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CREATIVE EQUITY: A PRACTICAL APPROACH TO THE ACTOR'S COPYRIGHT

Sarah Howes[†]

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I. INTRODUCTION

*In its haste to take Internet service providers off the hook for infringement, the [Garcia] court . . . rob[bed] performers and other creative talent of rights Congress gave them. I won’t be a party to it.*¹

– Judge Alex Kozinski

If a person sends a minimally creative, original e-mail to a friend, that writing can be registered with the U.S. Copyright Office.² Remarkably, the same likely cannot be said for an actor’s³ contribution to a play or movie.⁴ In Minneapolis, Actors’ Equity Association (AEA)⁵ member Nathan Keepers has developed a following for his personalized, sly take on the Jacques Lecoq, improvisational clowning, movement method.⁶ Keepers is perhaps

1. *Garcia v. Google (Garcia III), Inc.*, 786 F.3d 733, 749 (9th Cir. 2015) (Kozinski, J., dissenting), *aff’d en banc*, 786 F.3d 733 (9th Cir. 2015).

2. *See* 17 U.S.C. § 102(a) (2012).

3. Below are working definitions of the roles that this paper discusses. “Producers” are persons in charge of a production’s business affairs, including hiring the crew, ticket sales, and marketing. “Playwrights” write a play’s plot, dialogue, and often the initial stage directions. “Actors” on stage or in film are charged with portraying the playwright’s fictional characters. “Directors” make final decisions on most creative decisions in a theatrical production (e.g., deciding where actors stand, approving costumes, and approving set designs). “Choreographers” design and instruct the placement and movement of actors or dances on a stage.

4. The Ninth Circuit found it persuasive that the U.S. Copyright Office systematically denied actor requests for copyright ownership. *See Garcia III*, 786 F.3d at 741 (majority opinion).

5. *About Equity*, ACTORS’ EQUITY ASS’N, <http://www.actorsequity.org/AboutEquity/aboutequityhome.asp> (last visited Feb. 4, 2016) (“[F]ounded in 1913, [AEA] is the U.S. labor union that represents more than 50,000 Actors and Stage Managers.”).

6. *See* Camile LeFevre, *The Swan Swims with the Fish: Actor Nathan Keepers Talks About the Art of Movement in One Role to the Next*, MINNPOST (Feb. 6, 2008), <http://www.minnpost.com/arts-culture/2008/02/swan-swims-fish-actor-nathan>

best known for playing twenty different characters in the hit one-man show *Fully Committed* at the Jungle Theater.⁷ His professional biography includes roles at the Guthrie Theater, the American Repertory Theater, and being an Artistic Associate at the former Tony-winning Theatre de la Jeune Lune, now reimagined as The Moving Company.⁸ Due to a recent Ninth Circuit en banc decision that denied a film actor copyright interest to her performance, it is questionable whether mastermind actors like Keepers will ever own the copyright to their performances or their improvisational dialogue.⁹ As expressed by British television actor Malcolm Sinclair, “When you act in something and it goes on to be a worldwide success, it is incredibly soul-destroying to know you may have no part in it at all.”¹⁰

In 2015, the Ninth Circuit went beyond the facts of the case and broadly denied the existence of an actor's copyright, suggesting that actors look to state publicity laws for relief.¹¹ It is true that some states have adopted publicity rights, which mirror the power of an author to copyright, by protecting one's name, image, and likeness in commercial settings.¹² However, if the image

-keepers-talks-about-art-movement-one-role-next.

7. *See id.*

8. *Id.*; *see also* MOVING COMPANY, <http://themovingco.org> (last visited Feb. 4, 2016) (“Our mission is to create and produce visionary theatre built on the past, grounded in the present and looking to the future. And to unabashedly nourish an atmosphere for bold new productions for audiences locally, nationally and throughout the world.”); Theatre de la Jeune Lune, *The Fishtank*, YOUTUBE (Jan. 21, 2009), <https://www.youtube.com/watch?v=ovyRjLWjxe0>.

9. *See Garcia III*, 786 F.3d at 744 (holding that a film actress was unlikely to prove that her performance satisfied copyright's authorship and fixation requirements). *See generally* 17 U.S.C. §§ 106, 204, 504(c)(1) (2012) (stating that a copyright owner is given exclusive control over his or her work and is afforded a bundle of property rights, including the right to copy, to distribute, to create derivative works, to perform, and to publicly display. Property rights can be assigned or licensed individually or in their entirety. If a work is registered with the U.S. Copyright Office and another party infringes that work, the author qualifies for statutory damages and attorney fees).

10. INT'L FED'N OF ACTORS, A FIA GUIDE TO THE WIPO BEIJING TREATY ON AUDIOVISUAL PERFORMANCES 3 (2014).

11. *See Garcia III*, 786 F.3d at 744; *see also infra* Part II.D (discussing *Garcia*).

12. *See* 62A AM. JUR. 2D *Privacy* § 17, Westlaw (database last updated Nov. 2015) (“[A]ssociation of one's name, face, or likeness with a business, product, or service creates a tangible and salable product . . . there may be a ‘right of publicity’ in the value of a person's name or likeness which is a variety of the tort of invasion of privacy.”).

is embedded in copyrighted material, federal copyright law preempts access to this cause of action.¹³ As a result, actors without copyright ownership are left without a remedy to control unwanted distribution. While authorship would provide more economic security to the acting profession, copyright law is but one piece in the larger puzzle of solving this artist group's gross wage inequality.

In New York, copyright ownership has been a point of contention for theater collaborators.¹⁴ Unlike film or television writers, playwrights typically retain the copyright to their plays.¹⁵ But the person who profits most from a production is usually the producer, not the playwright. It is frankly unheard of to be a full-time playwright. Playwright and screenwriter Doug Wright shared how little he personally values copyright ownership in light of much higher Hollywood paychecks. For one Hollywood project, he earned "roughly eighty times the fee for [his] most recent play commission."¹⁶ Depending on the agreement, playwrights are generally given only around five to eight percent of the royalty rate, making this copyright battle look like a fight at the food bank over bread.¹⁷ But with American musicals bringing in as much as \$250 million, a five percent royalty rate has motivated some directors and choreographers to assert that their contributions are worthy of joint authorship to the script and authorship to the performance.¹⁸ Producers oppose these authorship claims because multiple authors complicate the production process¹⁹ and diminish profits for existing royalty holders.²⁰ For example, if directors were to own their individual performances, producers might have to ask

13. See *infra* Part II.B.

14. See The Dramatist Guild of Am., *DG Controversies & Their Resolutions*, YOUTUBE (Sept. 9, 2013), <https://www.youtube.com/watch?v=aOhekSs0jT8>.

15. See John Weidman, *The Seventh Annual Media and Society Lecture: Protecting the American Playwright*, 72 BROOK. L. REV. 639, 641 (2007).

16. Doug Wright, *Playwrights and Copyright*, 38 COLUM. J.L. & ARTS 301, 302 (2015).

17. See David Koeshler, *Theater Production Agreements*, DAVID KOESHER, <http://www.dklex.com/theatre-production-agreements.html> (last visited Feb. 4, 2016).

18. See Margit Livingston, *Inspiration or Imitation: Copyright Protection for Stage Directions*, 50 B.C. L. REV. 427, 428 n.4 (2009); see also *infra* Part V.C.

19. See generally *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 1999) ("So many people might qualify as an 'author' if the question were limited to whether they made a substantial contribution that the test would not distinguish one from another.").

20. See Livingston, *supra* note 18, at 432 n.35.

permission or negotiate an assignment before streaming a live broadcast of their performance.²¹ If a director's contribution was elevated to the level of meriting joint authorship, the playwright would be forced to split both his earnings and control with the director.²²

Regional theater cities like Minneapolis are the Wild West for theater copyrights in that no one talks about copyright. This is mainly because few new works are even made, and if made, almost none are reproduced to make a future interest truly desirable.²³ But Minneapolis does have theater—lots of it—and with theater comes a sizeable actor workforce. The sparse data available tells us that while Minnesota has fourteen times the national average for per capita revenues for theater companies, it also has an unexplained declining actor workforce.²⁴

I propose the recognition of the actor's copyright as but one solution to remedy this problem. The AEA, the stage actor's union, has been silent on copyright ownership, leaving that fight to individual actors.²⁵ From the actor's perspective, recognizing acting performance as copyrightable material could provide new benefits to the craft of acting, including royalties and the ability to control one's work.²⁶ As copyright law is an economic tool used to collect royalties, actors and their unions could leverage this property interest as a bargaining chip.²⁷ This is particularly paramount since actors are typically not paid much.²⁸ Even at a big house like

21. See 17 U.S.C. § 106(2), (5) (2012) (adaptation right).

22. See *infra* Part V.C.

23. The author of this article was compensated a modest \$150 for co-authoring a play that ran for several weeks at a Minneapolis theater house, and even enjoyed touring performances.

24. CITY OF MINNEAPOLIS, THE MINNEAPOLIS CREATIVE INDEX 2013: UNDERSTANDING THE SCALE AND IMPACT OF MINNEAPOLIS' CREATIVE SECTOR 8–9 (2013), <http://www.ci.minneapolis.mn.us/www/groups/public/@citycoordinator/documents/webcontent/wcms1p-104680.pdf>.

25. Telephone Interview with Ryan Hastings, Equity Union-AEA Bus. Representative (Jan. 3, 2013).

26. See 17 U.S.C. § 102(a)(3) (2012) (dramatic works).

27. See Carrie Ryan Gallia, *To Fix or Not to Fix: Copyright's Fixation Requirement and the Rights of Theatrical Collaborators*, 92 MINN. L. REV. 231, 234–35 (2007) (“[C]opyright . . . served dual purposes: economics, by granting authors the right of publication, and culture, by ‘encourag[ing] . . . learning.’” (footnote omitted)).

28. Steve DiPaola, ACTORS' EQUITY ASS'N, 2012-2013 THEATRICAL SEASON REPORT: AN ANALYSIS OF EMPLOYMENT, EARNINGS, MEMBERSHIP AND FINANCE 15 (2013), http://www.actorsequity.org/docs/about/AEA_Annual_12-

Chanhasen Dinner Theater, the largest dinner theater in the nation, a first-rate AEA actor like Keepers is only guaranteed \$696 per week.²⁹ The status quo is even worse for the many non-union actors who are typically only offered modest stipends, if compensated at all for their contribution.³⁰ In summary, copyright ownership could open the door to giving actors better pay, more control over their work, and the opportunity to argue for joint authorship.

Part II of this article explains AEA's minimal involvement in advocating for the actor's copyright and provides a summary of case law addressing the copyrightability question.³¹ Part III reveals the still-unlivable working conditions of the American stage actor, due mostly to inconsistent, short-lived work.³² Part IV illustrates the potential for greater profit sharing on Broadway and the larger theater community if live streaming were to become a more common venture.³³ Part V challenges legal and policy arguments against the actor's copyright, and explains the present state of the Beijing Treaty on Audiovisual Performances.³⁴ Part VI proposes the work be integrated into the subject matter categories "pantomime and choreographic works," and "dramatic works."³⁵

II. NON-UNION ACTORS ARE FIGHTING THE BATTLE IN COURT

Copyright protection, not explicitly listed in the Copyright Act, materializes either through state³⁶ or federal common law; or

13.pdf (reporting for the 2012-2013 season, AEA members earned \$25,000 or less).

29. ACTORS' EQUITY ASS'N, AGREEMENT AND RULES GOVERNING EMPLOYMENT AT CHANHASSEN DINNER THEATER 66 (May 26, 2014), http://www.actorsequity.org/docs/rulebooks/Chanhasen_Rulebook_14-18.pdf. Actors and producers are free to negotiate higher weekly salaries, as well as any additional terms of employment.

30. See generally *Classifieds: Paid*, MINNESOTA PLAYLIST, <http://www.minnesotaplaylist.com/classified/paid> (last visited Feb. 4, 2016) (showing paid classified advertisements for acting jobs commonly note that a modest stipend is available).

31. See *infra* Part II.

32. See *infra* Part III.

33. See *infra* Part IV.

34. See *infra* Part V.

35. See *infra* Part VI.

36. See, e.g., CAL. CIV. CODE § 980 (West, Westlaw through 2015); 3 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT §§ 17.5.11, 17.36 (3d ed. 2008). While 17

copyright-like powers through private contractual agreements.³⁷ The theater industry is unionized from top to bottom, negotiating most employment contracts through collective bargaining.³⁸ Apart from making a couple of ownership-like agreements available, AEA has left copyright ownership to the actors to negotiate for themselves.³⁹ Historically, the actor's copyright has gained little traction in state and federal court.⁴⁰ But in 2015, a Ninth Circuit en banc panel said actors have no copyright interest in the films they make.⁴¹

A. *AEA's Current Response to Intellectual Property Is Minimal*

AEA currently provides the "Mini Contract" and the "Workshop Agreement" to its members involved in new work.⁴² The rights included in these agreements resemble some of the property rights afforded to copyright owners without reference to ownership.⁴³ An actor uses a Mini Contract when he or she commits to a short-term play premiering at a smaller venue.⁴⁴ Embedded in the contract is a conversion clause entitling an actor to either additional money or a guaranteed part in a larger, subsequent production.⁴⁵

U.S.C. § 301 permits states to protect works not eligible for federal protection, this body of law differs from state to state, and appears to focus on the protection of pre-1972 sound recordings and unfixed bootlegged copies of live performances. *Id.*

37. Livingston, *supra* note 18, at 432.

38. *Contract Benefits*, ACTORS' EQUITY ASS'N, <https://www.actorsequity.org/benefits/contractbenefits.asp> (last visited Feb. 4, 2016) ("Through collective bargaining with theatrical employers, Equity establishes basic wages and working conditions . . .").

39. Telephone Interview with Ryan Hastings, *supra* note 25.

40. *See, e.g.*, Jules Jordan Video, Inc. v. 144942 Can., Inc., 617 F.3d 1146 (9th Cir. 2010); Fleet v. CBS, Inc., 58 Cal. Rptr. 2d 645 (1996).

41. *Garcia III*, 786 F.3d 733, 740–45 (9th Cir. 2015).

42. *See* ACTORS' EQUITY ASS'N, ACTOR'S EQUITY ASSOCIATION WORKSHOP AGREEMENT OVERVIEW I (2014) [hereinafter WORKSHOP AGREEMENT OVERVIEW], http://www.actorsequity.org/docs/rulebooks/Workshop_Overview.pdf; ACTORS' EQUITY ASS'N, ADDITIONAL RULES GOVERNING EMPLOYMENT UNDER THE MINI CONTRACT 1 (2011) [hereinafter RULES GOVERNING MINI CONTRACT], http://www.actorsequity.org/docs/rulebooks/Mini_Rulebook_2011.pdf.

43. *See* RULES GOVERNING MINI CONTRACT, *supra* note 42, at 3–4.

44. *Id.*

45. *Id.*

A Workshop Agreement defines an author's involvement in the development of a new play.⁴⁶ In consideration for the actor's participation, she can "earn a share in the future success of the show."⁴⁷ Actors under this agreement are placed inside of a diluted royalty pool and cannot control the work.⁴⁸ Most actors perform in small productions without compensation, let alone profit sharing.⁴⁹

To many theater professionals, AEA does not have a great record of providing more to its actors than standard agreements.⁵⁰ However, before collective bargaining, actors often received no pay for rehearsals, were forced to provide costumes and transportation, and were pressured into signing illusory contracts.⁵¹ Today, AEA requires that producers classify actors as employees, provide reasonable working conditions, and pay minimum weekly salaries.⁵² Alternative avenues to revenue, like actor collective business models, performing in unusual spaces, and the actors' copyright, are not viewed as priorities to the union.⁵³ Particularly since copyright law automatically transfers the work of an employee to his employer.⁵⁴ Given this result, keeping employee classification might be the better battle for the union. Employees enjoy immediate job securities and benefits, including eligibility for unemployment insurance and workers' compensation.⁵⁵ Still, if the

46. E-mail from Leah Cooper, Executive Dir., Theater Alliance, to author (Aug. 16, 2013) (on file with author).

47. WORKSHOP AGREEMENT OVERVIEW, *supra* note 42, at 2.

48. *See infra* Part IV.

49. E-mail from Zaraawar Mistry, Dir., Dreamland Theater, to author (Sept. 16, 2013) ("Most of the people and companies I work with operate in the non-profit arena, on a relatively small scale, where one's contribution is considered work made for hire, so the question of actor's copyright doesn't really matter anyway.") (on file with author).

50. Telephone Interview with Gülgün Kayim, Dir., Arts, Culture & Creative Economy (Sept. 25, 2013); E-mail from Zaraawar Mistry, *supra* note 49; E-mail from Leah Cooper, *supra* note 46.

51. ROBERT SIMONSON, PERFORMANCE OF A CENTURY 24–28 (2012) ("Under the 'satisfaction clause,' an actor who failed to please the manager in any way could be dismissed. . . . And, should a play flop out of town, as was frequently the case, companies were sometimes abandoned to find their own way home.").

52. *See* WORKSHOP AGREEMENT OVERVIEW, *supra* note 42, at 1–2.

53. Telephone Interview with Gülgün Kayim, *supra* note 50.

54. *See* 17 U.S.C. § 101 (2012) (work made for hire).

55. *See* Telephone Interview with Ryan Hastings, *supra* note 25 (stating that the AEA does not bargain for intellectual property rights, but strictly requires all production houses to classify actors as employees, and to process W-2s).

courts recognized the actor's copyright, AEA could leverage new rights. Further, as most actors are not members of a union, they typically go without both employee benefits and intellectual property rights.⁵⁶

B. State Publicity Rights May Not Be an Option with Copyrighted Works

Stephen Fleet, a non-union film actor who appeared in *Legend of the White Horse*, later distributed by CBS, brought a publicity rights case questioning the actor's copyright.⁵⁷ After not being paid, Fleet filed suit in California state court for misappropriation of his name, image, and likeness for commercial gain.⁵⁸ Summary judgment was granted in favor of CBS because of federal preemption.⁵⁹ When images are embedded in a film, the court felt the rights involved are that of copyright, not publicity.⁶⁰ The court noted that because it was suspect as to whether the performance fell within a work made for hire agreement,⁶¹ the actor would have been more successful in bringing a claim for copyright infringement.⁶² To the court, unlike a model in a photograph, CBS was distributing his dramatic performance, which was "copyrightable."⁶³

56. See generally *Skylark Opera v. Dep't of Emp't and Econ. Dev.*, No. A13-2343, 2014 WL 4672360, at *6 (Minn. Ct. App. Sept. 22, 2014) (determining that the workers hired by the Skylark Opera were independent contractors, but noting that their "decision should not be construed to extent to all persons hired by operas, orchestras, or theaters."). In Minnesota, the future of employee classification for non-union actors is uncertain. See *id.*

57. *Fleet v. CBS, Inc.*, 58 Cal. Rptr. 2d 645, 646-48 (Ct. App. 1996).

58. *Id.*

59. *Id.* at 648.

60. *Id.* at 651-52.

61. *Id.* at 648-50. CBS failed to present any evidence to prove that the actors were neither employees of the production company, nor that they signed explicit work made for hire agreements, as required by law. *Id.* Conversely, as the plaintiffs failed to challenge this component, the court was unable to make a ruling on the matter. *Id.*

62. *Id.* at 651 ("An actor who wishes to protect the use of the image contained in a single, fixed dramatic performance need simply retain the copyright.").

63. Cf. *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003-04 (9th Cir. 2001) (citing MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 1.01(B)(1)(c), at 1-23 (1999) (holding that the model's image in a photograph is owned by the photographer author)).

Four years after *Fleet*, another California state court found in favor of a model that brought a publicity rights claim for the unauthorized distribution of her image.⁶⁴ The court qualified the *Fleet* opinion by holding that when a party is ineligible for copyright protection (e.g., an actor or model), and they are challenging an unauthorized distributor, the claim is not preempted.⁶⁵ While the court questioned the *Fleet* actor's copyright eligibility,⁶⁶ it let the prior holding stand, all the while grouping other actors in the same unprotected category as models.⁶⁷ The court made no comment as to what made the *Fleet* actor an exception.⁶⁸

Finally, in *Jules Jordan Video*, a pornographic actor-producer appeared in federal court with a publicity rights claim; the court ignored the *Fleet* actor altogether.⁶⁹ The court determined preemption should depend on whether the work itself is copyrightable, and should pay no attention to the claimant's individual rights.⁷⁰ A publicity rights claim is preempted when it is "equivalent of a claim for infringement of a copyrightable work . . . regardless of what legal rights the defendant might have acquired."⁷¹ As a result, because plays and movies are copyrighted works, actors cannot access publicity rights if their performance—containing their name, image, and likeness—is distributed without their authorization. Unfortunately, *Garcia* failed to reconcile this case law when it proposed the actor turn to publicity rights as an alternative cause of action for removing her image from the disputed film.

C. Actors Granted Authorship over the Characters they Perform

The First Circuit went past basic copyrightability and gave actors straight-up character ownership.⁷² Actors starring in a

64. *KNB Enters. v. Matthews*, 78 Cal. Rptr. 2d 713, 721 (Ct. App. 2000).

65. *Id.* at 723 ("We do not believe a [publicity claim] is preempted under *Fleet* where, as here, the defendant has no legal right to publish the copyrighted work.").

66. *Id.* at 722.

67. *Id.* at 723.

68. *Id.*

69. *Jules Jordan Video, Inc. v. 144942 Can., Inc.*, 617 F.3d 1146, 1154–55 (9th Cir. 2010).

70. *Id.*

71. *Id.* at 1155.

72. *TMTV Corp. v. Pegasus Broad. of San Juan*, 490 F. Supp. 2d 228, 230 (D.

Spanish television show brought infringement claims alleging that a different program included substantially similar characters to the ones played by the plaintiff actors.⁷³ The court applied character case law to the actor's copyright.⁷⁴ In short, if James Bond is copyrightable, Sean Connery's portrayal of him should afford Connery authorship. When "characters depicted audio-visually"⁷⁵ are "especially distinctive,"⁷⁶ they should receive copyright protection.⁷⁷ Consistent with *scene à faire*,⁷⁸ copyright protection would not be given to stock characters and basic dialogue.⁷⁹ This holding fails to address the type of authorship given to the actors; whether it would be a derivative work to the underlying script, or a joint authorship with the screenwriter.⁸⁰

D. Bad Facts Managed to Make Unexpected Worse Law

The film *Innocence of Muslims*, a controversial YouTube video, forced an unknown, non-union actor at the forefront of national security and freedom of speech.⁸¹ "While answering a casting call

P.R. 2007).

73. *Id.*

74. *Id.* at 236 (citing *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003)); *see, e.g., Toho Co. v. William Morrow & Co.*, 33 F. Supp. 2d 1206, 1215 (C.D. Cal. 1998) (granting copyright protection for "Godzilla"); *Metro-Goldwyn-Mayer, Inc., v. Am. Honda Motor Corp.*, 900 F. Supp. 1287, 1297 (C.D. Cal. 1995) (granting copyright protection for "James Bond"); *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388, 391 (S.D.N.Y. 1981) (granting copyright protection for "Tarzan").

75. *TMTV Corp.*, 490 F. Supp. 2d at 236.

76. *Id.* (citing *Rice*, 330 F.3d at 1175).

77. *Id.*

78. *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978) ("[I]ncidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.").

79. *TMTV Corp.*, 490 F. Supp. 2d at 236.

80. *TMTV Corp.* does not answer whether the actor becomes a sole author or a joint author over the character. Is he the sole author of a derivative work to the underlying screenplay copyright or a joint author to the entire character? This thesis argues the former; an actor would properly have ownership to only his or her specific collection of audio and visual embodiments. New actors could still reinvent the role, which is particularly important in theater as roles are repeated all over the world. The latter would ignore joint authorship case law as the actor escapes proving intent. *Id.*

81. *See Garcia v. Google, Inc. (Garcia II)*, 766 F.3d 929 (9th Cir. 2014), *aff'd en banc*, 786 F.3d 733 (9th Cir. 2015).

for a low-budget amateur film doesn't often lead to stardom, it also rarely turns an aspiring actress into the subject of a fatwa."⁸² From this mess of a case, the actor's copyright enjoyed a short life before coming to its end in the Ninth Circuit.⁸³

The filmmakers, without the actor's knowledge, colored the Muslim Prophet Muhammad a child molester by altering the dialogue in the actor's thirty-second performance.⁸⁴ "[A]fter the film aired on Egyptian television, there were protests that generated worldwide news coverage. An Egyptian cleric issued a fatwa, calling for the killing of everyone involved with the film"⁸⁵ Soon thereafter, the actor and her family began to receive death threats. The actor, who never signed a work made for hire agreement,⁸⁶ requested that Google take down the controversial film by claiming copyright infringement.⁸⁷

The actor did not argue for joint authorship,⁸⁸ but rather that she held a derivative copyright in her own performance.⁸⁹ The lower court denied her motion for preliminary injunction;⁹⁰ it refused to comment on the actor's copyright, and instead found an implied license to distribute her performance.⁹¹ Nothing was said of the unauthorized, controversial modification.⁹²

82. *Id.* at 932.

83. *Garcia III*, 786 F.3d 733, 733 (9th Cir. 2015).

84. *Id.*

85. *Garcia II*, 766 F.3d at 932.

86. *Id.* at 949 n.5.

87. *Id.* at 932.

88. *Id.* at 934 (“*Aalmuhammed* . . . does not . . . ‘articulate[] general principles of authorship.’” (alteration in original)). See generally *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000) (“Burrow-Giles defines author as the person to whom the work owes its origin and who superintended the whole work, the ‘master mind.’”).

89. *Garcia II*, 766 F.3d at 935 (“A screenplay is itself a copyrightable creative work and a film is a derivative work of the screenplay on which it is based. Where, as here, an actor's performance is based on a script, the performance is likewise derivative of the script” (citations omitted)).

90. Order Denying Plaintiff Garcia's Motion for Preliminary Injunction, *Garcia v. Google, Inc.* (*Garcia I*), No. CV 12-08315-MWF (VBKx) (C.D. Cal. Nov. 30, 2012).

91. *Id.* at 3.

92. See *id.* (“[The plaintiff] created a work at defendant's request and handed it over, intending that defendant copy and distribute it.” (citing *Effects Assocs. v. Cohen*, 908 F.2d 555, 558–59 (9th Cir. 1990))); *Garcia II*, 766 F.3d at 932 (criticizing the lower court for failing to comment on the actor's copyright interest properly, or whether her contribution fell under work made for hire).

The original Ninth Circuit decision reversed;⁹³ the court found an actor's performance was copyrightable if the *Feist* test⁹⁴ was met and the performance was visual.⁹⁵ It rejected any argument that an actor is merely a pawn, tasked with reading lines; if acting was simply reading lines, "every shmuck . . . [would be] an actor because everyone . . . knows how to read."⁹⁶ Instead it is a craft; actors must combine "body language, facial expression and reactions to other actors and elements of a scene."⁹⁷ YouTube was required to take down the video, putting a stop to the distribution of the contested performance.⁹⁸ The court saw no reason to deny a non-joint author control over his or her contribution⁹⁹: If filmmakers want to manipulate a performance to the point of exceeding an implied license,¹⁰⁰ they must either get permission, or have actors sign work made for hire agreements ahead of time.

93. *Garcia II*, 766 F.3d at 940.

94. *Id.* at 934 ("An actor's performance, when fixed, is copyrightable if it evinces 'some minimal creativity . . . "no matter how crude, humble, or obvious" it might be.'" (quoting *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991))).

95. *Id.* Performances are copyrightable whether or not the actor speaks. *Id.* The injunction was amended to only stop the distribution of her five-second performance, not the rest of the film. *Id.*

96. *Id.* (quoting SANFORD MEISNER & DENNIS LONGWELL, SANFORD MEISNER ON ACTING 178 (1987)).

97. *Id.* (citing CONSTANTIN STANISLAVSKI, AN ACTOR PREPARES 15, 218–19 (Elizabeth Hapgood trans., 1936)).

98. *Id.* at 939–40.

99. The Ninth Circuit and the Second Circuit were once split as to whether a unified work (like a film) should allow for separate indivisible parts, but the en banc decision resolved this tension. *Compare Garcia II*, 766 F.3d 929, with 16 Casa Duse, LLC v. Merkin, No. 12 Civ. 3492(RJS), 2013 WL 5510770, at *10–11 (S.D.N.Y. Sept. 30, 2013) ("[O]nly the Film receives copyright protection; there is no separate copyright for the film's direction, production, or cinematography [T]he purpose of work-for-hire agreements is not to consolidate *copyrights* under a single owner, but rather to consolidate *authorship*."). *See generally* 17 U.S.C. §§ 101–106 (2012) (derivative works).

100. The court agreed that *Garcia* granted a broad implied license, but the filmmakers went outside the scope of the license by grossly modifying the purpose of the work. *See Garcia II*, 766 F.3d at 937 ("But the license *Garcia* granted Youssef wasn't so broad as to cover the use of her performance in *any* project. Here, the problem isn't that 'Innocence of Muslims' is not an Arabian adventure movie: It's that the film isn't intended to entertain at all. The film differs so radically from anything *Garcia* could have imagined when she was cast that it can't possibly be authorized . . .").

Then in April 2015, the Ninth Circuit took everything back, unnecessarily, as pointed out by Judge Paul Watford in his concurrence:

We don't have to craft new rules of copyright law to resolve this appeal [M]uch of what the majority says about copyright law may be wrong Had we chosen to decide narrowly here, we could have affirmed the district court's denial of a preliminary injunction by focusing solely on the irreparable harm prong [Garcia failed] to show that removing the film from YouTube would likely eliminate (or at least materially reduce) the risk of death posed by issuance of the fatwa.¹⁰¹

In its broad rejection of the actor's copyright, the court placed great weight on the fact that 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 in a motion picture."¹⁰² Further, the court felt that breaking a film into "many little pieces" was just too much, forgetting that copyright law already denies ownership on the ground of de minimis, or stock contributions¹⁰³—both better alternative rationales for denying Garcia authorship. In the court's *Lord of the Rings* "copyright of thousands" example,¹⁰⁴ the 20,000 extras would not be eligible for authorship because presumably none of the background actors would have made eligible contributions. The court also created a brand new rule for "fixation" that somehow requires the copyright owner to do the actual "fixing,"¹⁰⁵ and better yet, that her objection to the manipulation made her *somehow* less involved in the "fixing."¹⁰⁶ This is contrary to the prior viewpoint that a producer

101. *Garcia III*, 786 F.3d 733, 747–48 (9th Cir. 2015) (Watford, J., concurring). The majority claimed it needed to decide the merits of her copyright claim in order to decide whether the law favors Garcia before granting a preliminary injunction (*Winter's* four-factor test). *Id.* at 740 (majority opinion) (citing *Winter v. NRDC*, 555 U.S. 7, 24 (2008)).

102. *Id.* at 741.

103. *Id.* at 742.

104. *Id.* at 742–43.

105. *Id.* at 741 ("[F]ixation must be done 'by or under the authority of the author.'" (quoting 17 U.S.C. § 101 (2012))).

106. *See* 17 U.S.C. § 101 ("A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.").

(or perhaps even a *director*) owns a film's copyright, since producers are certainly not physically "fixing" a film.¹⁰⁷ This analysis bodes well for camerapersons and editors countrywide in their quest for authorship.¹⁰⁸

Finally, the court discussed how impracticable it is to require independent filmmakers to secure work made for hire agreements and for service providers to respond to DMCA takedown notices.¹⁰⁹ To the first parade of horrible contention, work made for hire in film is established law, as it is one of the enumerated art forms in the Act.¹¹⁰ To obtain a statutory work made for hire, a hiring party must have an independent contractor sign an agreement; otherwise, the hiring party will get an implied license only.¹¹¹ But even with such a result, filmmakers would only be on the hook if they somehow go past the scope of the actor's implied license—for example, use Final Cut Pro to have the actor calling Muhammad a child molester.¹¹² Second, this decision will empower few film actors to actually halt distribution through DMCA takedown notices.

Garcia dealt with a rare life or death scenario.¹¹³ Most actors would see no benefit in halting distribution. After all, actors benefit from exposure and adding to their resumes. What they are after is a better quality of life. Although theater is slowly becoming a more profitable industry,¹¹⁴ many theater artists remain skeptical that livable wages will come.

107. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000) ("In a movie this definition, in the absence of a contract to the contrary, would generally limit authorship to someone at the top of the screen credits, sometimes the producer, sometimes the director, possibly the star, or the screenwriter—someone who has artistic control.").

108. *Cf. Garcia II*, 766 F.3d 929, 944–46 (9th Cir. 2000) (Smith, J., dissenting) (presenting a comical discussion on this point of requiring the creator to do the fixing).

109. *Garcia III*, 786 F.3d at 743–47.

110. *See* 17 U.S.C. § 101.

111. *Id.*

112. *See Garcia III*, 786 F.3d at 737 (noting that the producer replaced the plaintiff's lines with, "Is your Mohammed a child molester?").

113. *Id.* at 738.

114. *The Tills Are Alive*, *ECONOMIST* (May 4, 2013), <http://www.economist.com/news/business/21577062-musicals-business-bigger-more-global-and-more-fabulous-ever-tills-are-alive/print> ("Musicals in America will probably generate \$1.9 billion in revenue this year, according to IBISWorld, a research firm . . .").

III. IMPROVING THE LIFE OF THE COMMON STAGE ACTOR

The financial benefits of copyright ownership could assist in improving the stage actor's dreary economic situation. In 2013, the National Endowment for the Arts (NEA) identified actors as having the highest unemployment rate among the entire artist labor force;¹¹⁵ almost thirty-two percent of reported union and non-union actors were unemployed.¹¹⁶ What is most striking is that while actors are more educated than the general labor force, they receive much less pay.¹¹⁷ Today, the average AEA union member works only seventeen weeks yearly,¹¹⁸ and members' median salary is only \$7,382.¹¹⁹ This figure places AEA actors well below the poverty line.¹²⁰

115. *The National Endowment for the Arts Announces New Research on Arts Employment*, NAT'L ENDOWMENT FOR ARTS (Mar. 28, 2014), <http://arts.gov/news/2014/national-endowment-arts-announces-new-research-arts-employment#sthash.oXEaOtTz.NmmlX2le>; see also NAT'L ENDOWMENT FOR THE ARTS, ARTISTS IN A YEAR OF RECESSION: IMPACT ON JOBS IN 2008 5–6 (2009) [hereinafter ARTISTS IN YEAR OF RECESSION], <http://arts.gov/sites/default/files/97.pdf> (stating that performing artists have the highest unemployment rates, with actors having the highest); Telephone Interview with Gülgün Kayim, *supra* note 50 (stating that economic studies on acting and dancing are misleading, as they only take into account actors who report income. The unemployment rate would be much higher if it accounted for all actors participating in the audition circuit).

116. ARTISTS IN YEAR OF RECESSION, *supra* note 115, at 10.

117. See NAT'L ENDOWMENT FOR THE ARTS, ARTISTS IN THE WORKFORCE 1990–2005, at 23 (2008) [hereinafter ARTISTS IN WORKFORCE], <http://arts.gov/sites/default/files/ArtistsInWorkforce.pdf> (“Almost 60 percent of actors have completed college—more than double the rate of the labor force as a whole—but their median income (\$23,400) is below the \$30,100 median for the total labor force.”); see also Teresa Erying, *Actors and Money*, AM. THEATRE, Jan. 2008, at 6, 2008 WLNR 1546547 (stating that educational debt for actors is a huge problem, causing young actors to ditch their dreams of being on the stage, and instead “head straight for pilot season . . .”).

118. STEVEN DiPAOLA, 2010–2011 THEATRICAL SEASON REPORT: AN ANALYSIS OF EMPLOYMENT, EARNINGS, MEMBERSHIP, AND FINANCE 4 tbl.1 (2011), http://www.actorsequity.org/docs/about/AEA_Annual_2010-11.pdf.

119. *Id.* at 5 tbl. 2.

120. 2015 *Poverty Guidelines*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://aspe.hhs.gov/2015-poverty-guidelines> (last updated Sept. 3, 2015) (stating that the U.S. federal poverty line for a single-person household is \$11,770); see *Contract Benefits*, *supra* note 38 (stating that AEA members often have guaranteed minimum salaries as part of their contracts. For example, an actor working at a small professional theater can make anywhere from \$215 to \$626 per week).

According to Arts, Culture and Creative Economy, the industry started to suffer when theaters stopped doing repertory with artists in residency.¹²¹ Those actors worked entire seasons, and enjoyed livable wages.¹²² Today, cast AEA actors enjoy sought-after, although short-lived, employee-status roles, whereas non-union actors operate as independent contractors.¹²³ Even those talented and lucky enough to get into AEA still need to get cast regularly to qualify for union benefits.¹²⁴ As a general rule, actors jump from short-term gig to short-term gig, never seeing future earnings from past work.¹²⁵ An actor's life is a perpetual return to the unemployment pool.¹²⁶ Before *Third Rock from the Sun* and *Dexter*, John Lithgow worked the audition circuit in New York City.¹²⁷ Despite being a Fulbright Scholar at London Academy of Music and Dramatic Art, Lithgow found himself unemployed and desperate for chances to read for commercials.¹²⁸ During his first week in New York, a fellow actor told him to go to the Unemployment Insurance Office to collect the “closest thing to

121. See Emily C. Chi, *Star Quality and Job Security: The Role of the Performers' Union in Controlling Access to the Acting Profession*, 18 CARDOZO ARTS & ENT. L.J. 1, 76–77 (2000) (stating that producers dissolved the use of artist in residency, or long-term company members, to cut substantial costs, and to encourage diversity in casting. Producers wanted to be able to seek out new blood to play roles); see also Erying, *supra* note 117 (“[T]he Guthrie raised the largest endowment the American theatre had seen up until that time and designated as one of its purposes the increase of actor salaries and the support of a large year-round acting company.”); Kevin Winge, *Sally Wingert: The Meryl Streep of the Twin Cities*, STAR TRIB. (Minneapolis) (Mar. 22, 2010, 9:47 AM), <http://www.startribune.com/local/yourvoices/88808952.html> (stating that Wingert was an actor who benefited from the former Guthrie's residency program—performing in over eighty Guthrie productions to date); Telephone Interview with Gülgün Kayim, *supra* note 50;.

122. Telephone Interview with Gülgün Kayim, *supra* note 50.

123. See ARTISTS IN WORKFORCE, *supra* note 117, at 23 (“Only 15 percent of actors work full time for the entire year.”); see Telephone Interview with Ryan Hastings, *supra* note 25.

124. See *Health Insurance*, ACTORS' EQUITY ASS'N, <http://www.actorsequity.org/Benefits/healthinsurance.asp> (last visited Feb. 4, 2016) (“In order to qualify for plan eligibility, you must have at least 12 weeks of covered employment in any 12 calendar months ‘accumulation period’ to qualify for 6 months of coverage.”).

125. Telephone Interview with Gülgün Kayim, *supra* note 50.

126. JOHN LITHGOW, *DRAMA: AN ACTOR'S EDUCATION 201–03* (HarperCollins 2011).

127. *Id.*

128. *Id.* at 201.

state support for the arts,”¹²⁹ only to be told that he would first have to get twenty weeks of work under his belt.¹³⁰

Copyright ownership could help the common stage actor in both the short and long term. In the short term, an actor could negotiate a higher weekly salary if he agreed to transfer the copyright of his performance to the producer. The International Federation of Actors, the global federation of trade unions, guilds, and associations, feels the exclusive rights provided by copyright law

give[s] performers maximum leverage, enabling them to authorize use against the promise of a fair payment, e.g. a residual or a royalty payment. . . . [P]erformers are often in a very weak bargaining position and forced to transfer of all their economic rights to producers in perpetuity for little more than a symbolic payment.¹³¹

If the Guthrie Theater wanted to cast a non-union actor to play Lysander in *Midsummer Night's Dream*, the theater might need to ask permission to use images or videos of his performance outside of the scope of his employment contract. For example, the Guthrie might decide to stream a live performance to China. In the long term, an actor could see residuals if a recording of the performance was sold to PBS, packaged into DVDs, or streamed through BroadwayHD.¹³² Furthermore, in the rare circumstance that a court labels an actor a joint author, that actor could see profits seventy years past her life.¹³³

IV. THE POTENTIAL OF ROYALTIES

In Minneapolis-St. Paul, owning the copyright to a new work seems fruitless, as plays typically are short-lived and result in little revenue even for the producers.¹³⁴ As a result, not a lot of money is put into original, new works in regional areas. The larger theater houses in town typically produce familiar works or adapt popular movies or books to attract larger audiences.¹³⁵ Conversely, New York

129. *Id.*

130. *Id.*

131. INT'L FED'N OF ACTORS, *supra* note 10, at 7.

132. BROADWAYHD, <https://www.broadwayhd.com/index.php/general/landing> (last visited Feb. 4, 2016).

133. *See* 17 U.S.C. § 302(b) (2012).

134. *See supra* note 23 and accompanying text.

135. *See, e.g., New Works Initiative*, MINN. OPERA, <http://www.mnopera.org>

City sees several profitable new works annually—works that run on Broadway for years or get turned into major motion pictures. A stage actor developing an up-and-coming Broadway production would be a fool to turn down authorship rights. Putting new works aside, the theater industry in Minneapolis continues to flourish; the performing arts brought in over \$187 million in retail sales for the city in 2011—fourteen times the national average.¹³⁶ As revenues increase, theater companies will face questions of wealth distribution.¹³⁷

A. *Very Few New Works Make Any Money*

On Broadway, “[y]ou can’t make a living, but you can make a killing.”¹³⁸ In the early nineties, the Tony winner for best musical, *The Will Rogers Follies*, brought in as much as \$425,000 a week in ticket sales, but after two years still only saw a sixty percent return on the producer’s \$7.5 million investment.¹³⁹ On the flip side, the highest grossing musicals, worldwide, have brought in billions of dollars for their investors.¹⁴⁰ In some ways, a successful Broadway production can see more revenue than Hollywood films because they can run for years.¹⁴¹ For instance, *The Lion King* (an offspring of Broadway “Disneyfication”),¹⁴² which opened in 1997, and cost Disney \$15 million to mount, has brought in a total of \$5 billion in

/about/new-works-initiative/ (last visited Feb. 4, 2016).

136. CITY OF MINNEAPOLIS, *supra* note 24, at 8, 13.

137. See generally *Guthrie Theatre Foundation*, PROPUBLICA, <http://projects.propublica.org/nonprofits/organizations/410854160> (last visited Feb. 4, 2016) (listing executive compensation for 2013 as 3.8% and other salaries and wages as 37.9% of total revenue).

138. *The Tills Are Alive*, *supra* note 114.

139. Bruce Weber, *Tougher Odds on Broadway: A Special Report*, N.Y. TIMES (June 3, 1993), <http://www.nytimes.com/1993/06/03/theater/tougher-odds-on-broadway-a-special-report-make-money-on-broadway-break-a-leg.html?pagewanted=all&src=pm>.

140. *The Tills Are Alive*, *supra* note 114 (“‘Cats’ probably made a 3,500% return for its initial investors.”).

141. Weidman, *supra* note 15, at 643 (“Variety reported that Phantom of the Opera had become the most successful entertainment venture of all time—more successful than Star Wars, more successful than Harry Potter—grossing 1.9 billion dollars in the United States, 3.2 billion dollars world wide, from ticket sales alone.”).

142. Elizabeth L. Wollman, *The Economic Development of the “New” Times Square and Its Impact on the Broadway Musical*, 20 AM. MUSIC 4, 445 (2002).

gross revenue.¹⁴³ Compare this with its original Hollywood film version (2D original release), which initially brought in an impressive \$312.9 million, and later upon its 2011 3D release, another \$29.3 million.¹⁴⁴ As shown, a theater production has the potential of making more money than its film counterpart in certain scenarios; however, the industry as a whole remains dependent on big house productions, nonprofit models, and grants to stay afloat.¹⁴⁵

B. *New Technologies Open the Door to More Revenue*

Theaters are finally seeing the “Light at the End of the Tunnel” when it comes to new technologies.¹⁴⁶ Historically, theater did not enjoy the same residual benefits as film because it was limited in its ability to distribute.¹⁴⁷ Now there appears to be an audience for live broadcasting of theater. Powerhouses like London’s National Theater and New York City’s Metropolitan Opera are now broadcasting performances all over the world.¹⁴⁸ Most recently, Broadway producers Bonnie Comley and Stewart F. Land launched BroadwayHD, a streaming service for theatrical performances that costs \$14.99 a month. “We’re not trying to replace theater. What we’re doing is trying to extend it to people who either can’t get [to Broadway] due to geography or economic

143. *Id.* at 448; *The Tills Are Alive*, *supra* note 114.

144. Grady Smith, *‘The Lion King 3D’ Claims Box-Office Crown with 29.3 Million*, CNN (Sept. 19, 2011), <http://www.cnn.com/2011/09/19/showbiz/movies/lion-king-box-office/>.

145. Interview with Patricia Mitchell, CEO, Ordway Ctr. for the Performing Arts, in St. Paul, MN (Sept. 20, 2014) (stating that smaller theaters depend on the larger theater houses like the Guthrie to stay out of the red. The Guthrie not only makes theater a priority in the community, but it also gives directors, actors, and writers a livable paycheck to supplement their other work).

146. *See* Chi, *supra* note 121, at 37 (concluding that Broadway has had to spend all of its money to create elaborate special effects that movie screens cannot offer, in response to Hollywood competition); ANDREW LLOYD WEBBER, *LIGHT AT THE END OF THE TUNNEL* (Universal Int’l 2005).

147. Chi, *supra* note 121, at 37.

148. Anthony Tommasini, *A Fight for Love, in the Met and Out*, N.Y. TIMES (Sept. 24, 2013), http://www.nytimes.com/2013/09/25/arts/music/love-and-conflict-in-the-19th-century-and-the-21st.html?_r=0; *Helen Mirren Play The Audience to Be Broadcast Live in Cinemas*, THE GUARDIAN (Feb. 22, 2013), <http://www.theguardian.com/stage/2013/feb/22/helen-mirren-audience-broadcast-live> (detailing how *Great Expectations* streamed live from West End to 120 U.K. cinemas, grossing £80,000 in box office sales).

or some sort of health problem.”¹⁴⁹ The pair has successfully licensed the recordings of over 120 Broadway productions and are hoping to shoot new footage “in front of a live audience, in HD.” Comley, a three time Tony winner for her producing, thinks the larger market is ready for BroadwayHD:

We’re never going to replace the communal experience of seeing actors live. I understand that. New York has an amazing caliber of talent—of writers, directors and performers—that we’d like to share with the world. If they can’t get here in time, we can share that with the world in the best way we can.¹⁵⁰

With new technologies, theater collaborators may one day enjoy the residual benefits shared by their brothers and sisters in the film industry.¹⁵¹

V. THE ACTOR’S COPYRIGHT IS SIMPLE

Copyright law protects “original works of authorship fixed in any tangible medium of expression.”¹⁵² Bad actor jokes aside, actors would likely meet the (easy to pass) *Feist* test for originality.¹⁵³ And

149. Sean Hutchinson, *Streaming Broadway Plays Musicals to Your Home with BroadwayHD*, INVERSE (Nov. 6, 2015), <https://www.inverse.com/article/7888-streaming-broadway-plays-musicals-to-your-home-with-broadwayhd>.

150. Mark Kennedy, *New ‘BroadwayHD’ Site Will Stream Live Theater*, HUFFPOST TECH (Oct. 26, 2015 9:52 AM), http://www.huffingtonpost.com/entry/new-broadwayhd-site-will-stream-live-theater_562e2ad4e4b0ec0a3894edb5.

151. Chi, *supra* note 121, at 82 (“Under collective bargaining agreements with producers, SAG actors receive residuals for the reuse of their original film and television products on network, cable, foreign, and pay-per-view television and on videocassette.”); Eyring, *supra* note 117 (stating that AEA former Executive Director John Connolly’s proposed solution to help actors was to “ride the wave of opportunities offered through new technology-based media platforms” and to “utilize old technology—such as videotape—to promote disseminate and celebrate the work of theatres and actors”); Interview with Patricia Mitchell, *supra* note 145 (summarizing that, with the success of live broadcasting at the Met, there is the potential for regional houses to go national or international. Producers are facing backlash from the artists who are concerned about the quality of work. Broadcasting or taping live performances runs the risk of not reading well to new audiences. Further, performers are curious about their cut before there is a cut to be had. Producers need to be given flexibility in piloting new technologies. If it is successful, then the performers should vocalize their respective rights).

152. 17 U.S.C. § 102(a) (2012).

153. As long as a performance is original and minimally creative, the actor is granted copyright ownership, no matter the quality of the work. *See Feist Publ’ns*,

the once practical difficulties of fixing live performance in a “tangible medium”¹⁵⁴ are much less cumbersome with modern recording devices like iPhones. While the primary goal of copyright law may be to increase dissemination, this goal has its limits. The Constitution’s framers may not have been pro-actors’ rights, but they favored systems that chip away at a producer’s monopoly.¹⁵⁵ Sure in the case of joint authorship, a stage actor would be going against similarly underpaid playwrights, but joint authorship claims continue to be hard to win. Undeniably, recognizing the actor’s copyright would likely burden producers. Existing contract templates, for example, would need to account for the change in the law. And as a practical matter, producers may have to start paying actors more to get them to hand over their copyrights. But how is this different than any other copyright scenario? Collaboration happens in just about every other art form out there. Recognizing the actor’s copyright would simply fix a flaw in the law. Finally, while still not ratified by the Senate, the White House did sign the Beijing Treaty on Audiovisual Performances, which would require United States copyright law to recognize an actor’s copyright interest in her audiovisual performance regardless.¹⁵⁶

A. *Fixation Is Old News with the Advent of Recording Equipment*

American copyright law is unique in its fixation requirement.¹⁵⁷ To be afforded copyright protection, creative expression must be fixed “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”¹⁵⁸ The actor’s performance struggles with the

Inc., v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991). In *Garcia*, the dissent was quick to label an actor’s contribution likely nothing more than a performance of a work, or rather an ineligible “procedure” or “process.” See *Garcia II*, 766 F.3d 929, 942 (9th Cir. 2014) (Smith, J., dissenting). A dancer too develops off of choreography or plotlines, but his or her work is not viewed as simply a performance of the underlying work. Further, a ballet is certainly a work, but copyright law continues to protect the individual dancer-contributor.

154. 17 U.S.C. § 102.

155. LYMAN PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 143, 147 (1968).

156. Beijing Treaty on Audiovisual Performances, art 2, June 24, 2012, 51 I.L.M. 1214.

157. Gallia, *supra* note 27, at 240 (stating that civil law countries have done away with the fixation requirement).

158. 17 U.S.C. § 101.

fixation requirement on two counts. First, staged performances rely on the memories of its performers, so an audience member will never see the same performance twice.¹⁵⁹ Second, while the actor herself is tangible, and she could likely restage her performance before a judge, there is nothing tangible about her creation.¹⁶⁰ It is not painted on canvas, or molded into a statue. But modern recording devices make it easier for a staged production to act like a film.¹⁶¹ A truth that Article 2 of the Beijing Treaty on Audiovisual Performances acknowledges; the treaty simplifies the fixation requirement by defining “audiovisual fixation” broadly to mean any “embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which they can be perceived, reproduced or communicated through a device.”¹⁶² Furthermore, actors could prove authorship with marked-up scripts. Actors are known to note character choices, blocking, gags, beats, or whatever type of reminder they need to prepare for rehearsal.

Recently, big-ticket productions have started providing live broadcasts of their performances; however, most productions never see the lens of a film camera.¹⁶³ But if actors held copyright

159. See RUSTOM BHARUCHA, *THEATRE AND THE WORLD: PERFORMANCE AND THE POLITICS OF CULTURE* 123 (1993) (“[T]he theater is the only place where the same gesture can never be repeated the same way twice.”).

160. Talia Yellin, *New Directions for Copyright: The Property Rights of Stage Directors*, 24 COLUM.-VLA J.L. & ARTS 317, 327 (2001) (“Because dance is, in essence, an intangible work of art that lives primarily through performance instead of through recordation, the fixation requirement creates a formidable obstacle to the registration of choreographic works.” (citing Barbara A. Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives v. the Custom of the Dance Community*, 38 U. MIAMI L. REV. 287, 301 (1984))).

161. *Contra* 16 Casa Duse, LLC v. Merkin, No. 12 Civ. 3492(RJS), 2013 WL 5510770, at *30 (S.D.N.Y. Sept. 30, 2013) (denying a director copyright ownership to a film, the court noted that the “only tangible medium of expression for the direction, production, editing, and cinematography is the Film itself”). Under the same train of thought, a recorded performance would only grant the recording protection, not the actor. Even under this holding, an actor being filmed does produce a tangible product. She moves and speaks. A director may tell her how to move, but it is the actor that produces physical action.

162. Beijing Treaty on Audiovisual Performances, art 2, June 24, 2012, 51 I.L.M. 1214 (2012).

163. Gallia, *supra* note 27, at 239 (concluding that, if a live theater production is broadcasted, it should be afforded protection as long as it is recorded at the “same time [as it is] being transmitted”).

interests in their work, perhaps more actors would start requiring videotaped performances. Recording work is a relatively cheap task for even modest theater companies.¹⁶⁴ HUGE, a small improv theater in Minneapolis, for example, records all of its performances.¹⁶⁵ At HUGE, improv is done for improv's sake—dialogue or plotlines are not transcribed into play scripts, to be performed at a later date.¹⁶⁶ As long as Congress persists in requiring fixation, actors will need to advocate that performances, or even workshop sessions, be recorded.¹⁶⁷

But recordings should not be the only solution; scripts provide a solution too. After all, actors are already trained to *take notes* in their scripts. Dancers, like actors, struggled with fixation as dancing too represents a momentary, live expression.¹⁶⁸ In response, the law began to accept *either* written notation or a recording as evidence.¹⁶⁹ If actors are analogized to directors, they will have a heavier burden

164. This author mounted a production for under \$2,000 and coincidentally recorded (without cost) major scenes on her iPhone for the purpose of marketing the work to nonprofit organizations.

165. Interview with Molly Chase, Managing Dir., HUGE Improv Theater, in Minneapolis, Minn. (Aug. 28, 2014) (HUGE records improv performances).

166. *Id.*; see also *About Us*, HUGE THEATER, <http://www.hugetheater.com/about-us/> (last visited Feb. 4, 2016) (“In an effort to raise the visibility of the Twin Cities as a destination for some of the best, unscripted theater in the country, HUGE seeks to establish a home for those who love improv.”).

167. Gallia, *supra* note 27, at 240–43 (noting that adherence to international treaties has brought about a loosening of the fixation requirement). Since the 1994 signing of the TRIPS (Trade Related Aspects of Intellectual Property Rights) agreement, the United States has had to comply with all of the provisions of the Berne Convention, with the exception of moral rights. *See id.* When the TRIPS Performances and Phonograms Treaty passed in 1996, the U.S. Copyright Act had to conform by making live *musical* performances copyrightable without recognition of the fixation requirement. *See id.* Jurisdictions differ as to whether this was permitted under the Commerce Clause. *See id.* Thus, it is uncertain whether the United States will continue to be stubborn about the fixation requirement. *See id.*

168. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C.). Until 1976 choreographic works were not explicitly protected by copyright. *Id.*

169. Jennifer J. Maxwell, *Making a Federal Case for Copyrighting Stage Directions: Einhorn v. Mergatroyd Productions*, 7 J. MARSHALL REV. INTELL. PROP. L. 393, 403 (2008) (“The Copyright Office’s position creates an inconsistency by providing copyright protection for movements dictated by choreographic notations, but not providing this same protection for movements dictated by stage direction.”); Yellin, *supra* note 160, at 327.

than dancers in proving their contribution.¹⁷⁰ In *Einhorn*, a director sought ownership of his stage directions in *Tam Lin*, an off-off-Broadway production.¹⁷¹ The court declined to rule on the submission of his prompt book, containing his blocking notes, in proving his individual contribution.¹⁷² Director Gerald Gutierrez's deposits of his prompt book for *The Most Happy Fella* were also rejected. The U.S. Copyright Office noted that the prompt book only represents the [blocking] text, and would not equate to property ownership in the "manner, style or method of directing, or for the actions dictated by them."¹⁷³ While this decision is consistent with section 102(b) of the Copyright Act—which excludes ideas, no matter what medium that idea takes—the courts and the U.S. Copyright Office should account for the difficulty actors face in providing evidence.¹⁷⁴

Actors should be prepared to submit both a copy of their rehearsal script and a videotaped performance of their work as deposits for copyright registration.¹⁷⁵ This would allow a fact-finder to differentiate between the work of a playwright and that of an actor.¹⁷⁶ Jennifer Maxwell, in her article on the *Einhorn* decision, commented on the judge's challenge with these types of claims:

[A] videotape of the performance alone should not fulfill the fixation requirement without any evidence of written recordation. For example, anyone watching a play may perceive that the character on stage is "powerful, without realizing he is positioned in the most compositionally powerful point on the stage." In such an instance, the

170. Yellin, *supra* note 160, at 328 ("[I]t is generally accepted that choreographic notation gives rise to a copyright in the movement dictated by the notation, not just in the notation itself.").

171. *Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189, 191–92 (S.D.N.Y. 2006).

172. *Id.* at 196.

173. Yellin, *supra* note 160, at 328 (citing Letter from Joseph Miranda, Supervisory Exam., Performing Arts Section, U.S. Copyright Office (June 22, 1995)).

174. 17 U.S.C. § 102(b) (2012); *see, e.g.*, *Am. Dental Ass'n v. Delta Dental Plans Ass'n*, 126 F.3d 977, 981 (7th Cir. 1997) (holding that a code of long descriptions of medical procedures was copyrightable, even if the systems inside were not).

175. Maxwell, *supra* note 169, at 402 ("[V]ideotape of the performance alone should not fulfill the fixation requirement without any evidence of written recordation.").

176. *See id.* at 401.

judge or any lay person becomes so absorbed by the “illusion of theater” that they credit the actor rather than the staging.¹⁷⁷

It is important to note the nature of performance makes it difficult to separate what is the writer’s work from what is the actor’s work. What is one without the other? The filming of *Jerry Maguire* illustrates this unique relationship, as both the writer-director Cameron Crowe and actor Tom Cruise were meticulous in their respective roles:

[Cruise] carried the [marked-up] script in a black notebook with multicolored page markers for easy access. Layer by layer, Cruise began to strip down to the part that many had told [Crowe] he would never play . . . [Similarly, in every picture Crowe is] holding pages from the script in hand, and the pages are mostly filled with scribbled notes about how each line could be played.¹⁷⁸

In this specific situation, there existed a mutual appreciation for the other’s contribution. Crowe gushed over Cruise’s commitment to the role, and Cruise viewed the script to be Crowe’s work: “Your words, man,’ he said, ‘You spent three and a half years on this script.’”¹⁷⁹ In the court room, a much less amicable situation, the judge will be tasked with determining the degree to which a claimant contributes to a work. The judiciary should be sensitive to the limitations of the common stage actor in providing tangible evidence; however, it would do an injustice to simply take an actor’s word for it. It would be unrealistic and excessive to require collaborators to document every single suggestion or movement that actors make throughout the rehearsal process.¹⁸⁰

177. *Id.* at 402 (citing Edward Einhorn, *A Case for Stage Director’s Copyright*, UNTITLED THEATER CO. #61, <http://www.untitledtheater.com/DirectorsCopyright.htm> (last visited Feb. 4, 2016)).

178. Cameron Crowe, *The Jerry Maguire Journal*, ROLLING STONE (Dec. 26, 1996), <http://www.theuncool.com/journalism/rs750-jerry-maguire/>; see Tom Cruise’s *Script Suggestions & Read Cameron Crowe’s The Jerry Maguire Journals*, BLACKBOOK (Apr. 15, 2013), <http://www.bbook.com/film/see-tom-cruises-script-suggestions-read-cameron-crowes-the-jerry-maguire-journals/> (including an image of Cruise’s marked up script, showing that he made suggestions as to the blocking and delivery of the performance).

179. Crowe, *supra* note 178.

180. *But see* Maxwell, *supra* note 169, at 402 (suggesting that stage directors should “record all of their contributions, including verbal directions during rehearsals, in the prompt book or on the script as a means of evidencing the full range of their contributions from the first time they read the script all the way

Still, the fixation requirement provides evidence in this abstract field of law. The submission of both rehearsal scripts and recorded performance should be sufficient for fixation.

B. The Framers Were Not Fully Supportive of a Producer's Monopoly

Playwrights and actors may be the creators, but theater producers are the ones who sell tickets.¹⁸¹ Copyright's primary goal is to encourage the creation of new work, such as a play, and the Framers felt this was best achieved by maximizing ticket sales. As such, copyright law has always favored producers by encouraging either the exclusive licensing of certain rights or the outright assignment for any amount of consideration.¹⁸² Still, if presented with the actor's copyright, the Framers would have likely favored it since it serves the important function of frustrating the producer's monopoly.¹⁸³ When America formed as a new nation, it brought with it England's copyright tradition.¹⁸⁴ Under Article I of the U.S. Constitution, Congress can "promote . . . useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . ." ¹⁸⁵ The mere inclusion of the copyright clause in the Constitution, a document famous for its brevity, is telling of its political importance.¹⁸⁶ Framers disagreed as to the

through to the last performance").

181. See Interview with Patricia Mitchell, *supra* note 145 (stating artistic directors and producers are charged with the constant task of making money and filling seats).

182. Mark Rose, *Making Copyright*, in 1 COPYRIGHT LAW: THE SCOPE AND HISTORICAL CONTEXT 193, 207 (Benedict Atkinson & Brian Fitzgerald eds., 2011) (stating the original copyright bill permitted rights to be held by either the author or those who "hath or have purchased or acquired the copy or copies of any book or books"); *id.* at 204 (stating the bill itself was "simply parliamentary confirmation of traditional [bookseller] guild practices"); Mark Rose, *The Statute of Anne and Authors' Rights: Pope v. Curl (1741)*, in GLOBAL COPYRIGHT THREE HUNDRED YEARS SINCE THE STATUTE OF ANNE, FROM 1709 TO CYBERSPACE 70, 71 (Lionel Bently, Uma Suthersanen & Paul Torremans eds., 2010) (summarizing that the first twenty cases under the British 1710 Statute of Anne involved bookseller against bookseller).

183. PATTERSON, *supra* note 155, at 147.

184. See Statute of Anne 1710, 8 Ann., c. 19, (Eng.) in 1 COPYRIGHT LAW: THE SCOPE AND HISTORICAL CONTEXT xxvii (Benedict Atkinson & Brian Fitzgerald eds., 2011).

185. U.S. CONST. art. 1, § 8, cl. 8.

186. See PATTERSON, *supra* note 155, at 180 (noting it was odd how fast America adopted British copyright traditions, especially when there was only a

extent of the Act's power. To James Madison, "[t]he right to useful inventions, seems with equal reason to belong to the inventors."¹⁸⁷ However, not all of the Framers agreed with Madison. Thomas Jefferson, for example, expressed reservations about granting too strong of monopoly in their work.¹⁸⁸ If inventions are forever locked away, it would burden consumers with overpriced goods, and stifle future creators.¹⁸⁹

Permitting the actor's copyright is compatible with the intentions of America's framers. Copyright commentator Lyman Patterson thought artists' rights were included in copyright legislation purely to act "as a weapon against monopoly."¹⁹⁰ In Hollywood, there already exists an ongoing negotiation between the economic interests of the studios and the labor rights of the individual creator collaborators. When an artist has a higher royalty amount, the cost of production eats away at the distributor's profits.¹⁹¹ Artists also restrict producers by protesting choices that belittle their work.¹⁹² Finally, the labor disputes from an actor can also lead to the creation of smaller production companies. Actors wishing to receive greater artistic autonomy go outside of Hollywood to star in smaller, independent films or to perform on stage. In a few instances, actors have actually chosen to produce themselves, using their star power to enter the market. Reese

small author community).

187. THE FEDERALIST NO. 43, at 209 (James Madison) (Terence Ball ed., 2003) ("The utility of this power will scarcely be questioned. The copy right of authors has been solemnly adjudged in Great Britain to be a right at common law. The right to useful inventions, seems with equal reason to belong to the inventors. The public good fully coincides in both cases, with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.").

188. See Thomas Jefferson to Isaac McPherson (Aug. 13, 1813) *Writings* 13:333–35, in 1 COPYRIGHT LAW: THE SCOPE AND HISTORICAL CONTEXT 261 (Benedict Atkinson & Brian Fitzgerald eds., 2011).

189. See *id.*

190. PATTERSON, *supra* note 155, at 147.

191. See generally JESSICA LITMAN, DIGITAL COPYRIGHT 175 (2006) (discussing the incentive structure of American copyright law).

192. See, e.g., *Turner Entm't Co. v. Huston*, CA Versailles, civ. ch. (Dec. 19, 1994), translated in ENT. L. REP. 3 (Mar. 1995), <http://www.unclaw.com/chin/teaching/iip/turner.pdf> (holding the colorization of Huston's films violated the author's moral right under French law, despite recognizing that it would be an economic detriment the producers).

Witherspoon started Pacific Standard Films, the production company responsible for *Gone Girl*, in response to a lack of powerful, meaningful positions for women in Hollywood.¹⁹³ As such, artist rights—like term limits—restrict monopolies, making it an important consideration for modern policymakers.¹⁹⁴

C. Joint Authorship Is Difficult to Prove

Playwrights, who are also artists, are fearful of other theater collaborators encroaching on their modest, well-protected piece of the pie.

The [Society of Stage Directors and Choreographers] attorney, Ron Schectman, was quoted in the *New York Times* as saying, “It’s about money.” Off-Broadway, the director’s union was able to gain for their members a share of future revenues from the producers—their employers. They have not been able to gain that on Broadway. Instead, they’re turning to the playwrights and the play itself as a source of revenue. They have made up this basis to give themselves justification towards getting a share of the playwright’s revenue.¹⁹⁵

Playwrights should be comforted in the fact that actors are unlikely to win joint authorship claims.¹⁹⁶ Joint work is “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.”¹⁹⁷ Joint authorship functions as a tenancy in common, meaning it gives the new owner all of the rights of copyright, including an equal share in earnings.¹⁹⁸ Subsequently,

193. Anna Moeslein, *Reese Witherspoon’s Moving Speech at Glamour’s 2015 Women of the Year Award “Like Elle Woods, I Do Not Like to be Underestimated”* GLAMOUR (Nov. 10, 2015), <http://www.glamour.com/entertainment/blogs/obsessed/2015/11/reese-witherspoon-women-of-the-year-speech>.

194. See PATTERSON, *supra* note 155, at 147.

195. David Auburn et al., Dramatist Guild, *Why is ‘Director’s Copyright’ a Bad Idea, & Should Playwrights Pay Directors a Percentage of Their Income?*, 10 DRAMATIST 7, 8 (2008), <http://www.dramatistsguild.com/media/PDFs/RoundtableonDirectorCopyright.pdf>.

196. Susan Etta Keller, Comment, *Collaboration in Theater: Problems and Copyright Solutions*, 33 UCLA L. REV. 891, 892 (1986).

197. 17 U.S.C. § 101 (2012).

198. See Keller, *supra* note 196, at 911 (“Under copyright, as a tenant in common with the other copyright owners, each joint owner may grant a nonexclusive license in the entire work without obtaining the consent of the other

these rights pass to the new joint author's heirs, forever stripping the original author of valuable property interest.¹⁹⁹ As the law stands, an actor given joint authorship will receive fifty percent of the playwright's royalties, even if he or she only created ten percent of the script.²⁰⁰

To prevent unjust results, courts should continue to require more than a *de minimis* contribution.²⁰¹ The Seventh Circuit denied actors joint authorship when their contributions were limited to line suggestions.²⁰² The court adopted Professor Goldstein's two-prong test: the contribution must be copyrightable, and the parties must have intended to create a "unified" whole.²⁰³ In regards to the first prong, without clarity on the actor's copyright, actors automatically lose here.²⁰⁴ The second prong is what makes this test difficult for any collaborator to achieve.²⁰⁵ In many jurisdictions, it appears that judges are looking for an explicit admission by either the original author or the producer that they intended on joint authorship with the claimant.²⁰⁶ Requiring an admission gives little

joint owners.”).

199. See *id.* at 900–01.

200. *Id.* at 919–22.

201. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.07 (2015). Professor Nimmer suggests that contributions that are more than ideas, basic lines, or stock characters should be granted authorship. *Id.* No federal district court has adopted this standard. See Michael Landau, *Joint Works Under United States Copyright Law: Judicial Legislation Trough Statutory Misinterpretation* 45 IDEA 154, 203 (discussing the Seventh Circuit's treatment of Nimmer's *de minimis* test). While courts do differ as to what intent means, none suggest that merely contributing should merit joint authorship. *Id.* at 168–69.

202. See *Erickson v. Trinity Theatre*, 13 F.3d 1061, 1072 (7th Cir. 1993) (finding that the actors failed to show copyrightable contributions: “Ideas, refinements, and suggestions, standing alone, are not the subjects of copyrights”).

203. See *id.* at 1070 (“[A] contributor will not obtain a co-ownership interest, unless the contribution represents original expression that could stand on its own as the subject matter of copyright.” (quoting PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE § 4.2.1.2, at 379 (1989))).

204. See *id.* at 1070–71 (emphasizing that ideas can be protected with contracts, not copyright).

205. See *id.*

206. Compare *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000) (denying joint authorship as the party lacked an “objective manifestation[] of a shared intent” such as explicit contractual agreements, or whether the party had top billing), with *Erickson*, 13 F.3d at 1072 (denying joint authorship as the contributions were not copyrightable, the court found intent in one of the plays as the author admitted that she intended it “to be hers as well as Ms. Erickson's”),

hope to an adverse party looking to prove intent. If authors are going to admit authorship they likely are going to agree to profit sharing without a court order.²⁰⁷

Joint authorship might come about if an actor creates dialogue or characters through performance, which the playwright uses in her finished product. For instance, authorship could be found if an actor is asked to improvise scenes or dialogue in a workshop or rehearsal setting.²⁰⁸ Arguably there is real commercial gold in having dialogue improvised, rather than scripted, as audiences take kindly to unpredictable, choppy exchanges. The late-night comedy star Conan O'Brien, for example, speaks of improv being as good, if not better than, pre-scripted material: "[T]he whole energy in the room changes. People know it. They know that this is the real thing. They know that these cookies are being made fresh right there in front of them. And it's exciting."²⁰⁹

Not every performance will merit joint authorship, but some will. When blocking and rehearsing a play, directors, choreographers, and actors contribute varying degrees of creativity and originality.²¹⁰ A director or choreographer may come prepared with blocking notes, and tell the actor line-by-line how they are going to move and speak. More likely, an actor will come prepared with notes on line delivery, comic beats, and ideas for physical gags.²¹¹ The director may give some general blocking notes to set

and Childress v. Taylor, 945 F.2d 500, 508 (2d Cir. 1991) (denying joint authorship when it was clear that one author "[never] contemplated, much less would have accepted, crediting the play as [written by the other.]", *and* 1 GOLDSTEIN ON COPYRIGHT § 4.2.1 (2011 Supp.)).

207. Livingston, *supra* note 18, at 454 ("[D]irectors would typically fail to satisfy the 'intent' criterion in the judicial test for joint authorship."); Yellin, *supra* note 160, at 332 (stating that Dramatist Guild President John Weidman gave joint authorship to a colleague who he believed truly was a co-author).

208. See E-mail from Leah Cooper, *supra* note 46 ("Ensemble-driven work is a growing trend, especially now in a second wave from the younger generation (those that followed Jeune Lune).").

209. FastCompany, *Conan O'Brien on Improvisation*, YOUTUBE (May 17, 2011), <https://youtu.be/iP8t16Z1byM>.

210. E-mail from Zaraawar Mistry, *supra* note 49 ("There are many ways that new theater works get made—theater companies commission works from individual playwrights, ensembles create collaborative works, visionary directors create original new plays with the help of a talented cast—the list goes on.").

211. In *Aalmuhammed*, the court denied a Technical Consultant joint authorship even though his duties extended into coaching actors, and altering dialogue. *Aalmuhammed*, 202 F.3d at 1230. The court was mostly concerned with

up the shape of the scene, but then will invite the actors to show “what they’ve got.”²¹² As each production functions differently, based on the talents and personalities of the collaborators involved, disagreements should be settled on a case-by-case analysis.

In its Bill of Rights, the Dramatist Guild affirms its strong stance by reminding members they “own the copyright of [their] dramatic work. Authors in theatre business do not assign (i.e., give away or sell in entirety) their copyrights, nor do they ever engage in ‘work-for-hire.’”²¹³ While it is admirable that playwrights have managed to retain their copyrights, it is unjust to say playwrights should be immune from joint authorship claims.²¹⁴ By choosing to collaborate with other artists, be it to spark creativity or develop entire scenes, the playwright is accepting the legal consequences.²¹⁵ No one is suggesting that playwrights simply sit in a hole and run from professional feedback. Receiving a few good ideas should not

how he was credited; the intention behind the Technical Consultant position was to have someone ensure historical accuracy, not the kind of contribution protected by copyright law. *Id.* at 1231. The craft of acting, on the other hand, inherently begs for creative contribution. Even when the script itself is unaltered, actors are trained to add memorable nuances to characters.

212. See F.X. Feeney, *In the Trenches with Stanley Kubrick*, DGA Q., Spring 2013, <http://www.dga.org/Craft/DGAQ/Issues/1302-Spring-2013.aspx?IID={E2FBCEAF-E563-4005-B42C-9FE08516C29B}> (“You want the actors to make a contribution. Don’t put them in a position where they’re told what to do—that you’ve already set up the first shot in your mind. They may feel more comfortable walking around, doing this or that.” He often said: ‘Let the camera accommodate the actors. Don’t have the actors accommodate the camera.’); Chris Hodenfield, *True Detective*, DGA Q., Winter 2015, <http://www.dga.org/Craft/DGAQ/Issues/1501-Winter-2015.aspx?IID={A963EA29-DB8D-44CC-B6C8-9043A0CF9011}>

(interviewing Cary Fukunaga, Director of *True Detective*) (“Every actor is different. Some want adjustments; some don’t. Some want to know exactly how to say something; some want to be absolutely free. It takes a while to figure out everyone’s style and form of communication.”); Harold Ramis, *Acting Like a Director*, DGA Q., Spring 2009, <http://www.dga.org/Craft/DGAQ/Issues/0901-Spring-2009.aspx?IID={65A79E2C-91DA-49F7-AA5E-7D89DD151804}> (“I realized the most talented actors don’t always need direction. Sometimes you just need to stand by and hold their coats.”).

213. *Bill of Rights*, DRAMATIST GUILD AM., <http://www.dramatistsguild.com/billofrights/> (last visited Feb. 4, 2016).

214. *Cf.* Weidman, *supra* note 15, at 639 (“[I]f a director’s copyright is ever established, it will belong, not to the union, but to directors individually.”).

215. E-mail from Zaraawar Mistry, *supra* note 49 (“There are certainly some cases where this might be possible.”).

result in losing half of one's profits.²¹⁶ Playwrights rely on peer feedback that they receive in the writing, workshop, and rehearsal process.²¹⁷ Feedback makes for better products, and ultimately more dissemination.

D. Beijing Treaty on Audiovisual Performances Treaty and Required Action by the Senate

In 2012, the United States signed onto the Beijing Treaty on Audiovisual Performances, which grants performers²¹⁸ authorship and moral rights²¹⁹ to their fixed, recorded and live audiovisual performances. It further grants actors the exclusive right of authorizing unfixed performances (e.g. theatrical performances and rehearsals, etc.) so long as they are not broadcasted.²²⁰ This effort has been the “result of more than 20 years of persistent advocacy work by FIA and other performer organizations,”²²¹ and has also gained the support of the White House and the U.S. Patent and Trademark Office. Yet to be legally binding on U.S. copyright law, the Senate must first ratify the treaty by a two-thirds majority. It also needs at least nineteen more member nations to ratify the treaty before it becomes enforceable internationally.²²²

216. E-mail from Leah Cooper, *supra* note 46 (“[Playwrights] invest quite a bit more time in a script than an actor does, and it has no guarantee of being produced widely if at all.”).

217. See Jeffrey Knapp, *What is a Co-Author?*, 89 REPRESENTATIONS, Winter 2005, at 2, 6 (noting that collaboration in play development dates back to 1590, and playwriting “was itself essentially a collaboration: . . . the joint accomplishment of dramatists, actors, musicians, costumers.” (quoting GERALD EADES BENTLEY, *THE PROFESSION OF DRAMATIST IN SHAKESPEARE’S TIME, 1590–1642*, 198 (reprint ed. 1986))).

218. Beijing Treaty on Audiovisual Performances, *supra* note 162, art. 2(a) (“[P]erformers’ are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore.”)

219. *Id.* art. 5 (“[T]he performer shall . . . have the right: (i) to claim to be identified as the performer of his performances . . . (ii) and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation, taking due account of the nature of audiovisual fixations.”).

220. *Id.* art. 6.

221. *Beijing WIPO Audiovisual Treaty*, INT’L FED’N ACTORS, <http://fia-actors.com/policy-work/intellectual-property/beijing-wipo-audiovisual-treaty/> (last visited Feb. 4, 2016).

222. Beijing Treaty on Audiovisual Performances, *supra* note 162, art. 26

At the 2012 Diplomatic Conference on the Protection of Audiovisual Performances, actor Meryl Streep expressed support, stating it provides actors over-due economic rights to their work:

This is a pivotal time in the performers' battle for intellectual property protection. While digital technology creates a wealth of new opportunities for performers, it also significantly increases the risk of performers losing [sic] control over their very own work product, through the unauthorized manipulation of their images or performances . . . In the same way that writers and composers depend upon royalty income for their survival in the long term, performers around the world must benefit, as well, from income from the exploitation of their work.²²³

This treaty seeks to remedy much of the discriminations felt by performers over their economic rights, without sacrificing the legitimate production needs of the film industry by providing for measures to prevent making "Swiss cheese" out of film copyrights. Again, this is the concern that too many creative contributors to a film will claim authorship. FIA remains confident that member countries will be able to do this by maintaining a presumption of transfer upon fixation²²⁴:

There is . . . not a single best way to implement the treaty but rather multiple options, each to be considered in light of the specific national situation. If exclusive rights work

("This Treaty Shall bind: (i) the 30 eligible parties referred to in Article 26, from the date on which this Treaty has entered into force; (ii) each other eligible party referred to in Article 26, from the expiration of three months from the date on which it has deposited its instrument of ratification or accession with the Director General of WIPO.")

223. *New "Beijing Treaty" Firms Up Copyright Protection for Audiovisual Performances*, TRAVEL IMPACT NEWSWIRE (Jun. 29, 2012), <https://www.travel-impact-newswire.com/2012/06/new-beijing-treaty-firms-up-copyright-protection-audiovisual-performances/>.

224. *See* Beijing Treaty on Audiovisual Performances Treaty, *supra* note 162 art. 12 ("A Contracting Party may provide in its national law that once a performer has consented to fixation of his or her performance in an audiovisual fixation, the exclusive rights of authorization provided for in Articles 7 to 11 of this Treaty shall be owned or exercised by or transferred to the producer of such audiovisual fixation subject to any contract between the performer and the producer of the audiovisual fixation as determined by national law."). National laws can also require a written contract or a "right to receive royalties or equitable remuneration," much like the existing residual system in Hollywood. *See id.* art. 12.

particularly well in some countries, it is often where performers are well organized, where there is a healthy and dynamic practice of collective bargaining in the industry and possibly also where intellectual property regulations have not weakened the performers' leverage by providing for a presumption of transfer of their rights to producers. In most others, a combination of exclusive rights and unwaivable remuneration rights subject to mandatory collective management might be a better way forward.²²⁵

In regards to the national treatment of this treaty, given that many actors are not affiliated with a professional union in the United States, Congress might consider creating a hybrid system that honors collective bargaining agreements while maintaining a collective management scheme for nonunion performers. No matter the specific devices to implement the treaty's terms, there would need to be deference to the balance in workers' rights already created by the existing work made for hire doctrine. In addition to the presumption of transfer provision, this treaty also excludes protection to extras—the background performers central to the *Lord of the Rings* “copyright of thousands” illustration provided in the *Garcia* decision.²²⁶

The *Garcia* majority considered the treaty to be “aspirational at best,” but global efforts continue to move forward.²²⁷ Four more countries (including China) have ratified the treaty, bringing the grand total up to ten countries; and in 2015, Maria A. Pallante, Register of the Copyright Office stated that she is working with the Obama Administration to have a “swift ratification” by the Senate.²²⁸ Additionally, former Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office David Kappos supports its adoption, calling the treaty a “milestone in protecting creative content around the world”:

225. INT'L FED'N OF ACTORS, *supra* note 10, at 31.

226. *Garcia III*, 786 F.3d 733, 743 (9th Cir. 2015) (“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.”).

227. *Id.* at 742 n.8.

228. *The Register's Perspective on Copyright Review: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 20 (2015) (statement of Maria A. Pallante, Register of Copyrights).

For American actors—represented by SAG and AFTRA—the treaty will increase global protection for performers and bring other countries legal norms into line with U.S. standards. It will not disrupt American motion picture companies’ global distribution networks. It represents a win-win for labor and industry, allowing them to work even more closely in fighting global piracy. Ratification by the United States and key trading partners will also give American stakeholders another mechanism to promote protection of the intellectual property in their films.²²⁹

Hopefully the Senate will make the United States another country committed to improving the economic conditions of the working actor, and that Congress as a whole will view this international law as a floor, not a ceiling to what can be done for the craft.

VI. PLACE THE ACTOR’S PERFORMANCE INTO EXISTING SUBJECT MATTERS

The judiciary still might be the best place to resolve the actor’s copyright as Congress paved the way for new art forms to be categorized by way of judicial interpretation.²³⁰ When the 1976 Copyright Act was enacted, its drafters strategically adjusted the scope of protection from “all writings of an author” to “original works of authorship.”²³¹ This adjustment resolved the conflict between Congress’ inclusion of new art forms and the Constitution’s narrow protection of book authors.²³² As clearly articulated by the drafters of the 1976 Act, “authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take.”²³³ The 1976 Act discontinued the practice of explicitly listing

229. David Kappos, *A Milestone in Protecting Creative Content Around the World*, DIRECTOR’S FORUM: A BLOG FROM USPTO’S LEADERSHIP (Jun. 26, 2012, 12:07 PM), http://www.uspto.gov/blog/director/entry/a_milestone_in_protecting_creative.

230. See *Gaiman v. McFarlane*, 360 F.3d 644, 648 (7th Cir. 2004) (“[C]opyrightability is always an issue of law.”); H.R. REP. NO. 94-1476, at 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664.

231. See *Feist Publ’ns. Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 355 (1991); H.R. REP. NO. 94-1476, at 51, *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5664.

232. Copyright Act of 1976, Pub. L. No. 94-553, § 120, 90 Stat. 2541, 2544–45 (codified as amended at 17 U.S.C. § 102).

233. H.R. REP. NO. 94-1476, at 51.

protected art forms.²³⁴ Now, art can be placed within a subject matter.²³⁵ These generous categories allow the judiciary to find a place for new art forms without Congress having to create a new category.²³⁶

An actor's performance can be categorized as both a "pantomime and choreographic" work, or a "dramatic" work, depending on whether the underlying script is impacted.²³⁷ The two subject matters already overlap with one another as speaking and actions are used to perform a dramatic work.²³⁸ The former would issue an actor a derivative copyright interest, and would operate much like the marriage of "musical works" and "sound recording."²³⁹ The latter would allow actors to claim joint authorship. By using existing models, actors would be provided copyright interests without having to wait for congressional action on the Beijing treaty. Furthermore, the implementation of this system would balance the rights of the actor with those of the playwright.

Defining the actor's performance within the walls of "pantomimes and choreographic works" gives flexibility to the various scenarios that may result in a copyrightable work.²⁴⁰ The Oxford English Dictionary defines acting as "[t]he performing of plays or other fictitious scenes and incidents, playing, dramatic performance; feigning a character not one's own."²⁴¹ Theatrical performance, while commonly found on stage, can occur in any situation without impacting the artistic quality of the work.²⁴²

234. Copyright Act of 1909, Pub. L. No. 60-349, § 5, 35 Stat. 1075 (1909) (replaced with The Copyright Act of 1976).

235. See 17 U.S.C. §102 (2012) ("Literary works," "musical works," "dramatic works," "pantomimes," "pictorial, graphic, and sculptural works," "motion pictures and other audio visual works"; and "sound recordings")

236. In fact, since the 1976 Act, the only amendment to the subject matter list came in 1990 with the addition of "architectural works." See Architectural Works Copyright Protection Act (AWCPA), Pub. L. No. 101-650, §§ 701-706, 104 Stat. 5133 (1990) (codified at scattered sections of 17 U.S.C.).

237. See 17 U.S.C. § 102.

238. 3 GOLDSTEIN, *supra* note 36, § 2.6.2.

239. Maxwell, *supra* note 169, at 396 (proposing that "directors may also make the secondary argument that stage directions are a derivative work").

240. See generally Yellin, *supra* note 160, at 238-39 (proposing a similar structure for the director's copyright).

241. THE OXFORD DICTIONARY (2d ed. 1989).

242. Telephone Interview with Gülgün Kayim, *supra* note 50 (stating that the AEA fails to provide systems for when its members get involved in performances

Furthermore, it is a fitting title to the work of the actor, as acting is largely a physical feat.²⁴³ An actor's choices in blocking and physical characterizations largely make up their unique contribution.

In *Horgan v. MacMillan Inc.*, the court extended a dancer's copyright beyond physical movements to include attitudes and the placement of dancers on the stage.²⁴⁴ By extending this holding to acting under the "pantomimes and choreographic works" category, an actor's physical choices, expressions, and line delivery could be protected work. After all, an actor's movements, and line delivery blend to create a performance. In portraying a distraught teenager, an actor may decide to combine Sid Vicious from the Sex Pistols and a Kangaroo—perhaps pouncing about the stage, flailing his arms, and delivering every line with a passive aggressive, angsty tone. This type of copyright ownership would be limited to the actor's contributions, and would not impact the rights of the playwright's underlying work, as is a requirement of derivative works.²⁴⁵ If an actor claims their performance alters the underlying script, then there will be a battle of joint authorship for the playwright's "dramatic works" interest.²⁴⁶ If an actor's performance results in contributions to the script or storyline, then the actor should argue for joint authorship under the "dramatic works" category.

that are outside of a brick and mortar theater house).

243. David Bridel, *In the Beginning Was the Body*, 28 AM. THEATER, Jan. 1, 2011, at 129–30, <http://www.americantheater.org/2011/01/01/in-the-beginning-was-the-body> (discussing the interplay between the body, the mind and the spirit in theater performance, which explains the vast array of physical acting training programs available).

244. 789 F.2d 157, 162 (1986).

245. See 17 U.S.C. § 103(b) (2012) (stating that a derivative work "extends only to the material contributed by the author of such a work, as distinguished from the preexisting material employed in the work"); *Entm't Research Grp. v. Genesis Creative Grp.*, 122 F.3d 1211, 1220 (9th Cir. 1997) ("If copyright protection were given to derivative works that are virtually identical to the underlying works, then the owner of the underlying copyrighted work would effectively be prevented from permitting others to copy her work since the original derivative copyright holder would have a de facto monopoly.").

246. Congress failed to provide definitions to "dramatic works" and "pantomimes and choreographic." 17 U.S.C. § 102. These categories have "fairly settled meanings." The arguments by actors and directors as to their contributions to a theatrical work have proved this assumption false. H.R. REP. NO. 94-1476, 53 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5666-67.

This division of a performance would not be the first time the Act divided a singular work into various interests.²⁴⁷ In 1971, Congress created the “sound recording” copyright, distinct from the “musical works” copyright to respond to the millions lost to unauthorized copying of sound recordings.²⁴⁸ Under this category, song performers and producers claim authorship that is separate from the underlying music or lyrics.²⁴⁹ The law should replicate this successful model by utilizing the “pantomime and choreographic,” and “dramatic works” categories.²⁵⁰ Largely it would be a systematic way to create limitless derivative works, and a ticket for actors to claim joint authorship.²⁵¹ The flexibility of derivative works is particularly relevant in live theater, where a play will be reproduced—with new directors and casts—throughout the world.²⁵²

VII. CONCLUSION

A Chorus Line remains the poster child for collaborative authorship problems. The musical won nine Tony Awards, a Pulitzer Prize, and has received over \$280 million in gross revenue.²⁵³ The script was based on the personal stories of nineteen dancer-actors.²⁵⁴ The dancer-actors were invited to participate in a play development session where a video camera recorded them talking about child abuse, divorce, and dancing for twelve hours.²⁵⁵ In exchange for having a video camera record their experiences,

247. NIMMER & NIMMER, *supra* note 201, § 2.10(A).

248. *Id.*

249. *Id.* § 2.10(A)(2).

250. 17 U.S.C. §§ 102(a)(3), (4).

251. NIMMER & NIMMER, *supra* note 201, § 3.01.

252. Gallia, *supra* note 27, at 251 (“Granting directors protection as authors of derivative works offers a flexible arrangement, one that can accommodate first and subsequent productions of plays for which the playwright owns the copyright as well as productions of work in the public domain.”); Keller, *supra* note 196, at 936 (proposing derivative works for theater collaboration as the “the playwright keeps intact a copyright in the original *script* as written and has the option of licensing it in that form. A new and separate copyright is available in the derivative *play* and its resulting production script”).

253. Campbell Robertson, ‘*Chorus Line*’ Returns, as Do Regrets Over Life Stories Signed Away, N.Y. TIMES (Oct. 1, 2006), <http://www.nytimes.com/2006/10/01/theater/01line.html?pagewanted=all>.

254. *Id.*

255. *Id.*

they were paid a nominal \$1.²⁵⁶ Later the original cast continued where they left off, and helped develop and shape the final product.²⁵⁷ After making it to Broadway, choreographer-playwright Michael Bennett agreed to give the dancer-actors collectively 0.5% of his share in gross box office.²⁵⁸ When a revival opened in 2006, the dancer-actors learned that their original contract excluded profits from such a venture.²⁵⁹ After all, they were given profit shares to the original show, not copyright ownership to the underlying story.²⁶⁰

In cases involving an actor's performance, the courts should confidently and explicitly categorize the work as copyrightable material. Easy access to cheap and accessible camcorders has transformed a performance from existing only in the mind of the viewer to being tangible evidence. Even though AEA is committed to improving the economic situation of its members, the union prioritizes employee classification, leaving intellectual property rights for the actor to negotiate herself.²⁶¹ Without clarity on the actor's copyright, the individual actor has little to leverage against a producer's bottom line. Furthermore, without being a copyright owner, an actor cannot stop the unauthorized distribution of their image or likeness. It is the role of the judiciary to correct this mistreatment of the law. When the court rejects, without exception, an actor's performance as a matter of law, the court is depriving an actor control over his or her work, and is degrading an actor's economic potential.

256. *Id.* One original dancer knew the \$1 pay off was wrong, but she thought, "If I don't sign this, I'm not going to be part of it." *Id.*

257. *Id.* Not all of the dancers who contributed to the original script were offered roles "to play themselves." *Id.*

258. Keller, *supra* note 196, at 931 (Bennett shared the rest of his royalties with four other collaborators, which were brought in later. Playwrights are typically given 6% of gross box office profits.); Robertson, *supra* note 253 (There were thirty-seven dancer-actors in total. They were broken up into three groups according to the level of contribution.).

259. Robertson, *supra* note 253.

260. E-mail from Zaraawar Mistry, *supra* note 49 ("When it comes to a discussion of royalties and future rights to a work, the most important thing in any collaboration is to have expectations clearly stated in a written contract.").

261. *See Contract Benefits*, *supra* note 38.