

In *Burrow-Giles*, the great author Oscar Wilde was photographed by the great

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\* This Essay is based on a talk that was given on October 2, 2015, at the Kernochan Center Annual Symposium at Columbia Law School.

\*\* Associate Professor of Law, St. John's University School of Law. Many thanks to June Besek, Jay Dougherty, Jane Ginsburg, Robert Kasunic, Jennifer Rothman, Zahr Said, and Kevin Reilly of the National Archives at New York City.

1. *Garcia v. Google, Inc.*, 786 F.3d 733, 753 (9th Cir. 2015) (en banc) (Kozinski, J., dissenting).
2. *Id.* at 736 (majority opinion). The earlier panel dissent did refer to the *Burrow-Giles* case numerous times. See 766 F.3d 929, 942–43 (9th Cir. 2014) (Smith, J., dissenting).
3. 111 U.S. 53 (1884).
4. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232–33 (9th Cir. 2000). *But see* Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 252 (2001) (arguing that, in *Aalmuhammed*, "the Ninth Circuit seriously misinterpreted *Burrow-Giles* when it suggested that this case attempted to distinguish between authorial and non-authorial contributions to a concededly copyrightable work").

photographer Napoleon Sarony.<sup>5</sup> Besides Wilde and Sarony, it has now been presumed, in multiple sources, that there was at least a third possible party involved in the photograph's creation—Sarony's "cameraman," Benjamin Richardson, who actually operated the camera.<sup>6</sup> Sarony later brought a copyright infringement suit against a lithographic company for its copying of the image.<sup>7</sup> The Supreme Court was forced to confront the authorship of the photograph. When all was said and done, we had: an author who was not *an Author* of the photograph; a cameraman who was also not *an Author* of the photograph; and a photographer who was *the Author* of the photograph.<sup>8</sup>



**The Oscar Wilde, No. 18 Photograph  
Copyright 1882, by N. Sarony  
Courtesy of the Library of Congress**

This division of labor, and concomitant allocation of rights, is largely due to the Court's focus on Sarony's pre-shutter activities in posing Wilde "harmonious[ly]"

5. 111 U.S. at 54.

6. See JANE M. GAINES, *CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW* 72 (1991); Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 434–35 (2004); Eva E. Subotnik, *Originality Proxies: Toward a Theory of Copyright and Creativity*, 76 BROOK. L. REV. 1487, 1498 n.44 (2011).

7. *Burrow-Giles*, 111 U.S. at 54.

8. *Id.* at 60 ("These findings, we think, show this photograph to be an original work of art, the product of plaintiff[ ] [Napoleon Sarony's] intellectual invention, of which plaintiff is the author . . .").

and the like.<sup>9</sup> But, of course, any contribution that Wilde himself made through the dedication of his facial expressions or body language would also have been pre-shutter. And we do not typically call Wilde, or those similarly situated, photographic “objects” but subjects.

So, was Wilde a moldable piece of clay in Sarony’s hands, or did he contribute more than that? Or as Jane Gaines asked in her treatment of the case, “Why did the photographer, rather than the celebrity subject, emerge as the creator of the image?”<sup>10</sup> It may be too late in the day to imagine the Court deeming Wilde *the* author of the photograph, but what about *an* author? Christine Haight Farley gestured in such a direction in suggesting that

it is difficult to imagine someone like Oscar Wilde, the self-proclaimed aesthete, who was so careful and deliberate in the construction of his celebrity persona, freely submitting to the whims of Napoleon Sarony. Specifically, his trademark look with his head resting on his hand cannot be said to owe its origin to Sarony.<sup>11</sup>

Now, the fact that Wilde’s look may not have “owe[d] its origin to Sarony” is arguably a different proposition from the claim that Wilde himself contributed protectable authorship to the image. After all, the same absence of origin in Sarony would also have been true of the material objects seen within the frame, which Sarony likely did not craft or manufacture himself. Still, the humanity and personality of Wilde could obviously be offered up to distinguish his contribution from that of the objects.

It is not surprising, however, that the possibility of Wilde as an author or co-author of the photograph did not merit any significant comment in the litigation.<sup>12</sup> Sarony certainly had no reason to argue that possibility. Additionally, the Burrow-Giles Lithographic Co. did not defend by stating that Wilde was the rightful author or a co-author of the photograph—that would have just meant rights clearance with someone else.<sup>13</sup> The closest the lithographic company came to such a stance was in arguing that the value of the photograph was due to Wilde’s fame:

9. The Court accepted the lower court’s finding that the Oscar Wilde, No. 18 photograph was a useful, new, harmonious, characteristic, and graceful picture, and that plaintiff made the same . . . entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.

*Id.*; accord GAINES, *supra* note 6, at 67; Farley, *supra* note 6, at 427.

10. GAINES, *supra* note 6, at 73, 45 (“Shouldn’t the subject portrayed have property in the one thing he indisputably owns, that is, property in himself?”).

11. Farley, *supra* note 6, at 433; *see also* LaFrance, *supra* note 4, at 252 (“[N]othing in the [Burrow-Giles] opinion forecloses the possibility that Oscar Wilde was a joint author.”).

12. *See* Douglas v. Stokes, 149 S.W. 849, 849 (Ky. 1912) (commenting that “[n]o question was made in [Burrow-Giles] as to the rights of the person whose photograph was taken”).

13. *See* Transcript of Record at 9–11, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) (No. 1071) (setting out the answer and defenses to be tried in the Circuit Court for the Southern District of New York).

It is perfectly clear that the object of such photographs is merely to have a large public sale. This is accomplished not by the accessories of the pose of the party photographed, but by the greater or less fame or notoriety which the subject of the photograph has acquired. Place a common laborer, unknown to fame, in the position in which we see Oscar Wilde herein, with all accessories, can there be any doubt but that such a photograph would be unsaleable? The merit of such photographs lies beyond the so-called invention of the photographer; it lies in the personal and facial qualities of the person represented.<sup>14</sup>

Through this sleight of hand, the Burrow-Giles Lithographic Co. sought to deny Sarony's authorial contributions without fully attributing any such contributions to another human being.<sup>15</sup>

At the end of the day, perhaps the Supreme Court's failure to engage with Wilde's possible authorial contributions is due to the simplest and most mundane of reasons. While easily overlooked in the sweep of the Court's elegant opinion, Sarony and Wilde had a contract in place.<sup>16</sup> According to Sarony's complaint:

[Sarony] made an agreement with one Oscar Wilde whereby the said Wilde, for good and valuable consideration paid and to be paid to him by [Sarony], sold to [Sarony] his, said Wilde's, portrait, and granted to [Sarony] the sole and exclusive right, privilege, and authority, so far as he could confer the same, to make, publish, sell, and dispose of portraits of him, said Wilde, in the United States; and that under and by virtue of said agreement [Sarony] made, invented, and designed a certain photograph and the negative thereof of and from him, the said Wilde . . . .<sup>17</sup>

## II. BENJAMIN FALK'S PHOTOGRAPHIC SUBJECTS

The idea of a photographic subject as a possible "author," however, has subsequently reared its head from time to time. A number of early follow-on cases to *Burrow-Giles* were brought by one of Sarony's contemporaries, Benjamin Falk. At least three of Falk's cases raised the possibility of authorial contributions by photographic subjects.

One case, *Falk v. Brett Lithographing Co.*, involved the copyright in a photograph of a mother and child, with the child's finger in the mother's mouth:<sup>18</sup>

14. Brief of Plaintiff in Error at 14, *Burrow-Giles*, 111 U.S. 53 (1884) (No. 1071).

15. *Id.* at 8 (arguing that, at most, "the true author is the sun—not the photographer").

16. *Burrow-Giles*, 111 U.S. at 54 (noting the lower court's reference to Sarony's "agreement with Oscar Wilde") (internal quotation marks omitted).

17. See Transcript of Record at 3–4, 6, *Burrow-Giles*, 111 U.S. 53 (1884) (No. 1071) (setting out the complaint in the Circuit Court for the Southern District of New York).

18. 48 F. 678 (C.C.S.D.N.Y. 1891).



**Photograph of Josie Sadler and Her Child**  
Copyright 1888, by B.J. Falk  
Courtesy of the Library of Congress

The court acknowledged that less posing artistry was done here than by Sarony. “The chief difference between that case and this . . . is that the artist did not do so much in preparing the subjects here as was done there.”<sup>19</sup> The reason is that Falk presumably exerted less control over the child’s decision to “put its finger in her mouth” than Sarony had exerted over Wilde.<sup>20</sup> Nevertheless, Falk had put the subjects into position “according to his judgment” and had used his artistry and professional eye to capture just that pose.<sup>21</sup> Said the court: “He is, and no one else can be, the author of this.”<sup>22</sup>

Another case, *Falk v. Donaldson*, involved an alleged infringement of Falk’s photograph of the famed actress Julia Marlowe.<sup>23</sup> This, I believe, is the relevant photograph:<sup>24</sup>

19. *Id.* at 679.

20. The court’s use of pronouns here is confusing. *See id.* (“This suit is brought upon a copyright of a photograph of Josie Sadler and her child, with the child’s finger in *her* mouth . . .”) (emphasis added). Interestingly, while some commentators have assumed otherwise, *see, e.g.*, BENJAMIN F. BURNHAM, *LEADING IN LAW AND CURIOUS IN COURT* § 993, at 769 (1896) (“[T]he principal ‘detail’ in the photograph of Josie Sadler and her child was the pose of the baby’s finger in its mouth.”); Farley, *supra* note 6, at 441 (“Actually, Falk did as much as Sarony, but the court seems unable to avoid giving credit to the baby for the thumb-sucking motif.”), the photographic evidence I have located—reflected in the image displayed above—indicates that the “mouth” belongs to the mother not the child. Whether a small child’s decision to place a finger in its mother’s mouth, rather than in its own mouth, reflects less autonomy by the child and therefore more input by the photographer could, of course, be debated. (The complaint identifies the photograph at issue as “Photograph No. 1 of Josie Sadler and Child by B.J. Falk, N.Y.,” which was registered in the summer of 1888. Bill of Complaint at ¶¶ 1–2, *Falk v. Brett Lithographing Co.* (C.C.S.D.N.Y. filed Jan. 9, 1890). I was not able, however, to obtain the actual registered photograph to confirm my analysis. Nor is the photograph still in the case file.)

21. *Brett Lithographing Co.*, 48 F. at 679.

22. *Id.*

23. 57 F. 32 (C.C.S.D.N.Y. 1893).

24. The court variously describes the photograph as depicting Marlowe from a “side view,” with her “arms . . . raised,” *id.* at 33, and it refers to “[t]he angle of the head, the clasping of the arms, [and] the interlaced fingers,” *id.* at 36. In addition, the complaint specifically identifies the photograph at issue as “Cabinet Photograph No. 22 of Julia Marlowe by B.J. Falk New York,” which was registered in early 1888. Bill of Complaint at ¶¶ 1–2, *Falk v. Donaldson* (C.C.S.D.N.Y. filed Dec. 15, 1891). The year “1888” and the number “22” are clearly visible on the image. (I was not able, however, to obtain the actual registered photograph to confirm my analysis. Nor is the photograph still in the case file.)



**Photograph of Julia Marlowe**  
**Copyright 1888, by B.J. Falk**  
**Courtesy of the Cabinet Card Gallery**



The facts were as follows. Marlowe had come to Falk's studio, bringing with her a number of costumes. Falk then photographed her posing as the different characters she played on stage, including Parthenia from the play *Ingomar, The Barbarian*.<sup>25</sup> Falk testified that he had "tried to produce an ideal portrait of the Greek maiden of the play," including her "simplicity, innocence, and courage," and had "secured the expression therein shown."<sup>26</sup> Falk further testified about his self-proclaimed processes "to make the subject so forget his surroundings as to mentally assume the part or character to be represented in the picture" and about "the arrangement of curtains, screens, and headlights, so as to bring out expression and character."<sup>27</sup>

This time, the defendants did defend with the claim that Falk was a "mere mechanic, and that it is absurd to suppose that complainant could have suggested to a trained actress like Miss Marlowe either costume, facial expression, or pose."<sup>28</sup> Indeed, Marlowe had been spotted elsewhere in the exact same pose and costume.<sup>29</sup> The court was willing to entertain the possibility of the subject's authorial contributions, and it admitted openly the complexities involved. It said that "[a]n examination of the photograph shows that it is the work of an artist. The question is whether the artist was Miss Marlowe, or complainant. How far the artistic contributions are to be attributed to the talent of Miss Marlowe, it is impossible to say."<sup>30</sup>

Nevertheless, the court sided with Falk. It stated, first, that Falk "was an artist before he became a photographer"<sup>31</sup> and that his contributions to the finished result had not been denied. More particularly, the court noted the pose of Marlowe with a side view. It concluded that the fact that she could not have determined by herself just how far to turn her body "so that the lights and shadows might best reveal the beauties of face and figure" was evidence that the pose was the work of the photographer.<sup>32</sup>

The court also appeared to rely upon the Supreme Court's instincts. "It does not seem any more absurd that Falk should have posed Miss Marlowe than that Sarony should have posed Oscar Wilde," said the court.<sup>33</sup> Indeed, a competing photograph of Marlowe in the same dress and same side view only underscored that in Falk's photo, she was much more than just "a pretty woman . . . standing for her picture"

25. *Donaldson*, 57 F. at 33; see FRIEDRICH HALM, *INGOMAR, THE BARBARIAN* (Maria Lovell trans., Walter H. Baker & Co. 1896) (1842). The popular play appears to be the source for the lines: "What love is, if thou wouldst be taught, / Thy heart must teach alone, — / Two souls with but a single thought, / Two hearts that beat as one. . . ." *Id.* at 31.

26. *Donaldson*, 57 F. at 33 (internal quotation marks omitted).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*; cf. Walter Benjamin, *Little History of Photography*, in *THE WORK OF ART IN THE AGE OF ITS TECHNOLOGICAL REPRODUCIBILITY AND OTHER WRITINGS ON MEDIA* 274, 281 (Michael W. Jennings et al. eds., Edmund Jephcott et al. trans., Belknap Press of Harvard Univ. Press 2008) (noting that many mid-nineteenth-century professional photographers had initially been portrait miniaturists).

32. *Donaldson*, 57 F. at 33.

33. *Id.* at 34.

but rather she had “lost her personality in the character she ha[d] assumed, as interpreted in the pose chosen by” Falk.<sup>34</sup>

In the third case, *Press Publishing Co. v. Falk*, Falk also prevailed, although this time with more potential bruising.<sup>35</sup> Falk had photographed a well-known actress who performed under the name Marie Jansen.<sup>36</sup> The facts were complicated but, in brief, the *New York World* had published one of Falk’s photographs of Jansen on her authority, and the question arose as to whether she was entitled to authorize the publication.<sup>37</sup> In order to resolve the dispute, however, the court considered not the respective artistic contributions by the photographer and subject,<sup>38</sup> but the relevant customs that operated as a default:

When a person has a negative taken and photographs made, for pay, in the usual course, the work is done for the person so procuring it to be done, and the negative, so far as it is a picture, or capable of producing pictures, of that person, and all photographs so made from it, belong to that person; and neither the artist nor any one else has any right to make pictures from the negative, or to copy the photographs, if not otherwise published, for any one else.<sup>39</sup>

The court distinguished that context from the one in which

a person submits himself or herself as a public character, to a photographer, for the taking of a negative, and the making of photographs therefrom for the photographer[. In this latter context], the negative, and the right to make photographs from it, belong to [the photographer]. He is the author and proprietor of the photograph, and may perfect the exclusive right to make copies by copyright.<sup>40</sup>

Interestingly, in addition to the mere carving out of the former category, the court phrased the possibility that a photographic subject might possess copyright interests in a photograph much more generously than in the past. It stated: “That she was the subject of the picture would not, alone, make it hers. The right to it would depend upon for whom the work was done . . . .”<sup>41</sup> On these facts, the court found that Jansen had not commissioned the photograph; rather, “the evidence

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34. *Id.* As Gaines insightfully points out, there are multiple layers of potential artistry at work here that the court completely glosses over: “If the photographer emerges here as author with such ease, it may be because of the irony that the personhood of the photographic subject is made invisible by the artistry of the actor who convincingly portrays a character.” GAINES, *supra* note 6, at 76; *accord* Farley, *supra* note 6, at 433.

35. 59 F. 324 (C.C.S.D.N.Y. 1894).

36. *Id.* at 324.

37. *Id.* Particularly troubling for Falk was that the publication did not include a copyright notice, a formality required at the time for the preservation of rights.

38. This may be because the case at hand was a suit in equity brought by the *New York World* to restrain the infringement suit that Falk had brought at law for various forms of relief. *Id.* (“Obviously, no question arises here as to the legality of the copyright, or as to any defense which the [*New York World*] could make at law.”).

39. *Id.* at 325 (citing *Pollard v. Photographic Co.*, (1888) 40 Ch.D. 345 (Eng.); *Moore v. Rugg*, 46 N.W. 141 (Minn. 1890)).

40. *Id.* at 325–26 (citing, among other cases, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884)).

41. *Id.* at 326.

shows that what Mr. Falk did was done for himself,” and he therefore owned the copyright.<sup>42</sup>

### III. TWENTIETH-CENTURY PHOTOGRAPHIC SUBJECTS

For a time, the notion that photographic subjects (and others) might possess copyright interests gained traction. This usually occurred, as foreshadowed by *Press Publishing Co.*, through the lens of what might be conceptualized as nascent work-for-hire principles,<sup>43</sup> which the 1909 Copyright Act had codified but not fleshed out.<sup>44</sup> The analysis had less to do with authorship than ownership.<sup>45</sup> For example, in *Lumiere v. Pathé Exchange, Inc.*, yet another case involving an actress as photographic subject, the court flatly stated the rule that “[w]hoever employs a photographer to take his picture for pay is entitled to the copyright as against the photographer, but a photographer who takes a picture for his own benefit and gratuitously is entitled to the copyright as against the sitter.”<sup>46</sup> A number of state courts also invoked these principles where it was clearly the privacy interests of the sitter or the sitter’s family members that were really at stake.<sup>47</sup>

In general, however, this line of cases did not discuss the proportional *authorial* contributions made by photographer and subject;<sup>48</sup> in other words, the cases suggested the existence of a single work of authorship. Moreover, with the advent of the 1976 Copyright Act work-for-hire provisions, the opportunities for photographic subjects to claim initial copyright ownership over photographs—particularly portrait photographs—were significantly scaled back.<sup>49</sup>

42. *Id.*

43. See, e.g., *Lumiere v. Robertson-Cole Distrib. Corp.*, 280 F. 550, 552–53 (2d Cir. 1922); *Altman v. New Haven Union Co.*, 254 F. 113, 118 (D. Conn. 1918). I say “nascent” because, as the Fifth Circuit pointed out, “[t]hese early cases presumed that the copyrights were assigned to the patron under the commission contract; there was nothing in them about ‘work for hire.’” *Easter Seal Soc’y for Crippled Children & Adults of La., Inc. v. Playboy Enters.*, 815 F.2d 323, 325 (5th Cir. 1987).

44. See 17 U.S.C. § 26 (1976 ed.), *repealed* by the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976); see also Michael B. Landau, “*Works Made For Hire*” after Community For Creative Non-Violence v. Reid: *The Need for Statutory Reform and the Importance of Contract*, 9 CARDOZO ARTS & ENT. L.J. 107, 110–14 (1990) (discussing the work for hire doctrine under the 1909 Copyright Act); R. Scott Miller, Jr., *Photography and the Work-For-Hire Doctrine*, 1 TEX. WESLEYAN L. REV. 81, 85–87 (1994) (discussing the treatment of photography authorship and ownership under the 1909 Copyright Act).

45. Cf. Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455, 487 (noting this distinction in discussing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903)).

46. 275 F. 428 (2d Cir. 1921).

47. See, e.g., *Metter v. L.A. Exam’r*, 95 P.2d 491, 496 (Cal. Dist. Ct. App. 1939); *Douglas v. Stokes*, 149 S.W. 849, 850 (Ky. 1912); cf. *Prince Albert v. Strange*, 1 McN. & G. 23, 43 (1849), cited in Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 202 (1890).

48. But see *Press Publ’g Co. v. Falk*, 59 F. 324, 326 (C.C.S.D.N.Y. 1894) (assuming, for the sake of argument, that Marie Jansen, the photographic subject, maintained some equitable interest in the copyright).

49. See 17 U.S.C. § 101(2) (2016) (omitting photographs as one of the nine “specially ordered or commissioned” works that may be designated works made for hire); see also Miller, *supra* note 44, at 102–03 (discussing legislative history of “specially ordered or commissioned” works as it pertains to the exclusion of photographic portraits); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON

Finally, in a more recent case, *Olan Mills, Inc. v. Eckerd Drug of Texas*, Eckerd was accused of routinely making copies of professional portrait photos.<sup>50</sup> It defended its actions by arguing, in part, “that subjects of portrait photographs are joint authors and thus co-owners of the copyright.”<sup>51</sup> Eckerd’s attempted invocation of co-authorship status on the part of the photographic subjects was understandable as a defense, since the subjects were presumably the ones who had authorized the copies to be made (which could be done more cheaply or conveniently through Eckerd). The court acknowledged that sometimes many contributors join forces to create a single work. But it said that “[s]uch is not the case . . . when an individual sits for a portrait photograph. The simple fact that an individual brings his own image to the studio is not enough to give that person a protectable property right in the portrait.”<sup>52</sup>

Indeed, except for a line of cases that primarily focused on commissioning status and payment,<sup>53</sup> we have instead entrenched rhetoric that paints the photographer as a quintessential Romantic author.<sup>54</sup> Certainly Oprah Winfrey failed in her quest to “claim authorship of [herself], her facial expressions, [or] her attire”; rather, the professional live-event photographers who had photographed her were “the sole authors.”<sup>55</sup> Judge Lewis Kaplan even worked into his well-known framework for evaluating photographs a form of originality grounded in the photographer’s “creation of the subject,” which can apparently apply to the posing of people and puppies alike.<sup>56</sup>

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COPYRIGHT § 5.03[B][2][c] n.155 (2015) (same).

50. No. CA3-88-0333, 1989 WL 90605 (N.D. Tex. Apr. 20, 1989); *see also* *Olan Mills, Inc. v. Eckerd Drug of Texas, Inc.*, No. CA3-88-0333, 1988 WL 161314 (N.D. Tex. Dec. 14, 1988).

51. *Olan Mills, Inc. v. Eckerd Drug of Texas, Inc.*, No. CA3-88-0333, 1989 WL 90605 (N.D. Tex. Apr. 20, 1989).

52. *Id.* at \*1 (“The court finds no basis in law, or in facts of the summary judgment record, to conclude that the subject of a portrait is a co-creator of the photograph.”); *see also* *Olan Mills, Inc. v. Eckerd Drug of Texas, Inc.*, No. CA3-88-0333, 1988 WL 161314, at \*2 (N.D. Tex. Dec. 14, 1988) (“Eckerd would seem to suggest that one becomes a co-creator of a portrait merely because he is the subject of a portrait. The court concedes that, unless a particular person sits before a camera, no photographic portrait can be made of him. The court is not convinced that such an interaction between photographer and subject rises to the level of a joint work.”); Jaszi, *supra* note 45, at 480 n.97 (“Thus, the ‘authorship’ concept is not infinitely expandable, at least where its expansion impinges on the legal independence of the ‘work.’” (citing *Olan Mills, Inc. v. Eckerd Drug of Texas, Inc.*, No. CA3-88-0333, 1989 WL 90605 (N.D. Tex. Apr. 20, 1989))).

53. *See supra* notes 35–47 and accompanying text.

54. *See* Jaszi, *supra* note 45, at 481; *cf.* Joan Infarinato, Note, *Copyright Protection for Short-Lived Works of Art*, 51 *FORDHAM L. REV.* 90, 123–24 (1982) (noting that “[p]hotographers, because they have long been covered by copyright, are among the best-protected artists in the marketplace” and that “[g]enerally, photographers assume they own all rights to a photograph, unless they have contracted them away on a work-for-hire basis,” but arguing that stylists, who often make critical creative contributions to the finished images, should also be accorded copyright interests).

55. *See* *Natkin v. Winfrey*, No. 99 C 5367, 2000 WL 1800641, at \*6–7 (N.D. Ill. July 25, 2000).

56. *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 453–54 (S.D.N.Y. 2005) (citing *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), and *Gross v. Seligman*, 212 F. 930 (2d Cir. 1914)); *cf.* *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1265 (10th Cir. 2008) (arguing that plaintiff’s digital wire-frame computer “models reflect none of the decisions that can make depictions of things or facts in the world, whether Oscar Wilde or a Toyota Camry, new expressions subject to copyright protection”).

#### IV. HOW WILDE WAS GARCIA'S CLAIM?

Circling back to where we began, it is helpful to read the Ninth Circuit's en banc opinion in *Garcia v. Google, Inc.* with reference to this forceful line of precedent, which largely did not consider, accept, or emphasize the photographic subject's authorial contributions to the finished photographic image. In *Garcia*, the plaintiff Cindy Lee Garcia claimed a copyright interest in her five-second acting performance in a film with which, for very grave reasons, she no longer wished to be associated.<sup>57</sup> Far from claiming that she had commissioned the film or her performance in it, Garcia had responded to a casting call by the filmmakers and she was paid \$500 for her work on the film.<sup>58</sup> (It was unclear what legally relevant paperwork she had signed, if any.<sup>59</sup>) At issue was whether her performance by itself constituted an original and protectable "work[] of authorship" under the statute.<sup>60</sup> The court declined to endorse such a view, largely based on policy concerns.<sup>61</sup>

As mentioned at the outset, in the course of its analysis, the court did not rely upon an "old friend" it had in the *Burrow-Giles Lithographic Co. v. Sarony* case. It is true that photographic subjects might be distinguished from actors. The root of the word "actor" can be traced to the Latin for someone with agency—essentially, a "doer."<sup>62</sup> (Contrast that with the term "sitter," often used for photographic subjects.) It is difficult, however, to draw a confident line between actors performing on film and pouty models or even mere laypeople posing for a still image. Notably, a number of the early photography cases discussed above involved actresses posing in costume.<sup>63</sup> What I suggest, therefore, is that even without an explicit reference to *Burrow-Giles*, deeply ingrained judicial instincts may help explain why, in the context of a filmed actor and another individual directing that performance, the actor ultimately had not just relatively few, but no copyright interests.

#### CONCLUSION

While all of this may suggest that I think the outcome in *Garcia* was historically

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57. *Garcia v. Google, Inc.*, 786 F.3d 733, 736–37 (9th Cir. 2015) (en banc). Garcia had thought she was acting in a film entitled *Desert Warrior*, "an action-adventure thriller set in ancient Arabia"; instead, her lines were dubbed over to create "an anti-Islam polemic renamed *Innocence of Muslims*." *Id.* at 737. Garcia sought a preliminary injunction to force Google to take down the film from all of its platforms. *Id.*

58. *Id.*

59. *Id.* at 741 n.5.

60. *Id.* at 741 (citing 17 U.S.C. § 102(a)). Garcia disclaimed co-authorship of the overall film. *Id.* at 742.

61. *Id.* at 742–43 ("Treating every acting performance as an independent work would not only be a logistical and financial nightmare, it would turn cast of thousands into a new mantra: copyright of thousands.").

62. OXFORD ENGLISH DICTIONARY (2016).

63. See, e.g., *Press Publ'g Co. v. Falk*, 59 F. 324 (C.C.S.D.N.Y. 1894); *Falk v. Donaldson*, 57 F. 32 (C.C.S.D.N.Y. 1893); see also *supra* note 34.

contingent rather than driven by the best possible reasoning, the Ninth Circuit en banc majority in my view did adopt the right approach in this tough case. There is a desperate need in copyright law for clear rules around which parties can plan their activities, and a reasonable approach to what constitutes the relevant “work[] of authorship” is helpful. Hesitating to deem each individual contribution to an integrated whole as a mini-work makes sense as a place to draw the line.<sup>64</sup> After all, even if the context in *Garcia* was highly unusual,<sup>65</sup> there is every reason to suppose that a pervasive lack of clarity over the authorship of photographs and works in other media would have followed in the wake of a different outcome in that case. For example, how would the authorship interests of a modern-day Madame Pierre Gautreau have fared?<sup>66</sup>



*Madame X (Madame Pierre Gautreau)*, 1883–84  
By John Singer Sargent  
Courtesy of The Metropolitan Museum of Art  
[www.metmuseum.org](http://www.metmuseum.org)

64. See *Garcia*, 786 F.3d at 742–43, 744 n.13. The Second Circuit’s recent case *16 Casa Duse, LLC v. Merkin*, 791 F.3d 247 (2d Cir. 2015), is largely supportable on similar policy grounds. Cf. Letter from Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy and Practices, U.S. Copyright Office, to M. Cris Armenta, at 2 (Mar. 6, 2014) (“The U.S. Copyright Office’s longstanding practices do not allow a copyright claim by an individual actor or actress in his or her performance contained within a motion picture.”).

65. See, e.g., *Garcia*, 786 F.3d at 752 (Kozinski, J., dissenting); Brief of Amici Curiae Professors Shyamkrishna Balganesh, Justin Hughes, Peter Menell, and David Nimmer in Support of Neither Party at 9–10, *Garcia*, 786 F.3d 733 (No. 12-57302).

66. “Madame Pierre Gautreau (the Louisiana-born Virginie Amélie Avegno; 1859–1915) was known in Paris for her artful appearance. Sargent hoped to enhance his reputation by painting and exhibiting her portrait.” *Madame X (Madame Pierre Gautreau)*, THE METROPOLITAN MUSEUM OF ART (last visited Mar. 12, 2016), <http://www.metmuseum.org/art/collection/search/12127> [https://perma.cc/P3AB-JGAP].