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SO YOU WANT TO BE AN AUTHOR: A COMPARATIVE ANALYSIS OF THE AUTHORIAL RIGHTS AWARDED TO PERFORMERS

DANIEL GOMEZ[†]

INTRODUCTION

In his classic 1980 song “On the Road Again,” Willie Nelson articulates that “the life [he] love[s] is making music with [his] friends.”¹ This affinity for the life of a traveling performer likely has little to do with his authorial rights under the Copyright Act.² However, as this Note demonstrates, Mr. Nelson indeed benefited from favorable authorial rights when compared to other types of performers, beyond the rights he acquired as the song’s writer. Specifically, the current law around the default authorial rights of performers provides greater protection to performers of sound recordings than it affords to visual and audiovisual performers.³

Intellectual property scholar Justin Hughes has explored this differential in copyright authorial protections in what he labeled a “[t]hought [e]xperiment[.]”⁴ In his experiment, Hughes compared the authorial protections afforded to musicians with those afforded to actors while minimizing all other creative contributions to the point of nullity.⁵ This Note seeks to expand on

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¹ WILLIE NELSON, *On the Road Again*, on HONEYSUCKLE ROSE (Columbia Records 1980).

² Michael Hall, *Why Does Willie Nelson Still Do It?*, TEXAS MONTHLY (Apr. 18, 2018), <https://www.texasmonthly.com/the-culture/why-does-willie-nelson-still-do-it/> [<https://perma.cc/6JEL-NHT6>].

³ For the purposes of this Note, I have limited my analysis to the protections afforded to musical artists compared to those of photograph subjects and actors.

⁴ Justin Hughes, *Actors as Authors in American Copyright Law*, 51 CONN. L. REV. 1, 36–39 (2019).

⁵ *Id.* Hughes notes that the reasoning of the legislative history to the 1976 Copyright Act was that in cases where a sound recording’s producer contributes minimally to the sound recording, the performer of the sound recording is given authorship. *Id.* at 37–38. Further, Hughes argues that the same protection should be

Hughes's thought experiment. Namely, it examines the law surrounding the default authorial rights of photographic subjects, actors, and musicians. This examination demonstrates that both actors and photographic subjects receive disproportionately minimal authorial recognition when compared to musicians. This Note then argues that the minimal default authorial protection afforded to actors and photographic subjects does not honor their labor rights. Further, it argues that the best way to correct the discrepancies between the authorial rights awarded to performers in these different fields is to expansively apply the doctrine of joint authorship.

Part I of this Note addresses how creative labor actually occurs in performance settings, how default protection is disparately awarded within these performance settings, and why protecting performers' creative contributions is important. Part II discusses possible copyright vehicles that are relevant to the issue of authorial rights of performers. That Part looks at the doctrines of work for hire, joint authorship, and implied licenses. Finally, Part III explains why an amended joint authorship doctrine would be the most helpful doctrine to equalize the authorship rights of performers and also addresses some counterarguments against allowing performers to be protected as joint authors.

I. CREATIVE LABOR AND THE PROBLEM OF DISPARATE PROTECTION

A. *Creative Labor in Performance Settings*

1. Photography

In *Burrow-Giles Lithographic Co. v. Sarony*, the Supreme Court of the United States provided some instruction as to how creative labor is carried out in the context of photography.⁶ There, the Court highlighted that the photographer's creative contribution was so pervasive that it warranted granting authorship rights over a photograph.⁷ Indeed, courts have identified

afforded to an actor who performs a Shakespearean soliloquy if all other creative contributions can be reduced. *Id.* at 39.

⁶ 111 U.S. 53, 59 (1884).

⁷ *Id.* at 60.

three ways photographers contribute originality to photographic works: “rendition,” “timing,” and “creation of the subject.”⁸

Originality in rendition is the creative labor that the photographer employs without regard to the subject or the setting of the photo—aspects such as lighting, angles, and developing techniques.⁹ Undoubtedly, photographers often have specialized knowledge and skills.¹⁰ This may include specialized skills in the effective use of light, abstract forms, and special equipment; or it may involve specialized knowledge of art more generally.¹¹ Originality in timing is the photographer’s being in the “right place at the right time.”¹² This highlights the photographer’s creative labor in choosing just when and where to snap a picture.¹³ Finally, creation of the subject is the photographer’s creative labor of setting the scene or subject in a precise way.¹⁴ This originality applies to the photographer’s special artistic vision that the subject could not contribute on his or her own.¹⁵ These contributions are clearly important in producing a valuable photograph.

However, these points of originality ignore the fact that the photographer is not the sole contributor to a photograph. Indeed, the art of photography is collaborative, requiring cooperation from the photographer and the photographic subject. This reality means that, oftentimes, the value of a photograph is not solely a product of the photographer’s artfulness, but rather, of the contribution of the subject involved.¹⁶ Notably, a spontaneous, creative

⁸ *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 452–53 (S.D.N.Y. 2005).

⁹ *Id.* at 452.

¹⁰ See Ming Thein, *What Makes a Good Photographer?*, MING THEIN: BLOG (Feb. 9, 2013), <https://blog.mingthein.com/2013/02/09/what-makes-a-good-photographer/> [<https://perma.cc/L9NY-RANY>].

¹¹ *Id.*

¹² *Mannion*, 377 F. Supp. 2d at 452–53.

¹³ *Id.* at 453.

¹⁴ *Id.*

¹⁵ Benjamin Falk’s description of his methods demonstrates this artistic vision. He would “make the subject so forget his surroundings as to mentally assume the part or character to be represented in the picture” and use curtains and lights to bring out the intended effects. Eva E. Subotnik, *The Author Was Not an Author: The Copyright Interests of Photographic Subjects from Wilde to Garcia*, 39 COLUM. J.L. & ARTS 449, 456 (2016) (quoting *Falk v. Donaldson*, 57 F. 32, 33 (C.C.S.D.N.Y. 1893)). The subject likely could not do this him or herself.

¹⁶ “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.” *Id.* at 452 (quoting Statement and Brief for Plaintiff in Error at 14, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) (No. 1071)).

contribution from a subject, neither foreseen nor arranged by the photographer, can sometimes become the most prevalent and valuable creative addition to the photograph.¹⁷

For example, photographer Jim Marshall's iconic picture of Johnny Cash in San Quentin State Prison—pointing his middle finger at the camera lens—is famous not because of masterful arrangement from the photographer, but rather because Cash opted to perform that gesture out of his own volition.¹⁸ Marshall recounted that he told Cash “John, let's do a shot for the warden,” to which Cash responded by “flipp[ing] the camera the bird.”¹⁹ This spontaneous, though provoked, reaction from Cash was more the product of his own creativity and not the careful development of an artistic vision or originality in the creation of the photograph. Marshall most certainly contributed creatively by being at the right time and place to take and provoke the photograph; however, Cash also contributed creatively to the photograph in choosing to pose in the iconic way he did. Indeed, Cash's independent creative contribution to the picture created the photograph that Marshall described as “probably the most ripped off photograph in the history of the world.”²⁰ And yet, Cash presumably received no copyright interest in the photograph.²¹

2. Film

There are two prevailing views regarding the creative expression contributed by actors.²² The first is that actors only follow the orders of a director and follow a script.²³ Thus, they contribute little or nothing creatively.²⁴ Even if not a copyrightable contribution, however, an actor under this view does contribute to a film in his or her creative recitation of the words on the

¹⁷ See, e.g., Priya Elan, *Johnny Cash Photographer Reveals Truth Behind San Quentin Prison Shot*, NME (Mar. 18, 2011, 1:04 PM), <https://www.nme.com/news/music/johnny-cash-19-1292708#Mw1zEKb1RV7FdRwC.99> [<https://perma.cc/DWW6-T34J>].

¹⁸ *Id.* Admittedly, there may have been originality in the timing of the photographer. See *supra* text accompanying note 12. The iconic image may be found in an article online. See Elan, *supra* note 17.

¹⁹ See Elan, *supra* note 17.

²⁰ *Id.*

²¹ See *supra* notes 15–16 and accompanying text.

²² See Hughes, *supra* note 4, at 41–43.

²³ *Id.* at 42. Hughes describes this as “recitation or ‘recitation+’: recitation with authenticity, recitation with sincerity,” and so on. *Id.*

²⁴ *Id.* at 43.

script.²⁵ Though this seems to be the view taken by courts, as discussed below, it may not be reflective of reality.²⁶

A second view is that actors contribute a great deal creatively to films, because their expressions, enunciations, and accentuations help create strong or realistic characters and strong emotional connections.²⁷ This view comports with the idea that “[t]he creative process of shooting a film is often more collaborative with significant modifications contributed by the actor.”²⁸ These “modifications” can include actors adding expressive elements to characters that were not sought by the director, like ad-libbed lines, pauses, inflections, or even tics.²⁹ As discussed below, this view seems to acknowledge the realities of the acting industry more effectively.³⁰

For example, in Heath Ledger’s Oscar-winning performance of the Joker in the movie *The Dark Knight*, Ledger adopted a tongue tic in his performance that some describe as “[t]he most identifiable characteristic” of the villain.³¹ However, this habit was not a product of careful direction, but rather, a habit of

²⁵ See *id.* at 48. “Nonetheless, one could still conclude that while ‘genuine human creativity’ goes ‘into acting a script’ nonetheless ‘this creativity is different in kind and in degree from the creativity that goes into creating the fixed, author-driven works like literature and visual art.’” *Id.* (quoting Jacob M. Victor, *Garcia v. Google and a “Related Rights” Alternative to Copyright in Acting Performances*, 124 *YALE L.J.F.* 80, 86 (2014)).

²⁶ *Id.* at 41 (“But no director has complete control over *human* actors, whether they are acting in front of the camera, only lending their voices to CGI-created cartoon characters, or merely operating marionettes. . . . [W]ithin the realm of what a director can theoretically control, many directors cede substantial leeway to actors.”).

²⁷ *Id.* This is putting aside those works where an actor makes extra-acting contributions as well, such as ad-libbing lines or contributing to the script. *Id.* at 45–46.

²⁸ *Id.* at 46.

²⁹ See *id.* at 46–47.

³⁰ See *id.* at 41, 46–49. Famous examples of actor-contributed modifications include Heath Ledger’s choice to fidget with the remote detonator in the hospital explosion scene in *The Dark Knight*, where the script merely told him to walk away from the explosion. See Paul Young, *The 32 Greatest Unscripted Movie Scenes*, *SCREEN RANT* (Oct. 2, 2012), <https://screenrant.com/greatest-unscripted-movie-scenes/> [<https://perma.cc/U8VA-QZWA>]. Ledger’s contribution added “a slight amount of dark humor to what would have just been a serious scene.” *Id.* Another example is Dustin Hoffman’s iconic “I’m walkin’ here!” line in *Midnight Cowboy* when a real New York City taxicab interrupted the film’s shooting. *Id.*

³¹ See Emily Zogbi, *7 Things You Didn’t Know About The Dark Knight*, *NEWSWEEK* (July 18, 2018, 11:29 AM), <https://www.newsweek.com/7-things-you-didnt-know-about-dark-knight-facts-1030256> [<https://perma.cc/9YKJ-J7CA>]; see also *THE DARK KNIGHT* (Warner Bros. Pictures 2008); *Heath Ledger*, *IMDB*, <https://www.imdb.com/name/nm0005132/awards> (last visited Oct. 14, 2020) [<https://perma.cc/2ZCJ-MM4E>].

Ledger's addition.³² This "cannily menacing" gesture was actually Ledger's effort to keep his prosthetics in place and an exaggeration of a tic that Ledger had.³³ Another example of the collaborative interplay between actors and directors is the final scene in the film *Call Me by Your Name*. In that scene, lead actor Timothée Chalamet looks directly into the camera's lenses while crying over the loss of his first love.³⁴ In the film's commentary, Chalamet describes this intimate, improvised moment as a "little homage to *Boyhood* here at the end, stealing a two-second look into the lens."³⁵ This moving moment in the film is an example of an actor independently contributing creatively to a film. Chalamet contributed this powerful moment to the film of his own accord; he was not carrying out a director's will, but rather he was apparently providing a moving allusion to another film.³⁶ And yet neither Ledger nor Chalamet presumably received copyright interests in their respective films.

3. Music

The traditional model for the creation of music involved an initial composition process and a later performance process.³⁷ In the composition phase, a composer would engage in the "deliberative activity" of writing and retooling a musical score.³⁸ This was followed by the "unrepeatable" interpretive process of having a musician, or group of musicians, perform that composed piece.³⁹ Such a practice created a belief that the musicians were essentially conduits for the work and not necessarily creative

³² See Zogbi, *supra* note 31.

³³ Estelle Tang, *I Am Heath Ledger: A New Documentary Takes an Intimate View of the Actor*, ELLE (May 15, 2017), <https://www.elle.com/culture/movies-tv/news/a45267/i-am-heath-ledger-documentary/> [<https://perma.cc/6AXT-EU45>]; see Shaheera Anwar, *5 Unknown Facts About Heath Ledger's Joker*, THE EXPRESS TRIBUNE (Jan. 23, 2018), <https://tribune.com.pk/story/1616036/4-5-unknown-facts-heath-ledgers-joker> [<https://perma.cc/5Q8H-SS6H>].

³⁴ CALL ME BY YOUR NAME (Sony Pictures 2017).

³⁵ San Vu, *Call Me by Your Name Commentary Track [—]Timothée Chalamet & Michael Stuhlbarg*, YOUTUBE (Mar. 14, 2018), https://youtu.be/njg7Ee_jiyM [<https://perma.cc/2X7W-7K4F>].

³⁶ *Id.* Costar Michael Stuhlbarg praised this creative choice from Chalamet in the commentary. *Id.*

³⁷ Robert Brauneis, *Musical Work Copyright for the Era of Digital Sound Technology: Looking Beyond Composition and Performance*, 17 TUL. J. TECH. & INTELL. PROP. 1, 7–8 (2014). In essence, the practice of creating music encompassed both the writing stage and the playing or performing stage. *Id.*

³⁸ *Id.* at 8.

³⁹ *Id.*

contributors themselves.⁴⁰ Indeed, the Copyright Office's policies reflected this belief, as "[f]rom 1790 through 1977, federal copyright protection for musical compositions could be obtained only through fixation in, and publication of, musical scores."⁴¹

Today, the creation of musical pieces no longer revolves around a written score.⁴² Indeed, "an analysis" conducted by Robert Brauneis "of more than 4.5 million musical work copyright registrations at the U.S. Copyright Office from 1978 through 2012" reflects this trend.⁴³ In his analysis, Brauneis found that, during the period covered by his study, the percentage of musical work registrations that included notations dropped from eighty-six percent to seventeen percent for unpublished musical works, and from eighty-six percent to twenty-seven percent for published works.⁴⁴

⁴⁰ *Cf. id.* at 10 ("As Elijah Wald put it, what became popular for a few months in the late 1800s and early 1900s was not a particular recording, but a song . . .") (citing ELLIJAH WALD, *HOW THE BEATLES DESTROYED ROCK 'N' ROLL: AN ALTERNATIVE HISTORY OF AMERICAN POPULAR MUSIC* 87 (2009)).

⁴¹ *Id.* at 12.

⁴² *Id.* at 28.

⁴³ *Id.*

⁴⁴ *Id.* at 29.

In 1978, [eighty-six percent] of musical works registered were accompanied by deposits of notation and only [fourteen percent] by phonorecord deposits. By 2012, [seventy-seven percent] of musical work registrations were accompanied by phonorecord deposits and only [seventeen percent] by deposits of musical notation ([six percent] were accompanied only by deposits of text—lyrics—and hence technically were not musical works).

Id. at 28.

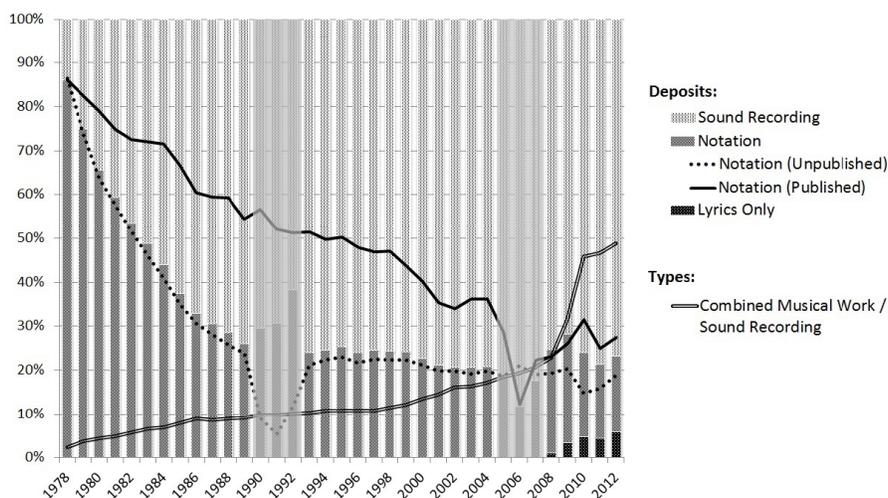


Figure: Musical Work Copyright Registrations, 1978–2012
Deposits and Types⁴⁵

Indeed, in the 1976 Copyright Act, Congress acknowledged the changing nature of the music industry by permitting the registration of phonorecords.⁴⁶ This change recognized that, in the modern era, there is often no prewritten composition, and only an unwritten creative process from the musician.⁴⁷ Further, the 1976 Copyright Act preserved protections for sound recordings, which Congress had enacted in the Sound Recording Act of 1971.⁴⁸ These protections had previously acknowledged that performances of composed works are creative endeavors in and of themselves, separate and apart from the underlying composition.

⁴⁵ *Id.* at 29.

⁴⁶ *Id.* at 31. The 1976 Copyright Act permitted the limited copyright protection of sound recordings, recognizing that performers also contribute greatly to musical works. *See id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 31–32. In 1994, Congress further expanded protections to musical performers when it adopted the Anti-Bootlegging Act as part of the Uruguay Round Agreements Act, which extended copyright protection to live performances, imposing both civil, 17 U.S.C. § 1101(a) (2018), and criminal, 18 U.S.C. § 2319A (2018), penalties for infringers—though the constitutionality of these provisions has been questioned by courts. Andrew B. Peterson, Note, *To Bootleg or Not to Bootleg? Confusion Surrounding the Constitutionality of the Anti-Bootlegging Act Continues*, 58 OKLA. L. REV. 723, 723–725, 723 n.2 (2005). Although the adoption of the anti-bootlegging provisions is emblematic of Congressional willingness to protect musical performers, the provisions do not grant authorial protection. *See* 17 U.S.C. § 1101; 18 U.S.C. § 2319A.

Thus, musicians are no longer seen as mere conduits for prewritten compositions, but rather as active creators in the musical process who operate in collaborative settings.⁴⁹ Indeed, musical performers may work with producers in recording a work, or interpreting another's composition in their own original way, but either way, they often contribute creatively to the final sound recording in a manner that is acknowledged under copyright law.⁵⁰

4. Three Different Collaborative Creations

In sum, photographic subjects, actors, and musicians all can deliver lofty creative contributions to a work. All three kinds of performers work in collaborative, creative endeavors, and all three add creative elements to those endeavors.⁵¹ By way of examples addressed above, photographic subjects can add notoriety, expressions, and gestures to a piece; actors can provide expression to the words of a script, improvise scenes and lines, and bring films to life; and musicians can create melodies, inflections, and creative interpretation to music.⁵²

Thus, it is difficult to define bright lines of requisite creativity by field. Indeed, the creative contribution of a performer will largely depend not on the industry, but rather on the particular creative work. For example, a photographic subject's contribution may be greater in cases where the subject is given great latitude to select the setting of the photo, the pose, or the light, but lesser where the photographer has carefully curated the setting, dictated the pose, or otherwise directed the captured photo. Likewise, an actor's creative labor may be greater where he or she is permitted to improvise lines or independently make choices about performance details or character attributes. However, where an actor is given very little discretion to make these kinds of decisions—and is more closely guided by a director—his or her creative labor may be significantly reduced. Similarly, a musical performer may contribute more creative labor to a work where the producer merely records the musician's performance

⁴⁹ See MELVILLE B. NIMMER & DAVID NIMMER, 11 NIMMER ON COPYRIGHT § 803.3 (2017) (addressing the collaboration between producers and performers).

⁵⁰ *Id.* § 803.5. Moreover, recording a musical performance can include not only a singular performer, but also a band, and a producer. *Id.* § 803.3(A)–(B).

⁵¹ See discussion *supra* Sections I.A.1–3.

⁵² See *id.*

without adding much, but less where a producer is playing a larger role in editing or adding to the performance.

However, as addressed below, the law does not effectively recognize these nuances.⁵³ Rather, the law distinguishes among the three groups discussed above by offering greater authorial protection to musical performers than to similarly creative photographic subjects and actors.

B. Existing Copyright Law Surrounding Authorship of Works

1. Photography

The weight of precedent suggests that as a default rule, photographic subjects cannot exert authorial rights over a photograph that they are featured in.⁵⁴ In this context, authorship, and therefore copyright, of the photograph is attributed to the photographer.⁵⁵

As briefly highlighted above, the Supreme Court addressed the question of who qualifies as the author of a photograph as early as 1884.⁵⁶ In *Burrow-Giles Lithographic Co. v. Sarony*, the Court confronted the authorship of a picture taken by Napoleon Sarony of Oscar Wilde.⁵⁷ Ultimately, the Court determined that the proper author of the photograph was Sarony, because much of the artistic vision came from Sarony's "mental conception."⁵⁸ Yet, despite this determination, the Court failed to address whether or not Wilde had contributed authorial creativity.⁵⁹

⁵³ See *infra* Section I.B.

⁵⁴ See generally Subotnik, *supra* note 15. Subotnik's Article outlines various cases and details the authorship doctrine for photographs. *Id.*

⁵⁵ See *id.* at 449.

⁵⁶ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 54 (1884).

⁵⁷ *Id.* at 54–55.

⁵⁸ *Id.* at 60. The Court noted that the photograph was made entirely from [Sarony's] 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.

⁵⁹ Subotnik, *supra* note 15, at 452. Subotnik posits that "perhaps the Supreme Court's failure to engage with Wilde's possible authorial contributions is due to" the simple reason that "Sarony and Wilde had a contract in place." *Id.*

This decision was soon thereafter interpreted by several cases involving the photographer Benjamin Falk.⁶⁰ In these cases, the old Circuit Court of the Southern District of New York denied authorial protection to photographic subjects.⁶¹ However, in *Press Publishing Co. v. Falk*, the court distinguished the context of a consumer paying for a photograph, where ownership of the rights in the photograph would lie with the paying consumer, and the context of “a person submit[ting] himself or herself as a public character, to a photographer,” where ownership of the copyright would lie with the photographer.⁶²

This approach has largely persisted.⁶³ Further, the copyright protection for photographic subjects who contract to have their photograph taken was not codified in the list of works under the work for hire provision of the 1976 Copyright Act.⁶⁴ Even more colorfully, in the 1989 case, *Olan Mills, Inc. v. Eckerd Drug of Texas, Inc.*, the court concluded that “[t]he 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.”⁶⁵ This case and others like it appear to reject that a photographic subject could be a joint author of a photograph.⁶⁶

For example, in *Janik v. SMG Media, Inc.*, the Southern District of New York held that a photo of Spin Magazine founder Bob Guccione Jr. was solely authored by the photographer.⁶⁷ The court stated that the simple choice of the subject to be photographed does not convey joint authorship to that subject.⁶⁸ Further, the court stated that it was “doubtful” that Guccione

⁶⁰ *Id.* at 452–58 (citing *Falk v. Brett Lithographing Co.*, 48 F. 678 (C.C.S.D.N.Y. 1891); *Falk v. Donaldson*, 57 F. 32 (C.C.S.D.N.Y. 1893); *Press Publ’g Co. v. Falk*, 59 F. 324 (C.C.S.D.N.Y. 1894)).

⁶¹ See *Brett Lithographing Co.*, 48 F. at 679; *Donaldson*, 57 F. at 33–34; *Press Publ’g Co.*, 59 F. at 325–26.

⁶² *Press Publ’g Co.*, 59 F. at 325–26.

⁶³ Subotnik, *supra* note 15, at 458. Subotnik notes that the analysis was largely about ownership, and not precisely authorship. *Id.* She further notes that some courts acknowledged the rights of photographic subjects who paid to be photographed, or had serious privacy interests in ownership of the photographs. *Id.*

⁶⁴ See 17 U.S.C. § 101 (2018).

⁶⁵ No. CA3-88-0333-D, 1989 WL 90605, at *1 (N.D. Tex. Apr. 20, 1989).

⁶⁶ *Id.*; see also *Janik v. SMG Media, Inc.*, 16 Civ. 7308 (JGK) (AJP), 2018 WL 345111, at *7–8 (S.D.N.Y. Jan. 10, 2018). A “joint work” is defined as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. § 101; see also *infra* Section II.B.

⁶⁷ *Janik*, 2018 WL 345111, at *8.

⁶⁸ *Id.* at *8 n.5.

had contributed copyrightable creativity in the photograph.⁶⁹ Indeed, even Guccione's choice "to stick out his tongue" was held to be an insufficient creative contribution to establish any authorship over that photograph.⁷⁰

Thus, the law has historically failed to—and continues to fail to—offer significant authorial protections for photograph subjects despite the creative labor photographic subjects can add to a photograph.⁷¹

2. Film

Courts have rarely addressed the issue of the authorship rights of actors.⁷² When it has been addressed, courts have expressed only narrow circumstances where an actor may have an authorial interest in a work.⁷³ These narrow circumstances include Peter Seller's contribution to *The Pink Panther*⁷⁴ and a group of actors from a Puerto Rican television show.⁷⁵ The question of whether actors can assert authorial rights over their creative contributions came to a climax in the controversial Ninth Circuit decision *Garcia v. Google, Inc.*⁷⁶

In 2011, actress Cindy Lee Garcia filmed a part for what she was told was "an action-adventure thriller set in ancient Arabia," entitled *Desert Warrior*.⁷⁷ Her role consisted of two sentences, for which she was paid \$500.⁷⁸ *Desert Warrior* was never actually released.⁷⁹ Instead, the director used the scenes that had been filmed under the pretense of filming *Desert Warrior* to manufac-

⁶⁹ *Id.* at *8.

⁷⁰ *Id.* at *8 n.5.

⁷¹ *See supra* Section I.A.1.

⁷² Hughes, *supra* note 4, at 16.

⁷³ *Id.* at 21–22; *see also* Richlin v. Metro-Goldwyn-Mayer Pictures, Inc., 531 F.3d 962, 970 (9th Cir. 2008); TMTV Corp. v. Pegasus Broad. of San Juan, 490 F. Supp. 2d 228, 236 (D.P.R. 2007).

⁷⁴ *See Richlin*, 531 F.3d at 964, 970.

⁷⁵ *See TMTV Corp.*, 490 F. Supp. 2d at 230. TMTV sued Pegasus Broadcasting for creating a show with some of the same actors playing identical or similar characters to a show TMTV had created earlier; however, the court denied TMTV's motion for summary judgment on the basis that there was a "reasonable inference" that in portraying the characters, the actors contributed creatively to the original characters so as to make the actors authors. *Id.* at 236.

⁷⁶ 786 F.3d 733 (9th Cir. 2015) (en banc).

⁷⁷ *Id.* at 737.

⁷⁸ *Id.* Garcia's part was to "seem[] concerned" while saying, "Is George crazy? Our daughter is but a child?" *Id.* (alteration in original).

⁷⁹ *Garcia v. Google, Inc.*, 766 F.3d 929, 932 (9th Cir. 2014), *rev'd en banc*, 786 F.3d 733 (9th Cir. 2015).

ture an offensive, fourteen-minute trailer for a film entitled *Innocence of Muslims*.⁸⁰ While the trailer included Garcia's image, her lines were dubbed "so that she appeared to be asking, 'Is your Mohammed a child molester?'"⁸¹ In 2012, that trailer was released on YouTube to protests and violence.⁸² Garcia received death threats, notably from a fatwa issued by an Egyptian cleric urging "Muslim Youth in America[]" to kill those involved in making the film.⁸³

Garcia sued to have the film removed from YouTube, asserting that she had a copyright interest in her performance.⁸⁴ The district court declined to award a preliminary injunction on the grounds that Garcia had not established a likelihood of success on the merits on her claim of authorship of her performance.⁸⁵ On appeal, the Ninth Circuit reversed, acknowledging that "Garcia may have [acquired] a copyright interest in her performance."⁸⁶

This opinion was met with criticism and in late 2014, the Ninth Circuit decided to rehear the case en banc.⁸⁷ Upon rehearing, the court issued an opinion rejecting Garcia's copyright claim.⁸⁸ The court based its reasoning largely on policy concerns.⁸⁹ In essence, the court feared that awarding authorial rights to actors and actresses would result in awarding a copyright interest to the "cast of thousands," which would result in a "logistical and financial nightmare" for the film industry.⁹⁰ Though the decision will likely not have far-reaching effects on the film industry because of the contractual nature of authorship rights, its

⁸⁰ *Garcia*, 786 F.3d at 737. This film is grossly offensive to people of the Muslim faith, as it "depicts the Prophet Mohammed as, among other things, a murderer, pedophile, and homosexual." *Id.*

⁸¹ *Id.* at 932.

⁸² *Id.* at 737–38; see also, e.g., Orla Guerin, *Deadly Film Protests in Pakistan*, BBC (Sep. 21, 2012), <https://www.bbc.com/news/av/world-asia-19671703/deadly-film-protests-in-pakistan> [<https://perma.cc/3LB9-HD2C>]. The film was also even "purported[ly]" related to the 2012 "attack on the United States Consulate in Benghazi, Libya." *Garcia*, 786 F.3d at 738.

⁸³ *Garcia*, 786 F.3d at 738 (alteration in original).

⁸⁴ *Garcia v. Nakoula*, No. CV 12-08315, 2012 WL 12878355, at *2 (C.D. Cal. Nov. 30, 2012), *rev'd sub nom. Garcia v. Google, Inc.*, 766 F.3d 929 (9th Cir. 2014), *rev'd en banc*, 786 F.3d 733 (9th Cir. 2015).

⁸⁵ *Id.* at *1.

⁸⁶ *Garcia*, 766 F.3d at 935, 940 (emphasis added). Though the dissent did not agree that Garcia could establish exclusive authorship, it seemed to suggest that Garcia could well be a joint author based on her acting. See Hughes, *supra* note 4, at 25.

⁸⁷ *Garcia v. Google, Inc.*, 771 F.3d 647, 647 (9th Cir. 2014).

⁸⁸ *Garcia*, 786 F.3d at 747.

⁸⁹ *Id.* at 742–43.

⁹⁰ *Id.*

holding has essentially obliterated any possibility of authorial rights of actors in their creative contributions to works.⁹¹

3. Music

The law surrounding the authorship rights of musicians in sound recordings is far more permissive. Indeed, the leading copyright treatise, the legislative history to the 1976 Copyright Act, and the copyright office have recognized that, in works of sound recording, the producer *and the performer* contribute copyrightable creativity.⁹²

The influential treatise *Nimmer on Copyright* outlines that, for sound recordings, there are two types of authorship: “[a]uthorship in the performance[.]” and “[a]uthorship in the production.”⁹³ Authorship in the production “include[s] capturing and manipulating sounds and compiling and editing those sounds to make a final recording.”⁹⁴ These activities serve to recognize the creative labor of producers of sound recordings.⁹⁵ On the other hand, authorship in the performance “include[s] playing an instrument, singing, or speaking, or creating other sounds which are captured and fixed in the sound recording. Individual performance authorship may be claimed only if the sound recording is comprised solely of an individual performance that is sufficiently creative.”⁹⁶ This type of authorship validates the creative labor of musical performers.⁹⁷

⁹¹ See 2 PETER S. MENELL, MARK A. LEMLEY & ROBERT P. MERGES, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2018*, at 606 (2018) (“This decision is unlikely to have a significant effect on filmmaking since motion pictures are among the works eligible for work-made-for-hire status and studios routinely require actors to execute work-made-for-hire agreements. . . . Nonetheless, the decision negates actors’ claims to copyright in film projects.”). However, in *16 Casa Duse, LLC v. Merkin*, the Second Circuit, relying on the *Garcia* decision, found that a director’s contribution to a film did not constitute a work of authorship and thus did not vest a copyrightable interest in that film to the director. 791 F.3d 247, 258–59 (2d Cir. 2015).

⁹² See NIMMER & NIMMER, *supra* note 49, § 803.3; H.R. REP. NO. 94-1476, at 56 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5669; *Circular 56: Copyright Registration for Sound Recordings*, U.S. COPYRIGHT OFF. 1, <https://www.copyright.gov/circs/circ56.pdf> [<https://perma.cc/LZ5K-QRYT>] (last updated Mar. 2019).

⁹³ NIMMER & NIMMER, *supra* note 49, § 803.3.

⁹⁴ *Id.* § 803.3(B).

⁹⁵ *Id.* § 803.3.

⁹⁶ *Id.* § 803.3(A).

⁹⁷ See *id.*; see also *supra* Section I.A.3.

According to *Nimmer*, based on the combination of creative labor in play, the law recognizes that

[g]enerally, both the performer and the producer of a sound recording of a musical performance or spoken word performance contribute copyrightable authorship to the sound recording. In some cases, however, the main or sole contribution may be production authorship (as in a recording of bird songs, where there is no human performance) or the main contribution may be performance authorship (as in a recorded performance where the only production involved is to push the “record” button).⁹⁸

This position serves to recognize that each creative work at issue will involve a collaboration of creative labor, and that the degree to which a performer or producer contributes creative labor into that particular work is relevant to determine authorship.⁹⁹ However, they often share in authorship as joint authors.¹⁰⁰

Similarly, the House Report to the 1976 Copyright Act recognized that a musical performer could assert authorship over a sound recording.¹⁰¹ Moreover, as recently as 2019, the Copyright Office, in its circular on the registration of sound recordings, endorsed the view that musical performers can have authorship over sound recordings.¹⁰² The circular states that “[t]he author of a sound recording is the performer featured in the recording and the producer who captured and processed the sounds that appear in the final recording.”¹⁰³ Therefore, in this context, there appears to be an increased validation of a performer’s right to authorship over his or her creative contributions to a work, to some degree.

⁹⁸ NIMMER. & NIMMER, *supra* note 49, § 803.3.

⁹⁹ *Id.*

¹⁰⁰ *Id.* § 803.8(B). See discussion *infra* Section II.B.

¹⁰¹ H.R. REP. NO. 94-1476, at 56 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5669.

The copyrightable elements in a sound recording will usually, though not always, involve “authorship” both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may, however, be cases where the record producer’s contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer’s contribution is copyrightable.

Id.

¹⁰² *Circular 56*, *supra* note 92, at 3.

¹⁰³ *Id.*

C. *Why Protect Performers Anyway?*

Modern copyright jurisprudence largely treats copyright protection as a utilitarian effort to increase "economic efficiency."¹⁰⁴ However, "this vision alone cannot adequately guide the development of copyright law."¹⁰⁵ Indeed, it would be remiss to ignore the "unmistakable" factor of authors' natural law rights,¹⁰⁶ namely, "that an author should reap the pecuniary profits of his own ingenuity and labour."¹⁰⁷ Indeed, though modern copyright law tends to view protection as a means for serving the public interest in receiving creative works, it also serves to give authors the fruits of their labor.¹⁰⁸

Moreover, "[t]he appropriateness of this reference to natural law becomes even more clear when one considers the fact that copyright law protects works for which no economic incentive is required to induce creation."¹⁰⁹ Further, vindicating the rights of performances is consistent with the utilitarian underpinnings of intellectual property law because it incentivizes the creative labor created by performers.¹¹⁰

¹⁰⁴ Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 517 (1990).

¹⁰⁵ *Id.* at 519.

¹⁰⁶ *Id.* at 521.

¹⁰⁷ *Millar v. Taylor* (1769) 4 Burr. 2303, 2398 (KB), *overruled by* *Donaldson v. Becket* (1774) 98 Eng. Rep. 257 (HL).

¹⁰⁸ *Wheaton v. Peters*, 33 U.S. 591, 657 (1834).

¹⁰⁹ Yen, *supra* note 104, at 537. Yen cites protections for "works authored by students to fulfill academic requirements[,] results of accidents[,] and products which the government requires public utilities to print." *Id.* (footnotes omitted) (citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 105 (2d Cir. 1951); *Hutchinson Tel. Co. v. Fronteer Directory Co. of Minn.*, 770 F.2d 128, 132 (8th Cir. 1985)). Further, Yen notes that

[i]f economic necessity were truly the only motivation for copyright, we would remove copyright protection from these works and any others which would be produced in the absence of copyright. Granting these works copyright induces no economic gain. If anything, economic welfare would increase if the public gained free access to these works through a denial of copyright. Our reluctance to take such a course of action demonstrates the natural law vindication of an author's creation in our copyright law.

Id.

¹¹⁰ Further, the utilitarian objections to awarding performers increased authorial protection revolve around the problem of "The Cast of Thousands"; however, this problem is minimized by the application of other copyright doctrines. *See infra* Section III.C.

1. Labor Rights to Creative Labor

The natural rights theory can be traced back to the Roman natural law.¹¹¹ Yet the “most famous proponent” of this view is John Locke.¹¹² Locke articulated that:

Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person; this nobody has any right to but himself. The labour of his body, and the work of his hands we may say are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.¹¹³

Thus, the central premise of the natural rights approach is that a person is entitled to the product of his or her labor. Applying Locke’s principles, a creative contributor should have a right to his or her labor. This application, however, depends in part on how broadly we define a creative contributor’s labor.

The law defines creative labor capaciously. To be copyrightable, a work need only exhibit a “modicum of creativity.”¹¹⁴ Further, courts largely should not “assess the artistic value of [a] work.”¹¹⁵ These low thresholds of a creator’s creative contributions suggest that courts treat creative labor as labor, regardless of the depth of that creativity, or the value contributed by that creativity.¹¹⁶ Thus, under a theory of natural rights, even a minority creative contributor ought to be entitled to the fruits born from his or her creative contribution.

2. Personal Rights to Creative Labor

The personality theory of property, posited by Hegel, justifies property as a form of self-expression.¹¹⁷ Though “the difference between [Locke] and Hegel—at least as to the analysis of intel-

¹¹¹ Yen, *supra* note 104, at 522.

¹¹² *Id.* at 523.

¹¹³ JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* § 27 (J.W. Gough ed., Basil Blackwell 1948) (1689).

¹¹⁴ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991).

¹¹⁵ Yen, *supra* note 104, at 533 (citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903)).

¹¹⁶ *See id.* at 536 (“Although our early notions of copyright were very limited, copyright now protects nearly all creations of an author’s mind . . .”). Yen also notes further requirements of copyrightability outside of the initial originality requirement at issue in our labor-focused analysis. *Id.* at 536–37.

¹¹⁷ *See* Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287, 329 (1988).

lectual property—may be minimal,” it is worth noting as an alternative justification for protecting the rights of creators.¹¹⁸

Hegel’s theory of personhood proposes that persons are “abstract unit[s] of free will.”¹¹⁹ Therefore, a person’s continuing existence is premised on their ability to find “personal embodiment or self-constitution” in the form of “things” in the external world.¹²⁰ Consequently, because these “things” become constitutively linked to the person, we should afford that person the freedom to control that “thing.”¹²¹ This control is afforded in the form of property rights.¹²²

In the context of intellectual property, a person often invests a great amount of his or her personhood into a work.¹²³ This is particularly the case for highly expressive works.¹²⁴ Thus, a person becomes bound up in that work; that is, the work is linked to that person’s self-constitution.¹²⁵ Thus, a person should be given a property right in that work to allow them to attain economic and noneconomic recognition for their personhood interest in that work.¹²⁶ Accordingly, this supports the notion that performers, who

¹¹⁸ *Id.* at 330.

¹¹⁹ Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 972 (1982).

¹²⁰ *Id.* at 958.

Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world. They may be as different as people are different, but some common examples might be a wedding ring, a portrait, an heirloom, or a house.

Id. at 959.

¹²¹ *Id.* at 958, 960.

¹²² *See id.* at 960.

¹²³ Hughes, *supra* note 117, at 340. “Poems, stories, novels, and musical works are clearly receptacles for personality. The same can be said for sculpture, paintings, and prints.” *Id.* The performing industries this Note focuses on can be highly expressive, as photographic subjects can identify with a photo taken of them, actors can identify with a role or character, and musical performers can identify with their rendition of a particular song.

¹²⁴ *Id.* at 341. “We should be more willing to accord legal protection to the fruits of highly expressive intellectual activities, such as the writing of novels, than to the fruits of less expressive activities, such as genetic research.” William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 171 (Stephen R. Munzer ed., 1st ed. 2001).

¹²⁵ Hughes, *supra* note 117, at 340. This justifies a person’s “persona.” *Id.* Though no labor is required to produce a “persona,” “[a]s long as a person identifies with his personal image” he or she will have a Hegelian interest in that persona. *Id.* at 340–41.

¹²⁶ *See id.* at 350. “Authors and inventors should be permitted to earn respect, honor, admiration, and money from the public by selling or giving away copies of

invest so much of themselves—or to the degree they do so in any work—be awarded copyright interests in a given work.

II. COPYRIGHT DOCTRINES RELEVANT TO RESOLVE THE DISPARATE PROTECTION OF PERFORMERS' AUTHORIAL RIGHTS

A. *Work for Hire Doctrine*

Under the Copyright Act, initial ownership of a copyright vests “in the author or authors of the work.”¹²⁷ This means that “an individual who writes, composes, or paints an original work of authorship on her or his own acquires the copyright upon the work’s creation.”¹²⁸ However, in the modern day works are often produced in an employment context.¹²⁹ Because of this reality, the law has recognized authorial rights in employers in the work for hire doctrine.¹³⁰ A work is considered to be a “work made for hire” if that work is

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.¹³¹

If a work meets this threshold, an “employer or other person for whom the work was prepared is considered the author for the purposes of [Title 17], and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”¹³²

The second subsection expressly protects nine enumerated types of works, including films, so long as there is a signed

their works, but should not be permitted to surrender their right to prevent others from mutilating or misattributing their works.” Fisher, *supra* note 124, at 172.

¹²⁷ 17 U.S.C. § 201(a) (2018).

¹²⁸ MENELL, LEMLEY & MERGES, *supra* note 91, at 587.

¹²⁹ *See id.*

¹³⁰ *See id.* at 587–88. This doctrine has been justified by the impact on reducing transaction costs. *Id.* at 594. The doctrine attempts to prevent the potential problem of having a contributor limit the commercialization of a possible work by acting as a “holdout.” *Id.*; *see also* 17 U.S.C. § 201(b).

¹³¹ 17 U.S.C. § 101.

¹³² *Id.* § 201(b).

written agreement stating that the work is a work for hire.¹³³ However, this section is not applicable to photographs or sound recordings *per se*.¹³⁴ Though that subsection of the statutory text offers a clear definition of when the work for hire doctrine applies in certain works, the first subsection offers little instruction to what is meant by "employee," making the scope of its application ambiguous.¹³⁵ In *Community for Creative Non-Violence v. Reid*, the Supreme Court addressed this lack of instruction and introduced a test to determine whether a creator is an "employee" for the purposes of the work for hire doctrine.¹³⁶

In that case, a sculptor agreed to build a sculpture for a nonprofit organization that sought to end homelessness in America.¹³⁷ The agreement was not memorialized in writing, and neither party addressed copyright.¹³⁸ The sculptor completed and delivered the statue and was paid \$15,000 for the completed statue; however, the statue was returned to the sculptor for minor repairs.¹³⁹ Later, the nonprofit sought to take the statue on a tour around various cities to raise awareness for homelessness.¹⁴⁰ The sculptor objected and refused to turn over the statue, stating that the statue's material would not tolerate the rigors of a tour.¹⁴¹ The sculptor filed a certificate of copyright, after which the nonprofit filed a competing certificate of copyright; in assessing their competing claims, the district court and circuit court focused on whether the sculptor was an employee of the nonprofit under 17 U.S.C. § 101(1).¹⁴²

The Supreme Court determined that in assessing whether a party is an "employee" for the purposes of 17 U.S.C. § 101(1), the general common law rules of agency apply.¹⁴³ Further, the Court outlined that, under the law of agency, courts should look to

the hiring party's right to control the manner and means by which the product is accomplished[;] . . . the skill required; the source of the instrumentalities and tools; the location of the

¹³³ *Id.* § 101(2).

¹³⁴ *See id.*

¹³⁵ *See* MENELL, LEMLEY & MERGES, *supra* note 91, at 588.

¹³⁶ 490 U.S. 730, 738–39 (1989).

¹³⁷ *Id.* at 733.

¹³⁸ *Id.* at 734.

¹³⁹ *Id.* at 735.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 735–36.

¹⁴³ *Id.* at 740–41.

work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.¹⁴⁴

Applying this test, the Court determined that the sculptor was the author of the sculpture.¹⁴⁵ Notwithstanding that designer's particular outcome, the work for hire exception offers strong copyright protection to employers, even outside of an express agreement, sometimes, at the expense of creators or performers.

B. Joint Author Doctrine

A "joint work" is one "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."¹⁴⁶ Courts have interpreted this definition to additionally require that (1) each joint author contribute work that is independently copyrightable, and (2) both parties demonstrate an intention to be joint authors when making such contributions.¹⁴⁷

However, in *Aalmuhammed v. Lee*, the Ninth Circuit required that the person seeking authorship over the work control the work.¹⁴⁸ In that case, the Ninth Circuit denied a contributor authorial rights in a Malcom X biopic based on his lack of "super-

¹⁴⁴ *Id.* at 751–52.

¹⁴⁵ *Id.* at 752–53. The Court pointed to the fact that sculpting requires a lot of skill. *Id.* at 752. Further, the Court noted that the sculptor used his own tools and studio; was unsupervised; only worked for the nonprofit for two months for a singular task; and was not formally recognized as an employee for tax purposes. *Id.* at 752–53.

¹⁴⁶ 17 U.S.C. § 101 (2018).

¹⁴⁷ *Thomson v. Larson*, 147 F.3d 195, 200–01 (2d Cir. 1998); *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231 (9th Cir. 2000); see also Brief of Amici Curiae Professors Shyamkrishna Balganes, Justin Hughes, Peter Menell, and David Nimmer in Support of Neither Party at 12, *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (No. 12-57302); see also H.R. REP. NO. 94-1476, at 120 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5736 ("Under the definition of section 101, a work is 'joint' if the authors collaborated with each other, of [sic] if each of the authors prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors as 'inseparable or interdependent parts of a unitary whole.'").

¹⁴⁸ 202 F.3d at 1234–35.

intendence" over the film.¹⁴⁹ There, Aalmuhammed was hired to work on the film, and he specifically reviewed the script and suggested extensive revisions, some of which were included in the final work.¹⁵⁰ Further,

Aalmuhammed submitted evidence that he directed Denzel Washington and other actors while on the set, created at least two entire scenes with new characters, translated Arabic into English for subtitles, supplied his own voice for voice-overs, selected the proper prayers and religious practices for the characters, and edited parts of the movie during post production.¹⁵¹

Aalmuhammed was paid for his work, but when he sought authorship recognition in the credits, he was rebuffed.¹⁵² Instead, he was listed in the credits as an "Islamic Technical Consultant."¹⁵³ Aalmuhammed sued Spike Lee and the production companies seeking, in relevant part, a declaratory judgment that the movie was a "joint work."¹⁵⁴ The court refused to give Aalmuhammed that relief.¹⁵⁵ The court reasoned that although he had contributed significantly to the work, Aalmuhammed was not a joint author because he did not "master mind" the work.¹⁵⁶ Further, the court noted that the parties lacked the requisite intent to form a joint author relationship.¹⁵⁷

¹⁴⁹ *Id.* at 1229, 1235.

¹⁵⁰ *Id.* at 1229–30.

¹⁵¹ *Id.* at 1230.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1235.

¹⁵⁶ *Id.* ("Aalmuhammed offered no evidence that he was the 'inventive or master mind' of the movie.")

¹⁵⁷ *Id.*

[N]either Aalmuhammed, nor Spike Lee, nor Warner Brothers, made any objective manifestations of an intent to be coauthors. Warner Brothers required Spike Lee to sign a "work for hire" agreement, so that even Lee would not be a coauthor and co-owner with Warner Brothers. It would be illogical to conclude that Warner Brothers, while not wanting to permit Lee to own the copyright, intended to share ownership with individuals like Aalmuhammed who worked under Lee's control, especially ones who at the time had made known no claim to the role of coauthor.

Id.

C. *Implied License Doctrine*

In order to transfer an exclusive license in a copyright, there must be a writing.¹⁵⁸ Yet, “nonexclusive licenses may . . . be granted orally, or may even be implied from conduct.”¹⁵⁹ To create an implied license, “(1) a person (the licensee) requests the creation of a work, (2) the creator (the licensor) makes that particular work and delivers it to the licensee who requested it, and (3) the licensor intends that the licensee-requestor copy and distribute his work.”¹⁶⁰

III. A REFORMED JOINT AUTHORSHIP STANDARD AS A VEHICLE TO EQUALIZE RIGHTS OF PERFORMERS

A. *Reforming the Joint Author Standard*

Intellectual property scholars have questioned the Ninth Circuit’s addition of the element of superintendence to the joint author analysis in *Aalmuhammed v. Lee*.¹⁶¹ This is because the superintendence requirement to establish joint authorship law fundamentally ignores the collaborative nature of many performance industries.¹⁶²

To recognize the collaborative nature of many performance industries, courts should adopt the approach posited by intellectual property scholar Justin Hughes.¹⁶³ Namely, he argues that courts remove the requirement of superintendence.¹⁶⁴ Thus, as Hughes has proposed, the standard should simply require that (1) the authors each contribute copyrightable expression, and

¹⁵⁸ *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990); 3 NIMMER & NIMMER, *supra* note 49, § 10.03(A)(1)(a).

¹⁵⁹ 3 NIMMER & NIMMER, *supra* note 49, § 10.03(A)(7), *quoted with approval in Effects Assocs., Inc.*, 908 F.2d at 558.

¹⁶⁰ *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 776 (7th Cir. 1996) (citing *Effects Assocs.*, 908 F.2d at 558–59).

¹⁶¹ Brief of Amici Curiae, *supra* note 147, at 13; *see also* Section II.B.

¹⁶² Brief of Amici Curiae, *supra* note 147, at 13–14. “The nature of a collaborative enterprise is such that at times different authors will exercise more control than the others over the work. To require a contributor to exercise equal ‘inventive’ control in order to be a joint author is therefore unrealistic.” *Id.* (citation omitted); *see Shyamkrishna Balganes, Unplanned Coauthorship*, 100 VA. L. REV. 1683, 1738 (2014).

¹⁶³ Hughes, *supra* note 4, at 62, 64; *see also* Maria Solis, *Lens of London: Granting Limited Copyright Protection for Performers 1*, 11 (Aug. 25, 2018) (unpublished working paper), <https://ssrn.com/abstract=3306360> (advocating for the use of joint authorship doctrine in motion pictures to permit actors to assert authorship over their important contributions).

¹⁶⁴ Hughes, *supra* note 4, at 61–62.

(2) the parties prepare that contribution with the intention that the work be merged inseparably.¹⁶⁵ This should require a fact-sensitive analysis of the individual contributions each contributor made.

Copyrightable contributions require only a low level of creativity.¹⁶⁶ But the creativity required by this standard has been disputed.¹⁶⁷ While some scholars advocate for a requirement that each author contribute an individually copyrightable work, others advocate for a standard requiring a contribution that is merely not *de minimis*.¹⁶⁸ However, requiring a strong contribution would not be in line with precedent suggesting only a "minimal degree of creativity" is required to secure copyright protection, nor would it acknowledge the reality of creative works.¹⁶⁹ Thus, as Hughes argues, courts should not enforce a strong originality requirement in order to find joint authorship of a work.¹⁷⁰

The second prong of Hughes' proposed analysis might be more fraught, since in the absence of a contract, it can be difficult to determine the parties' intentions.¹⁷¹ This prong turns on whether the parties intended, at the time the work was created, to merge their contributions inseparably.¹⁷² While this seems easy to determine, parties must also intend to be joint authors, and not solely intend to merge their contributions.¹⁷³ This prong would require a fact-sensitive inquiry.

¹⁶⁵ *Id.* at 59, 64.

¹⁶⁶ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

¹⁶⁷ Hughes, *supra* note 4, at 59–60.

¹⁶⁸ *Id.* This requirement will alleviate some of the concerns that plagued the Ninth Circuit in *Garcia and Aalmuhammed*, since not every contributor of a work will be able to assert ownership—only those who contribute *enough*.

¹⁶⁹ *Feist Publ'ns, Inc.*, 499 U.S. at 345; *see also* Hughes, *supra* note 4, at 60–61 ("[A] strong 'independently copyrightable contribution' standard is specifically 'incompatible with our common thinking about films. While the contribution of an actor might be imagined, or even shot, in isolation, there is no original expression from a film director or cinematographer that can be separated from what is done by other contributors. Yet in many jurisdictions, film directors are presumed to be the authors of audiovisual works.") (footnotes omitted). *But see* Joseph Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 458 (2009) (arguing for a stronger standard for originality in copyright).

¹⁷⁰ Hughes, *supra* note 4, at 60.

¹⁷¹ *See Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 2000).

¹⁷² H.R. REP. NO. 94-1476, at 120 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736.

¹⁷³ *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991).

The wording of the statutory definition appears to make relevant only the state of mind regarding the unitary nature of the finished work—an

Additionally, the law surrounding joint authorship “treats joint authors as tenants-in-common.”¹⁷⁴ This means that in most cases, joint authors will share coequal ownership over the entire work.¹⁷⁵ Hughes suggests that this approach is flawed.¹⁷⁶ Indeed, he argues that “nothing in the Copyright Act requires that outcome and the legislative history indicates that that was *not* Congress’s intent.”¹⁷⁷

Accepting Hughes’ approach, common law principles should guide a tenancy-in-common determination.¹⁷⁸ And, at most, “the common law has a rebuttable presumption of equal ownership shares and that presumption is rebutted by clear evidence of intent, unequal contribution, or other circumstances establishing that equal ownership would be inappropriate.”¹⁷⁹ This suggests that, in the copyright context, courts should engage in a factual inquiry to determine the extent of a party’s contribution to a work to determine the extent of their authorship. This view would be able to justly determine authorship given the collaborative nature of the creative industries.¹⁸⁰ Thus, adopting a fact-

intention “that their contributions be merged into inseparable or interdependent parts of a unitary whole.” However, an inquiry so limited would extend joint author status to many persons who are not likely to have been within the contemplation of Congress. . . . What distinguishes the writer-editor relationship and the writer-researcher relationship from the true joint author relationship is the lack of intent of both participants in the venture to regard themselves as joint authors.

Id.

¹⁷⁴ MENELL, LEMLEY & MERGES, *supra* note 91, at 607.

¹⁷⁵ *Id.*

¹⁷⁶ Hughes, *supra* note 4, at 64 (suggesting that this presumption has tainted courts’ openness to award joint authorship rights based on the severe relief granted to a joint author).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 65.

¹⁷⁹ *Id.*

¹⁸⁰ Currently, the law around musicians recognizes that creative contributions can come in different degrees, and thus ownership should be treated accordingly. NIMMER & NIMMER, *supra* note 49, § 803.3 (“In some cases, however, the main or sole contribution may be production authorship (as in a recording of bird songs, where there is no human performance) or the main contribution may be performance authorship (as in a recorded performance where the only production involved is to push the ‘record’ button).”).

The copyrightable elements in a sound recording will usually, though not always, involve “authorship” both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may, however, be cases where the record producer’s contribution is so minimal that the performance is the only copyrightable

sensitive approach of authorship would not only comport with common law principles surrounding tenancy-in-common,¹⁸¹ but also acknowledge the individual creative labors of specific works, since awarding authorship for the relative creative labor of the parties would validate each party's creative labor.

B. The Reformed Joint Author Standard as an Equalizer

The photography, film, and music industries are all collaborative in nature.¹⁸² Yet, the law only recognizes the joint authorship of musical performers.¹⁸³ This leaves performers in the similarly collaborative industries of photography and acting without access to similar protection.¹⁸⁴ Applying Hughes' joint authorship standard would correct this disparity in protection and afford a viable opportunity for joint authorship to photographic subjects and actors.

The first requirement of Hughes' joint authorship standard requires that each party makes at least a non-*de minimis* contribution.¹⁸⁵ Performers in the photography, film, and music industries all have the potential to contribute non-*de minimis* creative labor—that is, some “minimal degree of creativity.”¹⁸⁶ For example, photographic subjects can spontaneously and creatively add value to a photograph in a way not imagined or intended by the photographer.¹⁸⁷ Likewise, actors can create strong, realistic characters and produce emotional connections with the audience.¹⁸⁸ Finally, musicians create their own songs or perform pre-composed songs in an original and novel way.¹⁸⁹

element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer's contribution is copyrightable.

H.R. REP. NO. 94-1476, at 56 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5669. However, the photography and film industries likewise are industries based on varying degrees of creative contributions. See *supra* Section I.A.

¹⁸¹ See H.R. REP. NO. 94-1476, at 121.

¹⁸² See *supra* Section I.A.; H.R. REP. NO. 94-1476, at 56.

¹⁸³ See *supra* Section I.B.3. Indeed, the foundation of musical performers' increased protection stems from Congress' recognition of the collaborative nature of the music industry, and of the relevant creative labor expended by performers in that industry. See H.R. REP. NO. 94-1476, at 56.

¹⁸⁴ See *supra* Sections I.B.1–2.

¹⁸⁵ See *supra* Section III.A.

¹⁸⁶ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

¹⁸⁷ See *supra* Section I.A.1.

¹⁸⁸ See *supra* Section I.A.2.

¹⁸⁹ See *supra* Section I.A.3.

Next, the parties must intend to merge their contributions inseparably.¹⁹⁰ While this seems simple to assert,¹⁹¹ parties must also intend to be joint authors, and not solely intend to merge their contributions.¹⁹² This will be a fact-sensitive inquiry, but there is nothing that would prohibit a performer and a producer or other putative author from having the requisite intent to be joint authors. Indeed, in the field of sound recordings, musicians and producers generally intend to be joint authors.¹⁹³ This reflects the natural intuition that a reasonable person, all things being equal, would intend to maintain authorship over their contribution to a work.¹⁹⁴ Thus, absent a contrary indication, a reasonable performer would likely intend to maintain authorial rights in his or her contributions.

And, finally, courts should engage in an analysis into the relative contributions of joint authors, in order to award authorial shares that are equitable in the circumstances.¹⁹⁵ Under this reformed standard, authorship rights of photographic subjects and actors would be elevated to approximate the protections already afforded to musical performers. This reformed standard would account for their labor rights in their creative contri-

¹⁹⁰ H.R. REP. NO. 94-1476, at 120 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736.

¹⁹¹ A photographic subject plainly intends to have his or her image and any creativity “merged” into the final photograph, an actor clearly intends to have his or her performance “merged” into the final film, and a musical performer certainly expects that his or her performance will be “merged” onto the final sound recording.

¹⁹² *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991).

The wording of the statutory definition appears to make relevant only the state of mind regarding the unitary nature of the finished work—an intention “that their contributions be merged into inseparable or interdependent parts of a unitary whole.” However, an inquiry so limited would extend joint author status to many persons who are not likely to have been within the contemplation of Congress. . . . What distinguishes the writer-editor relationship and the writer-researcher relationship from the true joint author relationship is the lack of intent of both participants in the venture to regard themselves as joint authors.

Id.

¹⁹³ NIMMER & NIMMER, *supra* note 49, § 803.8(B). “Generally, where there are multiple authors of a sound recording, the sound recording is a joint work and the applicant should name all the authors of that work. In such cases, the authors’ contributions are not subject to separate registrations.” *Id.* (emphasis added).

¹⁹⁴ Hughes notes that, in the context of actors, “[g]iven all that dramatic performers think about their craft, it seems unlikely that the actor would think she is *not* an author.” Hughes, *supra* note 4, at 64.

¹⁹⁵ Hughes, *supra* note 4, at 59–60. Though, admittedly, this would require a tremendous amount of court resources, it would allow for a more equitable system of copyright protection.

butions by acknowledging their copyrightable contributions in a particular work, allowing for their intent to preserve ownership over those contributions and permitting them to assert authorship of those contributions.

C. *Taking on "The Cast of Thousands"*

The predominant policy concern guiding the Ninth Circuit in its decision to deny authorial rights in performance to Cindy Garcia is illustrative of possibly the biggest utilitarian concern about awarding performers rights in works. This is the fear of awarding authorship rights to "the proverbial 'cast of thousands,'" that is, works with many contributors.¹⁹⁶

This concern is rooted in the utilitarian goal of copyright law to "foster[] . . . the optimal use and dissemination of [literary and artistic] works."¹⁹⁷ Indeed, the Ninth Circuit expressed concern that "[t]reating 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."¹⁹⁸ Though that case dealt with the film industry, this same concern extends into the other industries discussed above. For example, the same problem may arise for photographs with multiple subjects, or sound recordings with several band members. Yet, in the latter scenario, the law unequivocally protects the individual authorial rights of creative contributors,¹⁹⁹ and fairness dictates equal treatment across media. Despite the threat of the "copyright of thousands," it need not be a foregone conclusion that offering performers protection will truly lead to this feared result.²⁰⁰ Indeed, as Hughes described, "worrying about 'copyright of thousands' in audiovisual works is like worrying about snow in South Florida."²⁰¹

¹⁹⁶ *Garcia v. Google, Inc.*, 786 F.3d 733, 742 (9th Cir. 2015).

¹⁹⁷ MENELL, LEMLEY & MERGES, *supra* note 91, at 500.

¹⁹⁸ *Garcia*, 786 F.3d at 743.

¹⁹⁹ NIMMER & NIMMER, *supra* note 49, § 803.8(B) ("a recording of a song might be jointly authored by the members of a band, or a singer").

²⁰⁰ Hughes, *supra* note 4, at 51.

²⁰¹ *Id.* (footnote omitted).

1. Contractual Protections

In the film and music industries, the work for hire doctrine reigns.²⁰² Indeed, in the film industry, performances are “almost always governed” by contracts, which establish the authorial rights in the producers.²⁰³ In the realm of photography, the contractual provision of the work for hire protections does not apply.²⁰⁴ However, some courts have recognized a quasi-work for hire doctrine in the recognition of ownership rights for consumers who pay to be photographed.²⁰⁵ And indeed, the general provisions of assignment contracts remain a source for contractually asserting rights.²⁰⁶ Yet, performers remain in fairly weak bargaining positions.²⁰⁷ Thus, “most performers are unable to obtain significant rights beyond the minimums guaranteed by collective bargaining agreements.”²⁰⁸

Given this context, particularly in the film industry where work for hire principles apply and contracts are almost always made to privately organize authorship rights, protecting the rights of performers is unlikely to have uproarious repercussions. Indeed, awarding authorial rights to performers may increase producers’ initiative to clearly delineate authorship rights privately via contract. Further, awarding creative contributors authorial rights as a default rule may actually serve to increase the bargaining power of performers. This may lead to a more leveled negotiating table—and fairer agreements—when parties engage in contractually organizing rights.

Further, if the work for hire doctrine fails to award full ownership to an employer or commissioning party, there remains a further contractual doctrine to halt the performer’s assertion of

²⁰² *Id.* at 53–54; Mary LaFrance, *Are We Serious About Performers’ Rights?*, 5 IP THEORY 81, 83 (2015). These agreements often provide minimal rights because of the performers’ relatively weak bargaining positions. LaFrance, *supra*, at 81–83.

²⁰³ Hughes, *supra* note 4, at 51. Indeed, “performers’ economic and moral rights in the works they help to create depend almost entirely on the contracts they negotiate with producers.” LaFrance, *supra* note 202.

²⁰⁴ See 17 U.S.C. § 101 (2018).

²⁰⁵ See *supra* Section I.A; Subotnik, *supra* note 15, at 458. Subotnik points out that this was based on a presumed assignment of rights from the photographer to the subject. Subotnik, *supra* note 15, at 458.

²⁰⁶ 17 U.S.C. § 204.

²⁰⁷ LaFrance, *supra* note 202.

²⁰⁸ *Id.* These minimum protections are even further diminished in nonunionized contexts.

authorship. This is the “two” in the “one-two punch” for ensuring that producers retain unfettered control over a work: implied licenses.²⁰⁹

Thus, an implied license would exist where

the film producer [or photographer] requests the performance; the actor [or photographic subject] gives the performance [or sits for the photograph] and delivers it while authorizing its fixation by the film producer [or photographer]; and the actor [or photographic subject] intends that the film producer [or photographer] copy and distribute the performance [or photograph].²¹⁰

This, too, will serve to prevent creative contributors from asserting certain holdout postures based on claimed authorship over works and thus prevent the “cast of thousands.” Indeed, this doctrine may even govern the above examples regarding Johnny Cash and Timothée Chalamet—absent any contracts. Marshall sought to photograph Cash, Cash allowed Marshall to photograph him, and Cash likely knew, and intended, that Marshall was going to distribute that photograph of him. Chalamet was hired to play Elio in *Call Me by Your Name*, he allowed the producer to record his performance, and intended for the movie, and thus his performance, to be distributed.

2. *De Minimis* Contributions

In order to get copyright protection, a work must have a non-*de minimis* amount of creativity.²¹¹ Indeed, where a copyright application lists multiple authors, all must make non-*de minimis* contributions.²¹² This requirement will also serve to limit the risk of the “cast of thousands.” In the context of film, Hughes observed:

In normal circumstances, the best boy—an assistant to an electrician on a film crew—would not contribute any original expression to the film. It is the same with an extra in a crowded

²⁰⁹ Hughes, *supra* note 4, at 55.

²¹⁰ *Id.* at 56.

²¹¹ Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 363–64 (1991).

²¹² NIMMER & NIMMER, *supra* note 49, § 618.8(D)(3). “If two or more authors are named in the application, and if it appears that one of the authors contributed *de minimis* authorship to the work, the specialist will ask for permission to remove that author's information from the registration record.” *Id.*

marketplace or battle scene: they probably contribute no original expression and, if they do, unauthorized reproduction would likely be *de minimis*.²¹³

In the context of photography, the doctrine likewise applies.²¹⁴ Thus, where a photographic subject only provides the *de minimis* creative contribution of merely being in a photograph, he or she will fail to assert any authorship over that photograph. Thus, this doctrine would also function as an effective tool in preventing the feared “cast of thousands,” as actors and photographic subjects who fail to exhibit the “modicum of creativity” required for copyright protection will be prohibited from asserting authorship in the work.²¹⁵

D. Treaty Aspects

Given the difficulty performers can face in seeking authorship recognition in a work,²¹⁶ treaties may offer performers certain rights outside of authorship to reward their creative labor to some extent. “Compared to treaties addressing authors’ rights, international agreements on performers’ rights are relatively recent developments.”²¹⁷ Indeed, the 1886 signing of the Berne Convention marked the first multilateral agreement with regard to authors’ rights.²¹⁸ Yet multilateral treaties only addressed performers’ rights starting in 1961, with the signing of the Rome Convention, which the United States has not joined, and which afforded “performers the right to prevent unauthorized broadcasting and recording of their live performances.”²¹⁹

In 1994, the United States joined a treaty recognizing performers’ rights for the first time.²²⁰ This shift came with the enactment of the Agreement on Trade-Related Aspects of Intel-

²¹³ Hughes, *supra* note 4, at 52 (footnotes omitted).

²¹⁴ See, e.g., Tang v. Putruss, 521 F. Supp. 2d 600, 605 (E.D. Mich. 2007).

²¹⁵ Arguably, this “cast of thousands” may only come after possibly expensive litigation, or threat thereof.

²¹⁶ LaFrance, *supra* note 202.

²¹⁷ *Id.* at 86.

²¹⁸ *Id.*

²¹⁹ *Id.* at 86.

In the case of sound recordings, performers could also prevent reproductions of recordings that exceeded the scope of their original consent. While the treaty also recognized a performance right in sound recordings, this right was limited to equitable remuneration payable to either the producer or the performers; the allocation was left up to the signatory countries. *Id.* at 86–87 (footnotes omitted).

²²⁰ *Id.* at 87.

lectual Property Rights (“TRIPS”), which “requires signatories to recognize performers’ rights to prevent the unauthorized recording of their live performances in ‘phonograms’ as well as any reproductions of those unauthorized recordings.”²²¹ This led to the enactment of anti-bootlegging provisions, which impose civil and criminal penalties on those who reproduce live performances without authorization, in the Uruguay Round Agreements Act.²²²

Additionally, in 1996, the United States signed WIPO Performances and Phonograms Treaty (“WPPT”).²²³ This treaty requires that signatories recognize an extensive range of performers’ moral and economic rights.²²⁴ Yet, this “has had no effects on performers’ rights under [United States] law.”²²⁵ Most recently, in 2012, the United States signed the Beijing Agreement.²²⁶ The Beijing Agreement seeks to recognize the moral and economic rights of audiovisual performers, similar to what the WPPT sought to accomplish for sound recording performances.²²⁷

In the face of these treaties, Congress is faced with changing copyright law in order to comply with the treaties’ requirements to recognize performers’ moral and economic rights.²²⁸ Thus, “[t]aking performers [sic] rights seriously is not an option; it is a necessity.”²²⁹

²²¹ *Id.*

²²² *Id.* at 82 & n.8, 87–88.

²²³ *Id.* at 88.

²²⁴ *Id.* “Many of [WPPT’s] provisions, however, apply only to performers on sound recordings.” *Id.*

²²⁵ *Id.* at 89 (“For instance, as was true prior to the WPPT, recording artists can assert rights of attribution and integrity over their recorded material only if they reserve these rights in their contracts with producers. While recording contracts typically call for performers to be credited on their recordings, certain forms of exploitation may be excluded. Similar limits apply to integrity rights; because the record company owns the copyright in the recording, typically, a performer can prevent alteration of the work only by negotiating for this right in the recording contract.”).

²²⁶ *WIPO-Administered Treaties*, WORLD INTELL. PROP. ORG., https://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=841 (last visited Oct. 23, 2020) [<https://perma.cc/YG4V-FYCK>]. The treaty has not yet been ratified. *Id.*

²²⁷ LaFrance, *supra* note 202, at 89–90.

²²⁸ *Id.* at 91 (“To comply with the treaties, Congress would have to adopt specific moral rights legislation for performers that is at least comparable to the protections that [current law] extends to the authors of works of visual art.”).

²²⁹ *Id.* at 92 (“The United States must also address performers’ rights in order to comply with our current international treaty obligations, as well as the new obligations that will arise when [the] Beijing [Agreement] enters into force. Yet Congress has made no effort to implement WPPT, raising doubts as to future compliance with [the] Beijing [Agreement].”).

CONCLUSION

Protecting the fruits of performers' creative endeavors is paramount. In 1972, Congress recognized this reality in its limited protection of sound recordings.²³⁰ This crucial move served to partly vindicate the creative labor of musical performers and entitled them to some of the fruits borne out of their creative labor. Yet, copyright law more generally continues to ignore the labor rights of performers in other fields; notably, in the fields of photography and film. This does not have to persist. Indeed, the law may already have an avenue to equalize the rights of different performers via the doctrine of joint authorship, as an expansive reading of that doctrine would serve to honor the creative contributions of performers and equalize the rights of creative contributors across media. Thus, courts should adopt a broader view of joint authorship and stop perpetuating the inequality among performers of different industries.

²³⁰ This was through the passage of the Sound Recording Act of 1972, preserved in the 1976 Copyright Act.