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**PERFORMANCE ANXIETY:
COPYRIGHT EMBODIED AND DISEMBODIED**

by REBECCA TUSHNET*

The primary economic and cultural significance of copyright today comes from works and rights that weren't contemplated by the Framers of the Constitution's Copyright Clause. Some, like videogames, were barely considered by the drafters of the 1976 Copyright Act, and new means of distribution have profoundly changed the scope and meaning of copyright even for entrenched genres.¹ Performance — both as protected work and as right — is where much of copyright's expansion has had its greatest impact, as new technologies have made it possible to fix performances in records and films and as cultural change has propelled recorded music and audiovisual works to the forefront of the copyright industries.²

Performance is now the prototype for all works. For one thing, the expansion of copyright beyond exact copying to substantial similarity and derivative works means that the actual scope of a copyright encompasses a practically infinite set of potential variations. This mimics the standard condition of any play or score, which carries with it a practically infinite set of potential performances, all of which will be understandably performances of the underlying work. Yet copyright has never fully conceptualized performance, and this has led to persistent confusion about what copyright protects.

Tensions and inadequacies in copyright's treatment of non-text elements of a work such as performance have been largely ignored for two reasons beyond copyright's traditional focus on text. First, the major copyright challenge of the digital age involves pure reproductions. When we are talking about massive sharing of digital files, collections of ones and zeros, it matters much less what type of work ultimately is reproduced. Second, copyright has been much more interested in "performance rights" than "performances," and debate has focused on issues such as what con-

*Thanks to Rob Kasunic and participants at the Chicago Faculty Workshop and the Chicago-Kent Faculty Workshop for helpful comments.

¹ Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 3 UTAH L. REV. 551 (2007).

² Software, which for historical reasons is considered a literary work, is also hugely valuable, but my focus here is on works sequentially experienced by users — whether that happens through reading (books), watching (film and television), listening (music/sound recordings), or playing (videogames). While software is a literary work, a videogame is also an audiovisual work. *See Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992).

stitutes a “public” performance instead of a “private” one and whether restaurants should have to pay when they turn the radio on. These are issues that tend to be resolved by interest group influence and bargaining.

Conceptually, legal discussions tend to offer a dual model of the performance as work. In one view, it’s protected because of its technical characteristics: the things that make it a material object, such as the fact that the camera or microphone operator chose a particular angle and the editor cut the film at a particular point or the sound engineer chose a particular level. In another, it’s protected because of its content: the creative actions of the performers being recorded. Courts and advocates tend to switch back and forth between these as needed. This dual nature allows courts to finesse awkward questions about the relationship between authorship, creativity, and copyright’s incentives.

One key problem of performance from copyright’s perspective is thus how to identify the creative elements that make a work of performance original and protectable, as distinguished from elements that make it a work (a fixed artifact).³ A major variant of this question involves authorship: who is sufficiently responsible for a work of performance to be deemed its author, and thus its default owner? In a world where works require dozens and even hundreds of people to complete them, this question will often be difficult to answer while both respecting creativity and recognizing economic imperatives. While contracts will often take care of authorship issues for well-represented commissioning parties, there will inevitably be gaps that require identification of who counts as an author; in addition, third parties such as fair users and intermediaries have separate interests in knowing who owns a work, and contracts don’t address the

³ Nimmer considers motion pictures “distinctive” among the categories of copyrightable works “in that their continuous sight and sound can provide the requisite fixation to almost any human activity,” “everything from an athletic event to a surgical procedure, from a Thanksgiving day parade to the steps executed in operating a nuclear power plant.” 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.09[F] (2013) (footnote omitted). One interesting thing about this statement is that motion pictures really aren’t distinctive in that sense: words can also fix descriptions of these things — and yet it does not seem to be a difficult concept that protecting copyright in the words doesn’t give any copyright in the activities described. See *Baker v. Selden*, 101 U.S. 99 (1879). Somehow, the immediacy or apparent realism of the moving image seems to create more difficult questions about what’s protected, though it’s still possible to undertake a separate analysis of whether the activity captured on film is itself a work of authorship. See 1 NIMMER & NIMMER, *supra*, § 2.09[F] (“The focus of this inquiry necessarily divides the creative aspects of the motion picture from the creative aspects of the underlying subject matter portrayed therein.”) (footnote omitted).

problems they face when performers make authorship claims. An underlying theory of authorship is necessary.

Another set of questions involves whether there are ways to recognize performers' creative contributions without contributing to copyright's bloat, and how to assess claims of infringement in a performance context when the alleged copying isn't exact. This article addresses these puzzles of performance, arguing that manageability rather than creativity is generally the basis for the rights allocations and distinctions copyright law makes. The recent controversy over the film *Innocence of Muslims*, along with other instances in which subjects of audiovisual works claimed copyright in those works, demonstrate the limited role played by creativity in copyright law. That's not necessarily illegitimate, but we should be more honest about why, even outside the work for hire context, we seem to require more of performers than of other author-claimants.

I. PERFORMANCE AS WORK: FLUIDITY AND FIXATION

Performance is not itself a category of protected works in U.S. law. Rather, certain performances are protected. A performance of a musical work, for example, can be fixed in a sound recording.⁴ A performance of a play, known as a "dramatic" work, can be fixed in an audiovisual recording. Choreography for dance can be fixed and protected if it is notated or if a performance is recorded on video.⁵ Movies and other audiovisual works are also protected, raising the possibility of protecting a film as a film and separately protecting the dramatic work recorded in that film (thus, for example, a film of the same performance taken from a different camera angle might infringe the performance but not the film), or of denying separate protection to the work depicted.⁶ By contrast, plays and scripts are literary works, not works of performance, even though they are intended to be performed.

In defining what it will protect, copyright helps produce what we consider valuable in art.⁷ Copyright law has often ignored the fluidity of creativity, especially when it comes to works that are performed. This tendency has only been reinforced by the traditional artistic hierarchies that elevate writers over performers, and look down even on written

⁴ A work consisting of recorded sound is still a sound recording if it's just a recording of nature, with no performance by human beings involved. See H.R. REP. NO. 92-487 (1971), reprinted in 1971 U.S.C.C.A.N. 1566, 1570.

⁵ 17 U.S.C. § 106 (2006); *Horgan v. MacMillan, Inc.*, 789 F.2d 157, 162-63 (2d Cir. 1986).

⁶ See 1 NIMMER & NIMMER, *supra* note 3, § 2.09[F].

⁷ See Anne Barron, *The Legal Properties of Film*, 67 MOD. L. REV. 177 (2004).

works to the extent they are part of genres such as science fiction and romance that are associated with visuals, embodiment, and high emotion.⁸

Both in creation and in execution, performance is less fixed and predictable than copyright's categories generally accept.⁹ For example, plays tend to emerge through interaction with performers rather than just from a playwright's head.¹⁰ The dependence of playwrights and others who write for performance on performers has generally not been recognized

⁸ Francesca Coppa, *Writing Bodies in Space: Media Fan Fiction as Theatrical Performance*, in *FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET: NEW ESSAYS* 225, 231 (Karen Hellekson & Kristina Busse eds., 2006) (“[T]raditional values . . . privilege the written word over the spoken one and mind over body. The move down the hierarchy therefore represents a shift from literary values (the mind, the word, the ‘original statement’) to what I would claim are theatrical ones (repetition, performance, embodied action).”); see also *id.* at 228 (noting that, even within relatively low status literary genres such as science fiction, the literary establishment has looked down on performance genres, including film); cf. Don Cusic, *In Defense of Cover Songs: Commerce and Credibility* 223, 224, in *PLAY IT AGAIN, COVER SONGS IN POPULAR MUSIC* (George Plasketes ed., 2010) [hereinafter *PLAY IT AGAIN*] (in music, critics and fans tend to prefer singer-songwriters, ignoring the value of interpretation).

⁹ There are performance-like written works and writing-like performances. It's not my project to argue that there are clean dividing lines, but rather to suggest that the prototype of the written text has had negative effects on modern copyright law (in much the same way one might suggest that the prototype of “mother” has had negative effects on mothers whose identities don't fit the prototype). See GEORGE LAKOFF, *WOMEN, FIRE AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 37 (1987).

¹⁰ As Brent Salter writes:

Theatre is inherently collaborative because it is an amalgam of the “static” word as it appears in the text and the “dynamic” act as it appears on the stage. There is an inseparability of the textual and the theatrical production. The process does not carefully insulate the writing of scripts from the acting or actual production of plays. It is not until this final step of “performance” is realised that the play can be said to be complete.

Brent Salter, *Taming the Trojan Horse: An Australian Perspective of Dramatic Authorship*, 56 *J. COPYRIGHT SOC'Y* 789, 815 (2009). Salter's interviews with directors repeatedly return to this theme:

Directors . . . suggest that there is a clear distinction between what is written on the page and what appears on the stage. As a consequence, some directors believe the notion of the “Romantic playwright” being the authorial voice of the work is incompatible with theatre creation. Theatre director Ben Winspear:

[Romantic authorship in theatre is] just not realistic. The theatrical text is only relevant when it's spoken and spoken in the context of the stage. At any other point it's like an architect's plans. You know there wouldn't be a single building in the world that accurately reflects the plans of an architect. You are always pulling out the jack hammer and shaving off a bit here, and knocking an extra doorway

either by copyright law or by literary critics.¹¹ For live theater, reproductive copying is neither the point of the endeavor nor particularly highly valued. Francesca Coppa explains that different performances are ways to learn more about the underlying work as well as to explore the multiple potential stories that can be told using the same characters and situations:

[I]n theatre, stories are retold all the time. . . . Moreover, there's no assumption that the first production will be definitive; in theatre, we want to see *your* Hamlet and *his* Hamlet and *her* Hamlet; to embody the role is to reinvent it. We also want to see new generations of directors and designers recast the play without regard for authorial intent or historicity, putting *Hamlet* into infinite alternative universes. What if Hamlet was a graduate student? What if Hamlet had an (entirely ahistorical) Oedipal complex? What if Hamlet was a street kid in the Bronx? Hamlet has been portrayed as an action hero/medieval warrior, the avenging son of a Japanese CEO, an angry young man, and a university student home on break.¹²

Though this is not often recognized, this fluidity is inherent in *any* work under modern copyright law. The intangible “copyrighted work” is, by definition, distinguishable from the material copies in which it is embodied.¹³ Thus, the boundaries of the “work” are unfixed until we start comparing it to other works that might or might not infringe. In modern copyright law, copyright owners have a right to control “substantially similar” copies of their works, and a (partially) separate right to control “derivative works,” which means that their rights extend to other forms, such as movie versions, sequels, translations, condensations, and so on.¹⁴ Every

through there and filling that up with concrete [T]heatre exists between the audience and the performers

Id. at 873. See also Coppa, *supra* note 8, at 237 (“The script isn’t the final product in theatre; in fact, one of the questions that theatre theorists have had to debate is the location of the work of art. Is it in the author’s original script? Probably not; the original script goes through innumerable changes in performance and is rarely seen outside of library archives. The published script of a theatrical or teleplay is usually a postproduction draft that takes into account changes that were made during production by actors, directors, and designers; far from being evidence of a single authorial vision, a published play is one of the most collaborative genres in existence. And most theatre works never result in a published script at all, so it’s difficult to argue for text as the central object in a theatrical art experience.”).

¹¹ Michael W. Carroll, *Copyright’s Creative Hierarchy in the Performing Arts*, 14 VAND. J. ENT. & TECH. L. 797, 818 (2012) (“Authors of source works are not similarly situated to most other authors because their work is not fully realized until it has been performed. The law should not give one of these codependent parties the right to veto the creative aspirations of the other”) (footnote omitted).

¹² Coppa, *supra* note 8, at 236.

¹³ 17 U.S.C. § 101 (2006).

¹⁴ *Id.* § 106.

copyrighted work is therefore like the script for a play: it is a blueprint, but not just for one particular instantiation. Rather, the blueprint can have a potentially infinite series of variations.¹⁵ All works are surrounded by possible derivative and infringing variants, most unrealized.¹⁶

However, as copyright's scope expanded, the conception of a work of art, paradoxically, hardened. The West has experienced a long period of what Fumi Arewa calls the "sacralization" of the work. For example, before the classical period, opera performers routinely chose arias that showcased their own skills, regardless of the opera in which the singers were performing. Over time, that ability to alter the role to suit came to seem bizarre: a failure of the performer to recognize her place.¹⁷ The same sacralization process tended to freeze symphonic music and dramatic works, making revisions of Shakespeare's plays to change their endings or genres — formerly standard — into assaults on the correct order of things.¹⁸ Only one version was "authentic." Shakespeare had to be protected both from the audience (which might want different versions or happier endings) and from "overbearing actors" whose desire to show off their own skills threatened the play's "integrity."¹⁹ Cultural arbiters admonished actors "not to take liberties" with the text.²⁰ This elevation of the creator of the fixed script/text over the performer, whose performance was thereby made less significant, is part of the cultural devaluation of performance. The body-work of performance — the physical labor of creating a performance — seems easier to discount than the creative labor of conceptualizing a work, even though a performance may be the result of just as much preparation and calculation as a script (and even though copyright formally disavows a labor theory of value).²¹

¹⁵ See Coppa, *supra* note 8, at 237.

¹⁶ Cf. Marvin Carlson, *Theatrical Performance: Illustration, Translation, Fulfillment, or Supplement*, 37 THEATRE J. 5, 10 (1985) ("A play on stage will inevitably display material lacking in the written text, quite likely not apparent as lacking until the performance takes place, but then revealed as significant and necessary. At the same time, the performance, by revealing this lack, reveals also a potentially infinite series of future performances providing further supplementation.").

¹⁷ See Olufunmilayo B. Arewa, *Creativity, Improvisation, and Risk: Copyright and Musical Innovation*, 86 NOTRE DAME L. REV. 1829, 1839-40 (2011).

¹⁸ LAWRENCE W. LEVINE, *HIGHBROW/LOWBROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA* 72, 138 (1988); *see also id.* at 146 (for symphonies, "the masterworks of the classic composers were to be performed in their entirety by highly trained musicians on programs free from the contamination of lesser works or lesser genres, free from the interference of audience or performer . . .").

¹⁹ *Id.* at 72.

²⁰ *Id.* at 138.

²¹ For a version of this argument from a venerable source, see Adam Smith:

Recordings changed what was sacred, but left the sacralization process largely intact. As Jacob Smith explains, “recording allowed for a shift in the ontological status of music, most dramatically in genres such as rock and roll, which made the record, not the written score or live performance, the central work.”²² Performances can now be separated from performers and exist as artifacts: “With recording one is able to experience, revisit, and analyze nuances of particular sounds and voices, so that improvised genres of music such as jazz can be heard and discussed in the same manner as a written score.”²³

Audiences came to understand and evaluate performances in relation to some other fixed instance, whether written or recorded.²⁴ Now, we go to concerts to see live performances of the recorded songs with which we are intimately familiar. These performances can then be judged against their recorded versions in a way that was impossible for previous generations, creating a new meaning for live, embodied performance.²⁵ Jazz is

The labour of some of the most respectable orders in the society is, like that of menial servants, unproductive of any value, and does not fix or realize itself in any permanent subject In the same class must be ranked, some both of the gravest and most important, and some of the most frivolous professions: churchmen, lawyers, physicians, men of letters of all kinds; players, buffoons, musicians, opera-singers, opera-dancers, &c. . . . Like the declamation of the actor, the harangue of the orator, or the tune of the musician, the work of all of them perishes in the very instant of its production.

2 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 45-46 (Edwin Cannan ed., 5th ed. 1904). Thanks to Wendy Gordon and Joseph Liu for insights on this point.

²² JACOB SMITH, *VOCAL TRACKS: PERFORMANCE AND SOUND MEDIA* 120 (2008).

²³ *Id.* at 121.

²⁴ See, e.g., Joanna Demers, *Melody, Theft, and High Culture, in MODERNISM AND COPYRIGHT*, [], [] (Paul K. Saint-Amour ed. 2010) (“Lydia Goehr has shown that Western art music’s work-concept emerged around 1800, alongside a growing awareness of musical material as property Composers no longer wrote mere pieces but rather works that existed theoretically as a set of instructions or ‘scores.’ These theoretical works were realized through performances whose quality was judged on the basis of their fidelity to the originating score as well as to conventions governing music-making. The work-concept was groundbreaking because it distinguished performances (which could be riddled with mistakes) from works (which were supposedly independent, permanent, and capable of expressing the ineffable). The work-concept, in short, allowed music to escape its grounding in ephemeral sound and to aspire to what was seen as a superior quality of the plastic arts: permanence.”) (citations omitted).

²⁵ The distinction isn’t total. It was always possible for an individual to consider Sarah Bernhardt’s Hamlet the canonical Hamlet; that judgment was just more debatable. Cf. Ben Brewster, *The Fundamental Reproach (Brecht)*, 2

celebrated for its improvisational nature and radio stations play canonical jazz recordings long after the improvisers are dead. Elsewhere, some people attend showings of *The Rocky Horror Picture Show* in order to participate in a live performance whose pleasures stem from its relation back to the fixed, canonical version.

This conceptual shift toward a single canonical performance as the embodiment of a work occurred even though fixity was neither historically a characteristic of books in the early age of print²⁶ nor is it now a requirement in the digital age.²⁷ Today, the same technology that allows exact fidelity also allows George Lucas to reconstruct *Star Wars* to erase the fact that, when the film was first shown, Han Solo shot first,²⁸ and allows Amazon to delete copies of George Orwell's books (and our notes on them) from our Kindles.²⁹

So why canonize? The static work seems easier to handle, legally speaking, than a changeable performance.³⁰ "Performances seem ineffable, and thinking about them induces reverie rather than analysis."³¹ In addition, art critics have been willing to deem performance marginal and less creative by comparison to standard works of literature and visual art.

CINE-TRACTS 44 (1977) (Brecht "asserted that 'the theatre's first advantage over the film is . . . in the division between play and performance', and continued 'the mechanical reproduction gives everything the character of a result: unfree and inalterable.'").

- ²⁶ ADRIAN JOHNS, *THE NATURE OF THE BOOK: PRINT AND KNOWLEDGE IN THE MAKING* (1998) (arguing that, because of the ways in which books were printed sheet by sheet and "pirated" by various printers who altered them in different ways, it was extremely common for different copies and unlikely that all copies of the "same" book would be identical; the fixity of print was an ideological effect, not a natural fact).
- ²⁷ WILLIAM J. MITCHELL, *THE RECONFIGURED EYE: VISUAL TRUTH IN THE POST-PHOTOGRAPHIC ERA* 52-53 (1992) (digital technology enables a general shift from fixity to lack of certainty in the existence of a true original; each digital image is an instance in a chain, "made to be processed, . . . and any file is the potential progenitor of an endless sequence of descendants").
- ²⁸ Rich Drees, *George Lucas and the Not-So-Special Edition of Star Wars*, FILMBUFFONLINE, <http://www.filmbuffonline.com/Editorial/EditorialStarWars.htm> (last visited July 29, 2010).
- ²⁹ Brad Stone, *Amazon Erases Orwell Books From Kindle*, N.Y. TIMES, July 17, 2009, <https://www.nytimes.com/2009/07/18/technology/companies/18amazon.html>.
- ³⁰ Anne Barron, *supra* note 7, at 371 (arguing that the division of art into specific types, as in copyright, makes performance exceedingly difficult to conceptualize, in part because theater and related arts cross the boundaries of type and in part because theater needs an audience to be complete and thus refuses the self-contained status so vital to copyright's (and modernism's) definition of an artwork).
- ³¹ John O. Thompson, *Screen Acting and the Commutation Test*, in *STARDOM: INDUSTRY OF DESIRE*, 183, 183 (Christine Gledhill ed., 1991).

(This bias is found in high and low culture alike — consider the preference many rock fans have for singer-songwriters, and the disdain they have for boy bands and other performing groups.) Performance is often founded on interpretation of others' creativity, as when actors perform an existing play or singers perform an existing song.³²

Moreover, a system oriented towards words has difficulty evaluating performance elements and may treat them as meaningless or worthless. Thus, prominent copyright lawyer Nathan Burkan failed to persuade a court that there was anything protectable in Charlie Chaplin's performance, despite (or perhaps because of) his argument that the performance was so distinctive that it couldn't be described in words, only portrayed.³³ Likewise, copyright law specifically prevents audio performers from claiming rights available to other authors: the sound recording copyright protects only against mechanical duplication of fixed sounds, not against the creation of soundalikes copying the performance elements added by a singer; while this restriction is necessary to make the mechanical license for musical works effective, it also encodes into law the judgment that creative elements of musical performance aren't worth protecting against the kind of copying that would be actionable as applied to books, scores, and the like.³⁴

Our difficulty with recognizing the contribution of performance elements to meaning is also troublesome when it comes to fair use. In *Campbell v. Acuff-Rose*, for example, Justice Kennedy's concurrence cautioned that the defense should not be read too broadly, using as an obvious example the claim that a rap version of the country hit *Achy Breaky Heart* would be (1) hilarious and (2) not a fair use.³⁵ Justice Kennedy was unwilling to acknowledge that performance style alone could change the meaning of a musical work sufficiently to serve as commentary on that work, even though it is patently obvious that this occurs on a regular basis.

³² See Carroll, *supra* note 11, at 799 (“Regrettably, copyright law in all countries takes an elitist approach. In the thrall, or under the pall, of the ideology of Romantic authorship, copyright grants the author of the source work a privileged position and the right to veto a live or recorded performance that does not suit her taste, unless one of copyright’s limitations or exceptions applies.”).

³³ See PETER DECHERNEY, HOLLYWOOD’S COPYRIGHT WARS 74 (2012) (“Burkan’s larger strategy, however, was to insist that [Charlie] Chaplin was a unique genius, an ineffable quality that anyone could just see for themselves. Chaplin’s genius could not be described or broken down into distinct elements. In one show of courtroom theatrics, Burkan claimed that a clip from a Chaplin film would have to be placed in the court’s decision, because words could not describe him.”) (footnote omitted).

³⁴ 17 U.S.C. § 114(b) (2006). I thank Joe Liu for this point.

³⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 599 (1994) (Kennedy, J., concurring).

George Plasketes argues that covers routinely provide a new meaning and message for existing works:

As one of music's major forms of intertextuality, covers are not only immersed in history, they recognize, recite and reshape the past A cover song invites, if not insists upon, a comparison to the original, . . . engaging the listener in a historical duet with lyric and lineage. . . . With the original framed in forefront or back of our mind, we consider the conversions and their contrasts³⁶

Tori Amos, for example, has an entire album of cover songs by men about women; her renditions are often transformative, most notably when she covers Eminem's tale of a jealous husband murdering his wife and child.³⁷ Jimi Hendrix famously reworked *The Star-Spangled Banner* in a way that transformed its meaning. More generally, Sheldon Schiffer has documented how racial, social, and sexual difference as instantiated by performers can change the meaning of a song.³⁸

³⁶ George Plasketes, *Further Re-flections on "The Cover Age": A Collage and Chronicle*, in *PLAY IT AGAIN*, *supra* note 8; at 11, 35-36; *see also* Greil Marcus, *Old Songs in New Skins*, in *DE CAPO BEST MUSIC WRITING 2000*, at 374, 376 (Peter Guarlnick & Douglas Wolk eds., 1999) ("One of the ways songs survive is that they mutate Pop songs are always talked about as the 'soundtrack to our lives,' when all that means is that pop songs are no mere containers for nostalgia, but lives change and so do soundtracks, even if they're made of the same songs."); Deena Weinstein, *Appreciating Cover Songs: Stereophony*, in *PLAY IT AGAIN*, *supra* note 8, at 243, 249 ("A cover can provide a different mood, another emotional tone, and can alter the meaning of a composition, inverting it or merely providing a new understanding of the subject. And many covers change both mood and meaning Goth renditions, for example, tend to infuse a composition with a sense of weakness or misery."). These changed meanings aren't necessarily progressive. *See* David Dante Troutt, *I Own Therefore I Am: Copyright, Personality, and Soul Music in the Digital Commons*, 20 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 373, 417 (2010) (discussing major record labels' practice of producing white covers of African-American performers and promoting those covers to white audiences).

³⁷ *See/hear also* Alanis Morissette delivering the Black Eyed Peas' *My Humps* in her distinctive mournful style, creating a contrast that both emphasizes the banality of the original song and the bathos of Morissette's own style. Alanis Morissette, *My Humps*, *YOUTUBE* (April 5, 2007), <http://www.youtube.com/watch?v=pRmYfVCH2UA>. I am reliably told that Bowling for Soup's cover of Britney Spears in the remake of *Freaky Friday* produces a similar effect. *See generally* Plasketes, *supra* note 36, at 27 (discussing ways in which cover songs recontextualize the work, making it the performer's own).

³⁸ Sheldon Schiffer, *The Cover Song as Historiography, Marker of Ideological Transformation*, in *PLAY IT AGAIN*, *supra* note 8, at 77, 81 ("Songs 'intended' to validate relations between God and its human subjects were sexualized (Sister Rosetta Tharpe's 1940s *Nobody's Fault But Mine* versus Led Zeppelin's 1970s). Songs intended to validate heterosexual romance and

Similar performance changes affect meaning in nonmusical performances. Comedian Tina Fey delivered vice presidential candidate Sarah Palin's words verbatim, and, in the performance, made a profoundly effective parodic point.³⁹ (Not incidentally, it is difficult to imagine anything other than performance that could have made this point: even playing footage of Palin's own interview would not have been as revealing.) Often, the changes depend on the physicality of the actors, particularly their apparent race, gender, or sexuality; attempts to change racial or gender casting in plays have been suppressed because of interference with preferred meaning.⁴⁰ But there are infinite and incalculable ways that performance elements can change meaning: for example, setting *Waiting for Godot* in a post-apocalyptic bunker has a very different meaning than setting it in Beckett's empty room, grounding "the individual's despair in an external event that was shared by all."⁴¹

In non-performance situations, where the person making the changes has the same desire to interpret an existing work through a new lens, courts have understood that the copyright owner's very insistence on fixing meaning strengthens the case for fair use. In the *Wind Done Gone* case, Alice Randall's rewriting of *Gone with the Wind* to add in discussions of miscegenation and homosexuality was a factor in favor of transformativeness, given the Mitchell estate's unwillingness to accept such changes.⁴² But Randall was a writer like Mitchell, not a mere implementer as directors and performers are often considered. Thus, her fair use defense was taken seriously in ways that directors' and performers' claims for interpretive freedom generally aren't.

Perhaps a performance-oriented culture will come to see the transformativeness of performance more readily. In one recent case, the plain-

sexual roles could validate homosexual love or alternative sex roles (Rod Stewart's *Tonight's the Night* 1970s versus Janet Jackson's 2000s). Songs meant to personify one ethnic or national group could augment another ethno-national identity (David Bowie's *Changes* 1970s versus Seu Jorge's in 2004) The recording star persona, utilizing the cover song to construct its own identity, by affiliation, alters the beliefs of its listeners.").

³⁹ Gender pops up in these examples along with race, which is not surprising given conventional associations between performance, excess emotionalism, and femininity.

⁴⁰ See Anthony Tommasini, *All-Black Casts for 'Porgy'? That Ain't Necessarily So*, N.Y. TIMES, Mar. 20, 2002, at E1 (cross-racial casting of *Porgy and Bess*); Leonard Jacobs, *German 'Godot' a No Go: Beckett Publisher Quashes Cross-Gender Production*, BACK STAGE, Feb. 6, 2004, at 62 (cross-gender casting of *Waiting for Godot*); Carroll, *supra* note 11, at 808 (discussing the content restrictions that are standard in performing licenses).

⁴¹ MARTIN GARBUS WITH STANLEY COHEN, *TOUGH TALK: HOW I FOUGHT FOR WRITERS, COMICS, BIGOTS, AND THE AMERICAN WAY* 192 (1998).

⁴² *SunTrust Bank v. Houghton Mifflin Co.*, 268 F. 3d 1257 (11th Cir. 2001).

tiff, Keeling, created a parody version of the film *Point Break*, *Point Break LIVE!* The parody stemmed from recreating the storyline of the original film — about an FBI agent who goes undercover to take down a group of surf-loving bank robbers — using amusingly unrealistic props and staging, and putting an unrehearsed audience member in the key role of the FBI agent, played in the film by notoriously blank actor Keanu Reeves. The lawsuit began when the defendants, after a dispute with the plaintiff, started staging their own version of *Point Break LIVE!* They obtained a license from the owners of the rights to *Point Break*, but none from Keeling, and argued that she had no valid copyright because her version was an unauthorized infringing work. The court, and a subsequent jury, found that she had established that her version was fair use. Therefore it had its own independent copyright, which the defendants infringed.⁴³

Here, performance works as commentary by heightening elements of the original. The props and the use of the unrehearsed audience member reading from cue cards “really catches the essential rawness of Keanu Reeves’ acting style.”⁴⁴ Tongue in cheek repetition produces a disruptive effect: the “wonderfully iconic quotes from the movie” combined with their theatrical presentation created “a night of live theater that rivals anything by Samuel Beckett in terms of pure excitement and energy.”⁴⁵ Like an annoying younger sibling repeating anything the older one says, the copying is itself the change that fair use seeks.

But the *Point Break LIVE!* decision produced barely any written findings. The court didn’t explain its conclusions on the transformative-ness of performance, and so the case may not make much of a precedential dent. It wouldn’t be surprising if the court simply found it very difficult to

⁴³ *Keeling v. New Rock Theater Prods., LLC*, No. 10-cv-09345 (S.D.N.Y. Jan. 10, 2013).

⁴⁴ ABOUT POINT BREAK LIVE, <http://www.pointbreaklivelive.com/About.html> (last visited Jan. 29, 2013); see also Eriq Gardner, *Playwright of ‘Point Break’ Parody Wins \$250K Trial Verdict* (Dec. 20, 2012, 4:45 PM PST), <http://www.hollywoodreporter.com/thr-esq/playwright-point-break-parody-wins-405930> (“The trial turned on Ms. Keeling’s testimony of how she made the serious into jokes and how the amount she used from the film was justified,” says Ethan Jacobs, an attorney at Vinson & Elkins, who represented her. By way of example, Jacobs says Keeling showed that by having unrehearsed audience members pretending to make a movie, ‘She captured the effect of Keanu Reeves’ performance in the film like he was reading off of cue cards.’”).

⁴⁵ *Id.*; see also Jacob Coakley, *Yo, Johnny! See You in the Next Life! Point Break LIVE! is the Ultimate Rush*, <http://www.lasvegasweekly.com/news/2008/oct/09/yo-johnny-see-you-next-life/> (Oct 9, 2008) (“This is a raucous, hysterical night of theater that revels in the stupidity of the movie and the absurd cleverness of adapting it live onstage in front of you.”).

explain in conventional legal language what was so transformative about repetition with irony and bad line readings.

If we don't have a good vocabulary for explaining how meaningful performance is, it should come as no surprise that we don't even know how to give credit to performers, as the following section discusses.

II. PERFORMANCE AS AUTHORSHIP

A. Background: Dividing the Dancer from the Dance

As noted above, the legal system has difficulty in assessing performance as a contributor to the value or meaning of a work.⁴⁶ It is even difficult to tell what creative elements audiovisual copyrights protect in many cases: the camerawork or the underlying activities depicted. In successfully arguing for protection for virtually all audiovisual works, proponents focused on the characteristics of a recorded performance that make it a *record* — the producer's choice of microphone, the cinematographer's choice of angle or focus.⁴⁷ As Anne Barron has explained with respect to

⁴⁶ See, e.g., Troutt, *supra* note 36, at 396 (“[T]he secondary status given to performers and performance under copyright law has been a critical lever in determining the scope of economic benefit and artistic recognition under music copyright law.”); Sunny Noh, *Better Late Than Never: The Legal Theoretical Reasons Supporting the Performance Rights Act of 2009*, 6 BUFF. INTELL. PROP. L.J. 83, 83-84 (2009). And yet performance can readily make all the difference. Playwrights who refuse to allow cross-racial or cross-gender casting, among others, are pretty clear that the written instructions do not control the meaning of a performed work. See Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 570 & nn. 162-163 (2004) (citing instances); *cf. id.* at 569-70 (discussing ways of performing music that change its meaning). Because of performance's connections to the body, it is unsurprising that treatment of performance has had a profoundly disparate racial impact as well. See, e.g., Troutt, *supra* note 36, at 404 (“[W]hether they were composers and performers or only performers, the majority of musicians then and now received most of their income as artists from performance. The fact that the 1909 Act continued to regard most performance as . . . unprotected ‘reading’ of protectable ‘writing,’ severely disadvantaged many musicians for generations, especially black artists who were often rendered unprotected performers after the theft of their compositions by unscrupulous intermediaries.”) (footnotes omitted).

⁴⁷ See 1 NIMMER & NIMMER, *supra* note 3, § 2.09[F] (“When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent to the public and in which order, there is no doubt that what the cameramen and the director are doing constitutes authorship.”); Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 847 (2d Cir. 1997); *cf. Eva E. Subotnik, Originality Proxies: Toward a Theory of Copyright and Creativity*, 76 BROOK. L. REV. 1487, 1513-17 (2011) (arguing that courts regularly protect photographs based on the characteristics that make them, physically,

UK law, copyright law has therefore oscillated between reducing film to a physical medium — a record of technical choices — and ignoring film’s specific characteristics, such as the way that editing creates narrative meaning, by claiming to protect the dramatic events recorded by the medium separate from editing.⁴⁸

The formal justification for providing copyright to film as film is that creative, authorial activity takes place in selecting camera angles and similar choices.⁴⁹ Thus, the Zapruder film was an incredibly valuable copyrighted work, whose creative choices consisted of Zapruder’s choice to bring his camera, choice (limited by multiple constraints) of place to stand, choice to focus on the Kennedy car, and so on. Zapruder wasn’t responsible for the things that happened on the film, but he owned his recording of them. But the film isn’t valuable because of the camera angles. It’s valuable because it’s a record of what happened. The situation is similar, if less historically significant, with many valuable works such as sports competitions, for which broadcast rights are worth billions of dollars. Copyright’s incentives are really working on the underlying, unprotectable games, not the camera angles.⁵⁰ Still, the participants — performers — aren’t understood to be authors.

When we can’t be sure what the protected elements of a work should be, we also have difficulty figuring out who to credit for it. Thus, controversies over performance works, including plays and movies, make up a large share of disputes over joint authorship in the U.S. system.⁵¹ Because joint authors share equally in the rights to a work no matter how unequal

photographs); BERNARD EDELMAN, OWNERSHIP OF THE IMAGE: ELEMENTS FOR A MARXIST THEORY OF LAW (1977) (arguing that the needs of capitalism led courts to shift from considering photographs as mere mechanical reproductions to regarding them as productions of an author; in film, the producer was likewise deemed an author).

⁴⁸ Barron, *supra* note 7, at 193.

⁴⁹ See *supra* note 3.

⁵⁰ Compare *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 669 (7th Cir. 1986) (baseball players’ performances in playing baseball were copyrightable, thus preempting right of publicity claims based on televised performances), with *Nat’l Basketball Ass’n*, 105 F.3d at 846-47 (unscripted sports performances were not copyrightable); 1 NIMMER & NIMMER, *supra* note 3, § 2.09 [F] (underlying athletic events themselves are “not subject to copyright protection[.]” even if fixed).

⁵¹ See *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998); *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991) (holding that an actress who helped playwright with play was not a joint author because of lack of intent); Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 228-29 (2001) (attacking the *Childress* approach to determining joint authorship and arguing that it has not been grounded in either law or policy by any subsequent court).

their contributions, and because each one can license it nonexclusively without the consent of the other authors, courts have preferred to award authorship to a single person. This preference, however, often leads to dismissiveness regarding the real creative contributions of others involved in bringing a work of performance to its audience.⁵²

Claims of copyright in stage directions have provided one place where tensions between creators have moved to the legal arena.⁵³ The law has difficulty conceptualizing stage directions because they are both dynamic — arising out of the interaction of many people — and dependent on the underlying play: they are at least close relatives to derivative works of the original script. Indeed, one might go beyond stage directions and claim that individual actors' performances are also derivative works — works that transform, recast or adapt the script to the medium of performance and that as a whole represent the addition of new creative material (the stuff of authorship).⁵⁴ This is an awkward conclusion, however, because the derivative works right is a separate right from the public performance right, and a standard license to perform a play only grants the latter.

Perhaps copyright law has been able to ignore stage performers' creativity because we expect their compensation to come from direct payment for the services of their bodies, not from the royalties to which other creative types are accustomed.⁵⁵ We understand the producer of a movie to be

⁵² Carroll, *supra* note 11, at 804 (discussing the “mutual dependence” of the author of a text destined for performance on the people who bring it to life, and vice versa; “Both the authors and the other creative parties contribute individual creativity to the collective performance. A range of creative individuals sits between the author of the source work and the performer, such as directors, producers, dramaturges, and cinematographers.”).

⁵³ See, e.g., David Leichtman, Note, *Most Unhappy Collaborators: An Argument Against the Recognition of Property Ownership in Stage Directions*, 20 COLUM.-VLA J.L. & ARTS 683 (1996); Jennifer J. Maxwell, Note, *Making a Federal Case for Copyrighting Stage Directions: Einhorn v. Mergatroyd Productions*, 7 J. MARSHALL REV. INTELL. PROP. L. 393 (2008); Talia Yellin, *New Directions for Copyright: The Property Rights of Stage Directors*, 24 COLUM.-VLA J.L. & ARTS 317 (2001); Margit Livingston, *Inspiration or Imitation: Copyright Protection for Stage Directions*, 50 B.C. L. REV. 427 (2009).

⁵⁴ Rob Kasunic's research has suggested that many copyright registrations for “pantomimes” historically were similar to stage directions. He speculates that actors could argue that their movements qualified as copyrightable pantomimes. Private correspondence.

⁵⁵ Cf. Christopher Sprigman, *The Knockoff Economy and the Power of Performance and Brands*, VOLOKH.COM (Oct. 18, 2012, 7:35 AM), <http://www.volokh.com/2012/10/18/the-knockoff-economy-and-the-power-of-performance-and-brands>, (suggesting that being able to charge for performance aspects of an experience diminishes the need for copyright's economic incentives).

interested in — motivated by — the right to circulate copies, and thus we generally treat movies as artifacts that exist only because of the incentives copyright provides. Actors, as well as theatrical directors, or anyone else engaged in making bodies move in space, seem to have different and lesser interests.⁵⁶

The lesser cultural value given to performance-oriented creativity pushes courts and critics towards perceiving single authorship. There are also factors pulling in that direction, especially for large-scale works such as films. For economic reasons, control is generally centralized in a film company as the owner of a “work made for hire.” And on a theoretical level, treating a film director as the unitary source of intent and meaning has been an irresistible temptation for many film critics. It’s just so much simpler than looking at all the contributors, and it’s often useful to believe that there is a single master mind to whom a unitary plan can be attributed.⁵⁷

But we also recognize performers as artists, which is to say as creators. The ideology of creativity as the foundation of authorship thus suggests that (some) performers should count as authors.⁵⁸ It’s true that individual authorship only matters in the U.S. in the absence of contracts with the potential authorial candidates specifying that the film is a work for hire for the purposes of copyright law. A work for hire is legally authored by the commissioning party. Such contracts are routinely signed with the traditionally recognized author-candidates involved in creating a film.⁵⁹ Contracts are less consistent with respect to non-lead performers,

⁵⁶ Cf. Matthew Rimmer, *Heretic: Copyright Law and Dramatic Works*, 2 QUEENSLAND U. TECH. L. & JUST. J. 131, 142 (2002) (arguing that there is a double standard in the treatment of producers as between plays and movies, so that “[t]he producer of a play is denied copyright protection because of a belief that a dramatic work is just concerned with live performance” while “[t]he producer of a film receives copyright protection in order to facilitate the capital investment that is required to produce and market such a work to mass audience”).

⁵⁷ See Salter, *supra* note 10, at 838.

⁵⁸ Carroll, *supra* note 11, at 805-06 (“An actor, a dancer, and a musician each face a range of creative choices when deciding how to perform a role or a piece of music. These creative choices can be fixed in a tangible medium simply by recording the performance. On copyright’s first principles, these creative choices are sufficiently original to qualify the performer as an author of her performance. This view does not enjoy full acceptance, however. . . . Courts treat musicians, producers, and some sound engineers as authors of their recorded performances. Nevertheless, courts recognize only some collaborators in theatrical productions as authors, and actors and dancers usually are not treated as authors.”) (footnotes omitted).

⁵⁹ See Jonathan Barnett, *Hollywood Deals: Soft Contracts for Hard Markets* 13 (2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2118918 (explaining that Hollywood film companies treat writers differently

makeup artists, set designers and so on, since their contributions are not generally thought to rise to the level of authorship in the first place.⁶⁰ If they're not authors, there's no reason to call their contributions "works made for hire," and perhaps some reason not to do so, in order to strengthen the argument that no one expects such people to be authors in the not uncommon case in which a contract is incomplete or not fully executed.⁶¹

Authorship is still important even if we expect it routinely to be transferred by contract. Among other things, a work is only copyrightable when it's fixed "by or under the authority of the author,"⁶² so we first need to know who the author is to know whether the fixation requirement has been met. Also, authors have special rights with respect to copyrighted works, compared to non-authors who contributed to those same works. While the author of a novel owns the copyright, and can even recapture it thirty-five years after transferring it to a publisher as a matter of statutory right, the editor of the novel owns nothing, no matter how much she contributed to the novel's value and success. The same rule applies to anyone who contributes material not rising to the status of "authorship" to any work — and for films, there are a lot of such people.

In order to protect against the threat of hundreds of people claiming partial ownership of each film or play, courts have interpreted the concept

than directors and actors because of their understanding of copyright law, requiring written contracts with writers in order to ensure ownership of the writers' copyright); *but cf. id.* at 11 (noting that studios do appear to insist that directors and principal actors transfer any intellectual property rights in writing even if the rest of the contract isn't formalized).

⁶⁰ See, e.g., Britton Payne, *Copyright Your Life: The Implications of Works Made for Hire and Termination of Transfer in Non-Scripted Entertainment*, 15 U. BALT. INTELL. PROP. L.J. 171, 172 (2007) ("Because of the nature of some kinds of reality television and other new media making use of the technological democratization of entertainment, the contracts granting copyright to producers often do not explicitly identify a performer as contributing work made for hire."); Gregory N. Mandel, *To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity*, 86 NOTRE DAME L. REV. 1999, 2018 (2011) ("Contributors often do not adequately consider their intellectual property rights beforehand, or even if they do, rarely pay enough attention to clearly define their respective rights by contract."); Rochelle Cooper Dreyfuss, *Collaborative Research: Conflicts on Authorship, Ownership, and Accountability*, 53 VAND. L. REV. 1159, 1165, 1169-82 (2000) (noting pervasive failure to contract with sufficient specificity about copyright ownership).

⁶¹ As Barnett points out, Hollywood is full of non-repeat players and potentially large one-time gains that make attempts to impose holdup costs on film companies more likely. Barnett, *supra* note 59, at 22.

⁶² 17 U.S.C. § 101 (2006).

of joint authorship extremely narrowly.⁶³ The 1976 Copyright Act defines a “joint work” as “a work prepared by two or more *authors* with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”⁶⁴ So the intention to merge contributions may be present, but you first have to be an author before that intention matters. And how do you get to be an author? Initially, courts look for a “master mind” in control of the entire production.⁶⁵ Since that’s inconsistent with the very idea of joint authorship, the courts then hold that each author must have the intent to share *authorship* specifically, not just the intent to merge their contributions into a unified whole, in order to become a joint author.⁶⁶ Courts also often state that true authors have final decisionmaking authority, again in inherent tension with the concept of joint authorship.⁶⁷

But this test is problematically self-referential: how do we decide who gets to have the relevant intent? What if, for example, contributor 1 thinks of herself and contributor 2 as authors, but contributor 2 sees himself as the sole author? Contributor 2’s self-centeredness is likely to be a

⁶³ Barron, *supra* note 7, at 206. Anne Barron attributes this result to the needs of capitalism overriding the theory of creativity supposedly adopted by copyright law. *Id.* at 191 (“[C]opyright law in the UK has had no difficulty whatsoever in reconciling the ideology of individual artistic expression with the commodity form of the subject: quite simply, the former has yielded unquestioningly to the latter when the relations of production have so required. This is nowhere more evident than in relation to photographers and filmmakers.”).

⁶⁴ 17 U.S.C. § 101 (2006) (emphasis added).

⁶⁵ *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000) (“author” is best defined as “the person to whom the work owes its origin and who superintended the whole work, the ‘master mind.’ . . . [For a film, this] 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.”) (citation omitted).

⁶⁶ *Id.* at 1233-34 (“[A] person claiming to be an author of a joint work must prove that both parties intended each other to be joint authors.”).

⁶⁷ If joint authors disagree, one of them must generally prevail, and yet they could still easily be joint authors as long as they both admit their interdependence. See Roberta Rosenthal Kwall, “*Author-Stories*”: *Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 60 (2001) (identifying bias against joint authorship in *Aalmuhammed*: “[T]he court is fixated on a definition of ‘authorship’ which embodies a single creative entity. . . . The notion that a movie could be the product of many creative authors whose contributions are blended into the final product is completely foreign to the court’s sensibilities. This bias is underscored by the court’s obsession with the exercise of ‘control’ as a key element in determining authorship.”).

legal advantage.⁶⁸ As long as he looks sufficiently author-like, his discounting of contributor 1's contributions will help him be deemed the sole author. Some scholars have begun to argue for use of accession, a doctrine borrowed from real property, to resolve related questions about ownership of derivative and transformative works.⁶⁹ But to know who owns an improvement or contribution through accession, one must first know who owned the core piece of property. Multi-contributor productions can often resemble the soup in the fable of "Stone Soup," in which a sharp operator convinces a village that he can make soup out of stones — as long as each of the villagers contributes a little bit of meat, vegetables, spices, etc. The resulting dish is delicious, and the stones are a but-for cause of the soup, and yet it seems odd at best to say that the stranger with the stones is the true owner and proprietor of the soup.

Along with intent, courts also look at customary roles to disqualify people as authors — editors are not authors;⁷⁰ playwrights are authors but

⁶⁸ See Roberta Rosenthal Kwall, Book Review, *The Author as Steward "For Limited Times": The Idea of Authorship in Copyright*, 88 B.U. L. REV. 685, 695 (2008) (noting that the standard favors the "dominant" author over an equally contributing but "non-dominant" author).

⁶⁹ See David Fagundes, *Efficient Theft: Copyright & the Accession Insight* (2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1949545; Christopher M. Newman, *Transformation in Property and Copyright*, 56 VILL. L. REV. 251, 292 (2011) (addressing accession with the presupposition that a work already has an identified author who has planned the work).

⁷⁰ As one court put it:

[A] writer frequently works with an editor who makes numerous useful revisions to the first draft, some of which will consist of additions of copyrightable expression. Both intend their contributions to be merged into inseparable parts of a unitary whole, yet very few editors and even fewer writers would expect the editor to be accorded the status of joint author, enjoying an undivided half interest in the copyright in the published work. Similarly, research assistants may on occasion contribute to an author some protectable expression or merely a sufficiently original selection of factual material as would be entitled to a copyright, yet not be entitled to be regarded as a joint author of the work in which the contributed material appears. What distinguishes the writer-editor relationship and the writer-researcher relationship from the true joint author relationship is the lack of intent of both participants in the venture to regard themselves as joint authors.

Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991). *But see* Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 223 (2001) (criticizing the "unexamined assumption" that Congress wouldn't have wanted this "parade of horrors" and the further assumption that an intention test is required to prevent it).

dramaturgs and actors are not;⁷¹ and so on. The result of the current test is that portions of a work added in rehearsal, or in the middle of production, when the lived experience of creating a work counsels changes in its form, are unlikely to result in any authorship rights for the people who are taking a script from the page to its instantiation in a performance. Copyright thus contributes to freezing notions of authorship and discounting the contributions of people who play vital roles in the form and content of the final work but who didn't write scripts for it.

Giving authorship to a single master mind responsible for making a film neatly avoids the practical problems of recognizing multiple creative contributions. But, as Barron points out, the cost of disregarding those contributions is a significant one: it seems to threaten copyright's legitimacy, since copyright is supposedly justified by the need to protect and incentivize creativity.⁷² The Patent and Trademark Office, for example, whose name indicates its outsider relation to copyright law, claimed in support of a treaty expanding copyright obligations that, "[u]nder U.S. law, actors and musicians are considered to be 'authors' of their performances providing them with copyright rights."⁷³ Yet this is not the consensus among copyright experts, especially as to non-lead singers and actors.

When it comes to sound recordings, indeed, copyright discourse is highly conflicted.⁷⁴ Representatives of the music industry touted the authorial contributions of recording engineers (as part of a larger strategy to argue that sound recordings generally constitute "works for hire" not subject to termination rights).⁷⁵ Yet recording a live concert without the per-

⁷¹ See, e.g., *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998) (dramaturg); *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991) (actor).

⁷² Barron, *supra* note 7, at 206-07 (pointing out that granting copyright to producers overprotects, in that it gives rights in non-expressive works like security videos, and underprotects, in that it ignores the "elements of film form that constitute a film as an aesthetic object").

⁷³ UNITED STATES PATENT AND TRADEMARK OFFICE, WIPO AVP TREATY – BACKGROUND AND SUMMARY 2 (2012).

⁷⁴ Nimmer recognizes the substantial uncertainty surrounding authorship of standard commercial sound recordings. See 1 NIMMER & NIMMER, *supra* note 3, § 5.03[B][2][a][ii] (suggesting that, if featured artists were authors and could therefore terminate transfers to record companies, "[e]qually entitled to terminate would be backup musicians, sound engineers, producers, and others" (citing Register of Copyrights Marybeth Peters' testimony that "[t]here could easily be a dozen or more potential co-authors of a single sound recording")) (citation omitted).

⁷⁵ H.R. REP. NO. 92-487 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1570 ("The copyrightable elements in a sound recording will usually, though not always, involve 'authorship' both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording As

former's permission is understood to be "without the consent of the author,"⁷⁶ which assumes that it's the performer, not the recording engineer, who's the author, in that case the sole author (since there was obviously no intention to create a jointly authored work). Authorship moves around as needed to meet the needs of the industry.

If authorlike contributions can easily disappear into a larger work without authorship, presumptive statutory categories might provide a better guide to joint authorship than the current system. American law could create such categories for audiovisual works in the same way that European countries list default classes of authors for films. The U.S. already distinguishes between lead performers and backup or session performers for certain purposes in sound recordings, and could explicitly do so for authorship purposes as well.⁷⁷ If anti-fragmentation considerations are primary, the law could identify specific roles eligible for joint authorship treatment (and perhaps allow others to contract into joint authorship), making explicit judgments about manageability rather than implicit judgments about value. While drawing lines may seem difficult, it is a difficulty already encountered by current law, only filtered through ideas of authorship and intent;⁷⁸ performers might benefit from making such determinations more openly and categorically.

in the case of motion pictures, the bill does not fix the authorship, or the resulting ownership of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved."); Mary LaFrance, *Authorship and Termination Rights In Sound Recordings*, 75 S. CAL. L. REV. 375, 383 (2002).

⁷⁶ See 17 U.S.C. § 1101 (2006).

⁷⁷ *But see* La France, *supra* note 73, at 405 n.110 ("In theory, Congress could designate by statute some finite class of creative collaborators [I]t is difficult to imagine a statutory scheme that could conclusively predetermine the owners of termination rights in every possible type of creative collaboration that results in a sound recording. Even statutory categories such as 'featured' and 'nonfeatured' musicians, see 17 U.S.C. §§ 114(g), 1006(b)(1) (2006), are open to much interpretation It is, therefore, doubtful whether any of these theoretical solutions offers much promise in practice."). LaFrance's criticism is well taken, but we may well need to decide between rough justice or none. It may make sense to make baseline assumptions for pure administrability purposes.

⁷⁸ *Cf.* 1 NIMMER & NIMMER, *supra* note 3, § 5.03[B][2][a][ii] (noting objection that determining "key contributors" to sound recordings would be too difficult, and the rejoinder that most contributors didn't qualify as authors in the first place because "side musicians, backup singers and engineers, are hired to work on a song with the contractual understanding through standard industry agreements that their contributions are made without claims of authorship") (quoting Michael Greene of the National Academy of Recording Arts & Sciences).

As is often the case, tensions in the law become more apparent in edge cases. The next sections discuss the rise of performers' copyright claims, asserted as a way to get around barriers to other (more appropriate) causes of action such as defamation and invasion of privacy. These cases, in which the performers are often sympathetic figures, threaten copyright's self-image as simultaneous protector of creativity and protector of economic incentives.

B. Case Study: Innocence of Muslims and the Innocence of Actors

Recently, authorship in performance was glancingly part of a significant public controversy: the *Innocence of Muslims* video disparaging Islam that sparked violent protests around the world.⁷⁹ One of the actors in the film, Cindy Lee Garcia, alleged without contradiction that she was duped into participating by the filmmaker, Nakoula. Garcia alleged that she was paid to perform in a film called *Desert Warrior*, "an adventure film set in ancient times." She was allegedly unaware of any religious or sexual content to the film (although her lines did involve her protest against marrying her thirteen-year-old daughter to a man of over fifty). She alleged that most of her scenes involved only "playing with the actress who portrayed her 'daughter.'" After filming, her dialogue was overdubbed and changed so that she appeared to accuse the prophet Mohammed of being a child molester.⁸⁰

Garcia attempted to exploit the gaps in our current concept of performance by arguing that all the ordinary rules for imputing her consent and non-author status were voided by the filmmaker's fraud.⁸¹ And it

⁷⁹ *Reactions to Innocence of Muslims*, WIKIPEDIA, https://en.wikipedia.org/wiki/Reactions_to_Innocence_of_Muslims (last visited Feb. 26, 2013).

⁸⁰ Complaint, *Garcia v. Nakoula* ¶ 4, No. 2:12-cv-08315-MWF-VBK (C.D. Cal. filed Oct. 4, 2012).

⁸¹ Garcia allegedly signed a release, which if valid appears to be a form adopted without much knowledge by anyone involved, and the form itself is incomplete, another sign of unsophistication on all sides. (Garcia claims that the release is a forgery. Michael Joseph Gross, *Disaster Movie*, VANITY FAIR (Dec. 27, 2012), <http://www.vanityfair.com/culture/2012/12/making-of-innocence-of-muslims> ("Garcia's suit includes expert testimony from a forensic analyst who worked on the case of the Zodiac Killer, asserting that Garcia's handwriting and signatures on the releases provided by Nakoula are forged.")). The "Assignment of Rights" provision in the "cast deal memo" assigns "all rights necessary for the development, production and exploitation of the Motion Picture, whether denominated copyrights, performance rights, or publicity rights," then separately states that all writing for the film will constitute "works made for hire." *Garcia v. Nakoula*, Declaration of Mark Basseley Youssef ¶ 4. The two provisions in the cast release were probably supposed to be alternatives, not to work in tandem, and only the latter provides for the "work for hire" status that is standard in film.

does seem that fraud should usually invalidate the contractual logics courts ordinarily use to resolve performers' authorship claims. However, copyright law wouldn't work very well if Garcia owned a separate copyright in her performance. But that conclusion requires us to explicitly detach authorship from creativity, at least for certain cultural artifacts, and admit that's what has happened.

Garcia sued a number of entities for producing and disseminating the film. Among her targets was Google, on whose YouTube site the film "trailer" appeared. Her initial lawsuit, in state court, asserted only intentional infliction of emotional distress and similar claims. Google has immunity under § 230 of the Communications Decency Act for such causes of action, but the CDA does not cover intellectual property claims.⁸² Thus, in her subsequent federal lawsuit she offered the theory that she was an *author* and not just a victim of a fraud. She alleged that Google wrongfully ignored her takedown notice⁸³ and was therefore liable for copyright infringement.

An earlier case offers an instructive comparison. In *Morrill v. Smashing Pumpkins*,⁸⁴ Jonathan Morrill filmed *Video Marked*, a music video, showing Billy Corgan's then-band The Marked. When Corgan's new, successful band The Smashing Pumpkins released a video that included short clips from *Video Marked*, Morrill sued, claiming sole ownership of the music video. Corgan's defense was that he was a joint author, and the court agreed. Corgan's songwriting and performance were copyrightable contributions to the overall work. Corgan controlled the performance elements, while Morrill's filming, editing and producing "helped shape and present"

The release also speaks of a grant of "permission" to "record" and "use" Garcia's performance, and states that Garcia won't bring any claims, "including but not limited to, those grounded upon invasion of privacy, rights of publicity or other civil rights, or for any other reason." *Id.*, Exh. 1. However, this language is insufficient to fully transfer a copyright interest, if any exists, because the Copyright Act bars any agreement that surrenders a natural person's right to terminate a copyright transfer after thirty-five years. *See* 17 U.S.C. § 203 (2006). *Cf.* Payne, *supra* note 60, at 189 (arguing that, if a performance is independently copyrightable, then a transfer of a performer's rights would be fully terminable, because the larger work in which it is embedded is unlikely to be a derivative work of the performance). Section 203 allows continued exploitation of derivative works post-termination, but the transferor can stop continued use of mere reproductions. I think Payne is wrong, because the termination right is best read to prevent termination in these circumstances, but the existence of the argument shows why a producer would want a work for hire agreement from anyone in the position of an author.

⁸² 47 U.S.C. § 230 (2006).

⁸³ 17 *id.* § 512.

⁸⁴ 157 F. Supp. 2d 1120 (C.D. Cal. 2001).

the music but would have been meaningless without the music. Corgan and his band had “sole control” over the musical work and its performance — they were the relevant master mind(s). In addition, Morrill described the video as a work he created “with” Corgan and the band, a “collaboration,” evidencing intent to be a joint author. Finally, the work’s appeal to the audience came both from the visual aspects of the work and the musical/performance elements, and the share of each in its success couldn’t be disentangled from the other. Thus, the court concluded, Corgan was a joint author.⁸⁵

Garcia would seem to satisfy this version of the “master mind” test — interviews with many people involved with the film suggest that the director gave no direction, and performers played with their performances and line readings at will;⁸⁶ and of course without her performance, there’d be a meaningless blank space in the film regardless of editing and camera operation. Likewise, whatever appeal *The Innocence of Muslims* has seems to come from the combination of the various contributions. As a unitary work, it wasn’t designed to be separable. Only “intent to be a joint author” stands between Garcia and joint ownership.

Given current doctrine’s joint authorship intent requirement, however, Garcia’s position as victim of a fraud makes her authorship claim untenable. The very facts that indicate that she was defrauded, and that we ought not to take her initial consent to perform in (what she thought was) the film as true consent to its creation and dissemination, plead her out of authorship status.⁸⁷ In order to establish her blamelessness, Garcia pled that the filmmaker, Nakoula, manipulated her. She did not receive a

⁸⁵ Cf. *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 668-69 (7th Cir. 1986) (telecasts of baseball games are protectable because of “camera angles, types of shots, the use of instant replays and split screens,” and similar choices, but baseball players’ contributions were also copyrightable). *Baltimore Orioles’* conclusion about the copyrightability of the underlying game has been heavily criticized. See 1 NIMMER & NIMMER, *supra* note 3, § 2.09[F]. Subsequent cases have largely ignored the possibility of joint authorship and the critical question of intent. See, e.g., *Big Fights, Inc. v. Ficara*, 40 U.S.P.Q.2d 1377, 1378 (S.D.N.Y. 1996) (holding that filmmakers, not boxers, own copyright to movies of fights while quoting *Baltimore Orioles* for the proposition that both the contributions of the filmmakers and the contributions of the performers are copyrightable).

⁸⁶ See Gross, *supra* note 81.

⁸⁷ Nimmer has argued that a material breach by the hiring party should allow rescission of a work-for-hire agreement, thus allowing a person who would otherwise be an author to regain that status; this would imply similar results for fraud. However, the treatise notes that this position has not been followed in the US, particularly where there is an agreement with a non-employee to contribute to a work for hire. 1 NIMMER & NIMMER, *supra* note 3, § 5.03[E].

full script from him but was only given “specific pages”⁸⁸; he “held himself out as the writer and producer,” “managed all aspects of production, and as far as [Garcia] observed, was in charge of all aspects of the production.”⁸⁹ Indeed, Nakoula allegedly “used her as a puppet.”⁹⁰ This is the language of Nakoula as master mind: the singular author who can accept or reject contributions from others without losing his status as singular author.⁹¹ Thus, even accepting her claim that her contract transferred no copyright rights — and additionally that her contract was void based on fraud — that would still not give her a copyright interest in the film under current doctrine. She wasn’t a joint author because she wasn’t an *author*.

Garcia argued that the film was not a joint work because there was no meeting of the minds, given Nakoula’s fraud.⁹² But that’s a much worse fact for Garcia than for Google: since she was simply an actor in a larger production, the parties’ failure to form a mutual intent to create a joint work means that authorship stays with the “master mind,” in this case clearly Nakoula, who told Garcia that she was “innocent” of involvement with the final work. Regardless of Garcia’s intent, there is no reason to believe that Nakoula ever had any intent of sharing authorship in the copyright sense.⁹³ Later, Nakoula allegedly disavowed any ownership interest in the film.⁹⁴ But that didn’t logically mean that Garcia became the author. At most, a lacuna may have appeared, a blank space — or perhaps Nakoula dedicated the work to the public domain as part of whatever his mission is.

The Ninth Circuit, in *Aalmuhammed v. Lee*, had previously held that “a person claiming to be an author of a joint work must prove that both parties intended each other to be joint authors.”⁹⁵ Garcia argued that this meant that the burden was not on her to prove ownership, because she

⁸⁸ *Id.* ¶ 28; *see also* Declaration of Cindy Lou Garcia ¶ 10.

⁸⁹ Complaint, *supra* note 80, ¶ 5.

⁹⁰ *Id.* ¶ 8; *see also* Gross, *supra* note 81 (“During filming, as in the auditions, everyone associated with the production got the sense that Sam Bacile [aka Nakoula] was in charge. . . . The film’s titular director was Alan Roberts, whose long list of B-movie credits includes soft-core films such as *Young Lady Chatterley*. . . . He was generally perceived to be Nakoula’s lackey, and he kept his distance from most people on the set.”).

⁹¹ *Almuhammed*, 202 F.3d at 1234 (“an author ‘superintend[s] the work . . . ‘by putting the persons in position, and arranging the place where people are to be . . .’”).

⁹² Garcia v. Nakoula, Ex parte Application for TRO, at 4.

⁹³ *See* Garcia Declaration ¶ 13 (stating that Nakoula claimed sole responsibility for the film, and averring “I never harbored any intent, jointly with [Nakoula] or with anyone else . . . to commit my performance to *Innocence of Muslims*”).

⁹⁴ Garcia Ex parte Application, at 13 n.9.

⁹⁵ 202 F.3d 1227, 1233-34 (9th Cir. 2000).

was claiming to be the sole copyright owner.⁹⁶ This argument is revealing because it's so odd: Garcia argued that, as a performer who appeared for five seconds in a much longer film,⁹⁷ she should be considered the sole author as long as the director wasn't intervening in the dispute. The very implausibility of the claim highlights how the current joint authorship standard inherently presumes that there's one real or core author who can be identified and whose intent can then be assessed.⁹⁸ Only from that baseline can the Ninth Circuit's standard sensibly be applied. The standard is useless if, for example, two people each claim sole authorship of a work they produced together and we can't tell which is the "real" author.

In response to the point that she had pled herself into the position of non-author, Garcia argued that the position "that minor actors simply do not make creative contributions because they are reading a script or do not have marquee billing [] denigrates the work of actors."⁹⁹ But Google's argument — following the case law — was not about creativity: it was about authorship.¹⁰⁰ The case law functions to detach participants' creativity from any copyright interest in a work where intent to become joint authors was absent on the part of the person who seems to count as the "master mind." Creativity abounds in an audiovisual work, but it only finds legal attachment points in a few places. Again, this poses difficulties for the theoretical coherence of a law that supposedly grants rights *because* of the existence of creativity in a work, but those appear to be tolerable in the interests of consolidating ownership.

Garcia's initial ownership argument — disavowing joint ownership but claiming copyright — implied that, in the absence of an intent to share authorship, both parties (or, here, all parties, since there were multiple actors involved) owned undivided copyrights in something. But what? It couldn't be in the work as a whole, since if they all owned undivided copy-

⁹⁶ Garcia, Ex parte Application, at 18.

⁹⁷ Garcia v. Nakoula, Google Opposition, at 13.

⁹⁸ See also Reinsdorf v. Skechers, U.S.A., 2011 U.S. Dist. LEXIS 28293, at *9 (C.D. Cal. Mar. 9, 2011) (parties' inconsistent intentions could indicate lack of intent to form a joint work; what remains is to decide who the singular author then was).

⁹⁹ Garcia Reply at 1.

¹⁰⁰ See Aalmuhammed v. Lee, 202 F.3d 1227, 1233 (9th Cir. 2000) ("Everyone from the producer and director to casting director, costumer, hairstylist and 'best boy' gets listed in the movie credits because all of their creative contributions really do matter. It is striking in Malcolm X how much the person who controlled the hue of the lighting contributed, yet no one would use the word 'author' to denote that individual's relationship to the movie. . . . A creative contribution does not suffice to establish authorship of the movie.").

rights in the work as a whole, they'd be joint authors; that's the definition of joint authorship.

As a workaround to this problem, Garcia claimed sole ownership of her performance as fixed (or deformed) in the final film, alleging that she owned copyright in "the dramatic performance she delivered."¹⁰¹ Thus, she claimed sole authorship of her contribution even absent an authorship interest in the final film. She cited cases holding that actors' performances fixed on film were within the subject matter of copyright,¹⁰² and argued that *Aalmuhammed* recognized that contributions not rising to the level of joint authorship could still be independently copyrightable as separate works.¹⁰³

But there is a gap between "within the subject matter" of copyright and "copyrightable,"¹⁰⁴ and that gap here is authorship. The key move in this argument is whether, as Google insisted, the film had to be treated as a unitary work for these purposes.¹⁰⁵ A "dramatic performance," inseparable from the audiovisual work of which it is a part, has little claim to a separate copyright status. Even Garcia's registration application reflects this difficulty. She used the form for registering an audiovisual work (a category recognized by the Copyright Office) but then stated that she sought to register a performance (a category not recognized as such).¹⁰⁶

Google also, unsurprisingly, appealed to policy considerations in favor of conceptualizing the work at issue as the film rather than as Garcia's performance: Google decried the

impenetrable thicket of conflicting rights that would arise if each creative contributor (*i.e.*, actors, director, producer, cameraman, cinematographer, costume designer, make-up artist, etc.) could hold an independent

¹⁰¹ Garcia Complaint ¶ 10, 11.

¹⁰² *TMTV Corp. v. Pegasus Broad. of San Juan*, 490 F. Supp. 2d 228 (D.P.R. 2007); *Fleet v. CBS, Inc.*, 58 Cal. Rptr. 2d 645, 650 (Ct. App. 1996) (holding that "individual performances" in a film were copyrightable, and thus that actors' right of publicity claims were preempted by federal copyright law).

¹⁰³ Garcia Reply at 5-6, citing *Aalmuhammed*, 202 F.3d at 1231, 1232 ("We recognize that a contributor of an expression may be deemed the 'author' of that expression for purposes of determining whether it is independently copyrightable.").

¹⁰⁴ As indicated by preemption cases, which generally find that right of publicity claims are preempted when they're based solely on the use of a copyrighted work, in which the person portrayed consented to appear, at least when the work isn't used as part of an ad for an unrelated product. Actors' performances are in that sense within the scope of copyright even though the actors aren't copyright owners. See *Fleet*, 58 Cal. Rptr. 2d at 650; *cf.* *Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053 (C.D. Cal. 2000) (scope and protection are not synonymous).

¹⁰⁵ Google Opposition, at 14.

¹⁰⁶ Garcia Complaint Exh. B.

and exclusive copyright interest in his or her contribution to a movie. The copyright held by the film's author would be rendered meaningless, as he or she could not possibly exercise the exclusive rights afforded under the Copyright Act without trampling on the rights of other contributors.¹⁰⁷

This fundamentally utilitarian consideration is why, if the master mind does not intend to share authorship, voluntary contribution of copyrightable material to a unitary work that can't be disaggregated into the separate contributions of individuals constitutes a surrender of *authorship*, which means a surrender of ownership.¹⁰⁸ This situation is not unique to performers—software created by multiple contributors is another common example—but the general inability of performers to access the benefits of authorship shows how copyright's antifragmentation inclinations can trump creativity-as-authorship. Contracts could change this rule in performer-friendly ways, but rarely do. (Even European copyright law, which is generally more protective of the claims of individuals than American law, has scant regard for performers in this regard: default rights-owners in films, where specified, are people such as producers, directors, screenwriters, cinematographers, and composers — not performers.¹⁰⁹)

The court's denial of Garcia's motion for a preliminary injunction broke no new ground. Because Garcia didn't and couldn't claim authorship or co-authorship of the entire film, "by operation of law Garcia necessarily (if impliedly) would have granted the Film's author a license to distribute her performance as a contribution incorporated into the indivisi-

¹⁰⁷ Google Opposition at 14-15. *See also* Note, *Recent Cases: Copyright – Joint-Authorship – Second Circuit Holds That Dramaturge's Contributions to the Musical Rent did not Establish Joint Authorship with Playwright-Composer*, 112 HARV. L. REV. 964, 967 (1999) (noting that if a work can be carved up into multiple works, a contributor "could hold a collaborative work hostage, or demand its dismemberment").

¹⁰⁸ Cf. Russ VerSteeg, *Intent, Originality, Creativity and Joint Authorship*, 68 BROOK. L. REV. 123 (2002) (justifying essentially the present regime with a contractarian argument based on implicit consent).

¹⁰⁹ PASCAL KAMINA, *FILM COPYRIGHT IN THE EUROPEAN UNION* 151-52 (2002) (arguing that a performer would never count as an author, as actors only perform works and do not create them or contribute to them substantially enough to rise to the level of authors); *see also* Adriane Porcin, *Of Guilds and Men: Copyright Workarounds in the Cinematographic Industry*, 35 HASTINGS COMM/ENT L.J. 1, 6 (2012) (in French law, the director, the scriptwriter, the author of any adaptation, the dialogue writer, and the composer are considered authors of an audiovisual work by default; EC law provides that the director of an audiovisual work is an author, but does not specify anyone else who must be considered an author). While European law mandates certain protections for non-owners, it distinguishes "authors" from "interpreters," excluding performers from the definition of authors. *See* Porcin, *supra*, at 10.

ble whole of the Film.”¹¹⁰ Yet it is not clear why Garcia’s fairly persuasive fraud claim has no purchase against the implied license.¹¹¹ Moreover, while Ninth Circuit precedent means that Garcia’s license is apparently irrevocable,¹¹² in other circuits an implied license may be revocable at will, which would allow similar claims.¹¹³

The policy considerations behind Google’s arguments are compelling, but would be more persuasive if offered without the fiction of a master mind who, Svengali-like (or at least Hitchcock-like), controlled everything in the film. If we are honest that, at least with respect to large-scale works, we are interested in economic incentives and in the smooth operation of copyright rights and limitations, rather than in rewarding creativity as such, we can deny multiple authorship claims without calling performers uncreative. Despite her sympathetic moral status as against Nakoula, Garcia’s remedy should lie outside of copyright.

C. Other Performers’ Authorship Claims and Their Weaknesses

Garcia is not the only performer to have made similar authorship claims.¹¹⁴ Legal scholars have suggested that unwilling participants in “revenge porn,” whose images are uploaded onto public websites without their consent, should claim copyright in still and moving pictures as “authors” of their own performances. As Derek Bambauer puts it:

For revenge porn, I think there is a defensible position that the subject – the victim – of the image or video is at least a joint author. . . . Because of the subject – not because of the lighting, the use of unusual color or angle, the excellent development of the print, or any other contribution by the photographer. Put it this way: imagine that the victim is replaced by a

¹¹⁰ *Garcia*, No. CV 12-08315-MWF (VBKx) (C.D. Cal. Nov. 30, 2012), at 3.

¹¹¹ Perhaps the underlying idea is that fraud can’t void a license to create a copyrighted work. Garcia knew that she was contributing to the production of a unitary work, even if she was deceived about the nature of that work. Her remedy would then be in contract, not in copyright. Conceptually, one might liken this to the difference between covenants in copyright licenses (breach of which makes a licensee liable in contract, but not for copyright infringement) and conditions (breach of which makes a licensee into a copyright infringer). See *MDY Indus. v. Blizzard Entm’t, Inc.*, 629 F.3d 928 (9th Cir. 2010); cf. Christopher M. Newman, *A License is Not a “Contract Not to Sue”*: *Disentangling Property and Contract in the Law of Copyright Licenses*, 98 IOWA L. REV. (forthcoming Mar. 2013).

¹¹² *Asset Mktg. Sys., Inc. v. Gagnon*, 542 F.3d 748, 757 (9th Cir. 2008); *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 585-86 (9th Cir. 1993).

¹¹³ See *Walthal v. Rusk*, 1998 WL 42469 (N.D. Ill. Jan 28, 1998).

¹¹⁴ See also, e.g., *Ahn v. Midway Mfg. Co.*, 965 F. Supp. 1134, 1139-40 (N.D. Ill. 1997) (two martial arts experts and a professional dancer who modeled for characters to be used in the *Mortal Kombat* arcade games were not authors, given the game makers’ control and the relative insubstantiality of the plaintiffs’ contribution to the game).

dummy, or Felix the Cat. No one is even going to glance at the photo: there's nothing expressive or original about it. I think that means that a victim, and her attorney, can often take a legally defensible position that she is an author of the photo.¹¹⁵

Bambauer's concern for the victims of these reprehensible sites is understandable, but distorting copyright law is not the right solution. Change the subject: Lee Harvey Oswald was not an author of the Zapruder film, though he created the subject matter.¹¹⁶

Entertainer Hulk Hogan recently claimed copyright in a sex tape in which he was featured, though it's unclear whether he claimed to be the author or whether he secured the copyright as part of a settlement with the person who recorded and released the film without his consent.¹¹⁷ In his initial argument, his attorneys claimed that the film itself was made without his knowledge, which would pose some difficulty for a claim that he was an author.¹¹⁸ A court denied his request for a preliminary injunction against dissemination of the film, questioning his later-added copyright claims as inconsistent with his disavowal of knowledge, and emphasized the First Amendment interests in reporting news.¹¹⁹ Other celebrities who've had sex tapes released have also claimed copyright rights by transfer of ownership from the author (the filmmaker), but authorship-by-performance may represent a new legal frontier for disappointed performers.¹²⁰

¹¹⁵ Derek Bambauer, *Beating Revenge Porn with Copyright*, INFO/LAW (Jan. 25, 2013), <http://blogs.law.harvard.edu/infolaw/2013/01/25/beating-revenge-porn-with-copyright/>.

¹¹⁶ In a different context, Nimmer criticizes the idea that contributing commercial value to a work is an indicator of the copyrightability of that contribution. 1 NIMMER & NIMMER, *supra* note 3, § 2.09[F] n.78 (“[I]n a reductio ad absurdum . . ., one could maintain that the fans, popcorn vendors, and everyone else whose image is broadcast have participated in the creation of a copyrightable work. Their mere appearance on the television screen vouchsafes the ‘commercial value’ of their appearance . . .”).

¹¹⁷ See José Patiño Girona, *In Legal Twist, Hulk Hogan Might Copyright Sex Tape*, TBO.COM (Nov. 8, 2012), <http://www2.tbo.com/news/breaking-news/2012/nov/08/in-legal-twist-hulk-hogan-might-copyright-sex-tape-ar-559467>.

¹¹⁸ *Id.*; see also Oren J. Warshavsky, *Hulkamania Is Running Wild: Let the Battle Begin (in Court)*, LEXOLOGY.COM (Nov. 11, 2012), <http://www.lexology.com/library/detail.aspx?g=739ce022-6912-4c29-a354-ea51048a613d>. Given that Hogan settled with the initial taper, his copyright claim might well be the result of a transfer as part of the settlement.

¹¹⁹ *Bollea v. Gawker Media*, No. 12-cv-02348 (M.D. Fla. Dec. 21, 2012) (questioning the validity of the plaintiff's claimed copyright, though resting its decision on fair use and plaintiff's own lack of interest in exploiting the tape).

¹²⁰ See, e.g., *Michaels v. Internet Entm't Group, Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998) (granting summary judgment against sale of celebrity sex tape on copyright grounds); cf. *Michaels v. Internet Entm't Group, Inc.*, 1998 WL

The distinction between initial ownership and transfer makes a difference because of the divergent way the law treats authors and people claiming invasion of privacy. Non-authors have a much harder time suppressing dissemination of works about them than authors do. Courts may react badly when the copyright has been obtained by transfer in order to suppress the work. Howard Hughes, for example, purchased the copyrights in articles about him in and then sued a biography quoting those articles; the court found fair use in significant part because of Hughes' censorial motive.¹²¹ By contrast, if the copyright was owned by the performer in the first instance, she could easily be seen as exercising an ordinary right of control over timing and release,¹²² or even a right to suppress the work entirely.¹²³

Expanding performers' ownership claims by giving them pieces of a larger work is therefore not an optimal way to recognize the creative value they provide. Many commentators have proposed solving problems of joint authorship by allocating interests proportionally, rather than equally.¹²⁴ While these rules might do more equity as between contributors to works, they would create significant problems for third parties, such as intermediaries or fair users. In a world in which any contributor might be at least a partial author, after a final judicial determination, how should YouTube react to a takedown notice from a contributor, especially if YouTube isn't in a position to confirm that the work was posted by another contributor? (Given that an exclusive right is required to send a

882848 (C.D. Cal. Sept. 11, 1998) (granting summary judgment against copyright owner in favor of news program that aired short clips of the same sex tape).

¹²¹ *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966). *But see* *Scott v. WorldStarHipHop, Inc.*, 2012 WL 1592229 (S.D.N.Y. May 3, 2012) (where film showed subject repeatedly hitting another person, court dismissed right of publicity claim by subject, but refused to dismiss his copyright claim because he'd obtained copyright by transfer). As Eric Goldman points out, allowing copyright to suppress truthful negative information is an abuse of its purpose, but it's more likely to work for audiovisual content because of the veridical nature of audiovisuals — the truth can be reported in many noninfringing verbal ways, but a picture or video often needs to be shown to be fully understood. Eric Goldman, *The Dangerous Meme That Won't Go Away: Using Copyright Assignments to Suppress Unwanted Content—Scott v. WorldStarHipHop*, ERIC GOLDMAN TECH. & L. BLOG (May 14, 2012), http://blog.ericgoldman.org/archives/2012/05/the_meme_that_w.htm.

¹²² *Harper & Row v. Nation Enters.*, 471 U.S. 539, 551 (1985).

¹²³ *Stewart v. Abend*, 495 U.S. 207, 228-29 (1990).

¹²⁴ *See, e.g.*, Dreyfuss, *supra* note 60, at 1220; Kwall, *supra* note 67, at 57-58; Mandel, *supra* note 60, at 2020.

DMCA takedown notice or to sue for infringement, recognizing more joint authorship would affect these practices as well.)

How should a user who believes her work is a fair use evaluate a threat from the same contributor? Or, if the contributor claims a separate copyright in her contribution, as Garcia did, how should we think about fair use? The “amount used” factor might change substantially if works can be carved into multiple copyrightable performances, and a use might “transform” the meaning of the overall work but leave a contributor’s performance untouched/uncommented-on, which would seem to mean that the use wouldn’t be transformative as to that contributor’s interest. While all of these problems could be worked through with a new set of rules (likely adding further epicycles of copyright complications), I pose them to make clear that the current authorship/ownership rules don’t just favor big corporations, though they of course also do that.

As Professor Justin Hughes has explained, the practice of recognizing “microworks” — little bits of larger works, each with their own copyrights — is harmful to the overall function of the copyright system.¹²⁵ The performer isn’t the only one who might exploit such arguments to suppress fair use. If a film’s copyright owner successfully obtained the performer’s rights, it could make the same arguments against fair uses of short clips. While some courts might resist such gamesmanship, Hughes has documented that many courts are willing to accept this kind of slicing and dicing in order to expand copyright owners’ rights.¹²⁶

Indeed, another reason to doubt that tweaks to authorship doctrine would do much good for most voluntary performers is that, at least for well-advised producers, contracts would change to ensure that no individual contributor is ever an author of an audiovisual work, but always a participant in the creation of a work for hire.¹²⁷ The people most affected by

¹²⁵ Justin Hughes, *Size Matters (Or Should) In Copyright Law*, 74 *FORDHAM L. REV.* 575 (2005).

¹²⁶ *See id.* at 576-79.

¹²⁷ Even Nakoula tried that, however badly. Compare the consequences of *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), which found that newspapers lacked rights to use freelancers’ articles in computer databases. The result seems to have been that contracts going forward granted the newspapers full electronic rights, with no increase in payment. *See, e.g.*, Eric B. Easton, *Who Owns ‘The First Rough Draft of History?’: Reconsidering Copyright in News*, 27 *COLUM. J.L. & ARTS* 521, 524 n.11 (2004) (“[F]reelance contracts now typically include a ‘work made for hire’ clause or other provisions granting publishers the right to use purchased freelance articles without meaningful restriction or further compensation.”); Maureen O’Rourke, *Bargaining in the Shadow of Copyright Law After Tasini*, 53 *CASE W. RES. L. REV.* 605, 605-06 (2003) (“[L]arge publishers . . . have been requiring freelancers to sign work for hire agreements or to license all of their rights under so-called ‘all-rights agreements’ . . . all often for no compensation

a change in the law would be amateurs who didn't have Hollywood-style contracts — the *Innocence of Muslims* situation — and people who were filmed without their consent (such as participants in brawls that show up on YouTube), or who didn't think copyright would matter (such as people who make sex tapes but expect that their lovers will stay true). For those people — the least likely to be well advised, and relatedly the least likely to be incentivized by copyright to create — courts would still have to assess what level of contribution would suffice to make them “authors.” Would deliberately planned movement count? Causal effect on the event ultimately recorded? Only a very strong right grounded in mere physical presence in the film, which would itself tend to diminish the role of creativity in justifying the right, would help in those situations.

Other rights would do a better job than copyright here: victims of revenge porn should have an invasion of privacy remedy, whereas for voluntary performers who make significant contributions to a work we might consider statutory rights to compensation (rather than control), as already exist in some instances for music in the U.S. and more broadly in Europe.¹²⁸

III. PERFORMANCE AS INFRINGEMENT

Infringement inquiries also raise difficult questions about how to compare distinct media, particularly when one medium includes a performance element and the other doesn't. We should be highly skeptical of most such claims. The technical features of texts and performances are different, and they produce different effects on the audience, or the same effects in different ways.¹²⁹ For example, written text has the ability to present characters' internal states of being; first person narrative has dif-

above what publishers paid under licenses customarily understood by the industry to grant rights only to one-time publication in North America.”).

¹²⁸ As Catherine Fisk has argued, non-copyright regimes such as labor law also have a role to play in securing compensation, attribution, and other benefits as against employers. See, e.g., Catherine Fisk, *The Modern Author at Work on Madison Avenue*, in MODERNISM AND COPYRIGHT 173 (Paul K. Saint-Amour ed., 2010) (arguing that, given work for hire doctrine, labor relations have meant more to determining authorship and authors' rights than formal copyright law); Catherine Fisk, *The Role of Private Intellectual Property Rights in Markets for Labor and Ideas: Screen Credit and the Writers Guild of America, 1938–2000*, 32 BERKELEY J. EMPLOY. & LAB. L. 215 (2011) (arguing that unions can support privately negotiated intellectual property rights suitable to particular industries).

¹²⁹ Cf. *Miller v. Civil City of South Bend*, 904 F. 2d 1081, 1086 (7th Cir. 1990) (“The raw communicative power of dance was noted by the French poet Stephane Mallarme, who declared that the dancer ‘writing with her body . . . suggests things which the written work could express only in several paragraphs of dialogue or descriptive prose.’”).

ferent qualities than limited third person or omniscient third. By contrast, audiovisual works produce identification (or distance) with techniques based on external presentation, such as closeups and reaction shots.¹³⁰ These techniques make use of the physical (or at least visual) presence of performers: embodiment changes how stories are told. Narration in film and television is carried out not by a speaker but “by the camera (the angles, duration, and sequencing of what it sees) and not uncommonly by music.”¹³¹

Consider the technique of the repeated flashback: because of the way in which we experience visuals and audio, repetition that would be intolerable in a written text is a standard storytelling technique for television and movies. Indeed, movies and shows can be *built* around repeated sequences — *Groundhog Day* is the most well-known example, though there are many others.¹³² Relatedly, many people happily listen to the same sound recordings over and over, but reading the same book multiple times in a short period is a task generally reserved for those with small children to placate. Whether the repetition includes variation or not, something about the performance experience changes the value and pleasure of that repetition. The medium isn’t entirely the message, but performed works regularly bring new meanings with them in every performance, as Francesca Coppa noted with respect to *Hamlet*. The bottom line is that although performance elements often drop out of our consideration of creativity in audiovisual works in authorship disputes, they are still vital to audiovisual works.

To say that a novel is substantially similar to a film with the same general plot, and thus infringing, therefore requires a very high level of abstraction away from the affordances of each medium and a focus on narrative. But narrative theorists point out that story (what happens) is distinct from narrative (how what happens is communicated to the audi-

¹³⁰ Y’Barbo argues that the expression in a book comes from its prose and literary devices, including internal monologue, while film’s expression is visual and depends on actors, juxtaposition of images (such as the Kuleshov effect, whereby sequencing shots leads viewers to attribute emotions to actors as if they were reacting to the previous shot), and other forms of editing. Written texts communicate the passage of time differently than film, leading to different pacing. Douglas Y’Barbo, *Aesthetic Ambition Versus Commercial Appeal: Adapting Novels to Film and the Copyright Law*, 10 ST. THOMAS REV. 299, 356-62 (1998).

¹³¹ H. PORTER ABBOTT, *THE CAMBRIDGE INTRODUCTION TO NARRATIVE* 19 (2d ed. 2008).

¹³² See *Groundhog Day Loop*, TVTROPES.COM, <http://tvtropes.org/pmwiki/pmwiki.php/Main/GroundhogDayLoop> (listing examples) (last visited Mar. 30, 2013).

ence).¹³³ Consider a recent review of the film adaptation of Jack Kerouac's *On the Road*, which deems the movie itself not good as a movie, but "a pretty interesting work of literary criticism," because "[s]ome things just feel different when they are thrust visibly in front of you rather than filtered through the ramshackle prose of Jack Kerouac." Some of Kerouac's most well-known lines, when delivered by actors, are transformed:

[While we hear one famous line, the actors] . . . are walking bouncily down an alleyway, jumping in puddles and generally making bumptious asses of themselves. Which is pretty much what Sal, in the book, says they're doing as he shares that thought. But somehow, when reading it, you forget he's watching a couple of twentysomethings yell half-baked philosophy at each other on a noisy city night. Watching them on screen, it occurs to you: The Beat generation was just a bunch of guys.¹³⁴

The tale has changed in the visual, embodied telling. But it's a copyright truism that plots in themselves are not protected.¹³⁵ If what is protected is *how* the story is told, and changing a medium involves inherent changes in that mechanism, then how could a film ever infringe a book, or vice versa?¹³⁶

A number of theorists express skepticism that there can be anything like a true adaptation, from the perspective of artistic criticism, of a book into a film.¹³⁷ Yet it has seemed important to copyright theorists, such as

¹³³ *Id.*

¹³⁴ David Haglund, *On the Road: Not a Great Movie, But an Interesting Work of Literary Criticism*, SLATE (Dec. 20, 2012, 7:32 PM ET), http://www.slate.com/articles/arts/movies/2012/12/on_the_road_the_movie_reviewed.html.

¹³⁵ Y'Barbo, *supra* note 130.

¹³⁶ *See id.* at 335-36 ("[A]esthetic appeal, which is what copyright law is ostensibly designed to protect, is fragile. Paint eyebrows on the Mona Lisa, affix arms to the Venus de Milo, or add a plot to a Jane Austen novel, and you may end up with a work whose difference in aesthetic appeal, compared with the original, is far out of proportion to the actual modification. . . . *Clueless* undeniably retains many of [the features of Jane Austen's *Emma*], most notably the theme, plot, style, and basic sequence of events. However, many are reproduced in the movie in painstaking detail. It impacts the viewer as a truly different work, with a different aesthetic appeal.") (footnotes omitted).

¹³⁷ *Id.*; GEORGE BLUESTONE, *NOVELS INTO FILM*, at viii, 5, 23, 31 (1968) ("changes are inevitable the moment one abandons the linguistic for the visual medium," particularly since film can imply the content of thoughts but can't show them directly; film shifts focus from thought and character to external action and plot). Echoing the earlier discussion of authorship, Bluestone also argues that film and literature are inherently different because film must be produced collaboratively, while an individual author can target smaller and more idiosyncratic audiences. *Id.* at 47-48, 58. *See also* Seymour Chatman, *What Novels Can Do That Films Can't (and Vice Versa)*, reprinted in *FILM THEORY AND CRITICISM: INTRODUCTORY READINGS* 445 (Leo Braudy & Marshal Cohen eds., 6th ed. 2004).

Melville Nimmer, to insist that it must be possible for a film to infringe a book, so much so that Nimmer was willing to dispense with the general rule that infringement must be judged from the perspective of an ordinary observer (who is, after all, the consumer who might substitute one work for the other).¹³⁸ He therefore called for literary analysis to discover infringing similarity. This appears to be a mistake of kind, since applying literary analysis to film is a bit like applying color theory to cooking — it might tell you something, but it probably won't reveal the most important information. The hegemony of the word, that is, led Nimmer to ignore the study of the special features of film, which at least arguably would allow us to figure out whether the protectable expression of a novel had been translated into an audiovisual mode (just as we could determine whether an English novel had been translated into French).¹³⁹ The good news is that courts have generally been able to reject infringement claims predicated on mere plot similarity, recognizing that film's narrative techniques generally involve completely different kinds of expression than written texts.¹⁴⁰

Of course, film infringement cases often appear to be strike suits, in which a writer-plaintiff believes the defendant-filmmaker has copied elements that are far from unique. Courts thus are rarely forced to confront the role of performance elements in substantial similarity head-on. In other circumstances, some courts have been willing to hold that a still image can infringe a performance, and vice versa. In *Horgan v. MacMillan, Inc.*,¹⁴¹ the Second Circuit suggested that photographs of a ballet could, by the power of imagination, contain more than what was depicted and communicate performance elements, including the copyright-protected choreography.¹⁴² More recently, another case identified potential substantial similarity between a music video and a still photograph because “both

¹³⁸ Melville B. Nimmer, *Inroads on Copyright Protection*, 64 HARV. L. REV. 1125, 1137-38 (1951).

¹³⁹ See Cameron Hutchison, *Adapting Novel into Film 15-18* (2012), <http://ssrn.com/abstract=2117556>.

¹⁴⁰ See, e.g., *Braddock v. Jolie*, No. 12-055883 (C.D. Cal. Mar. 29, 2013), slip op. at 11 (“It is difficult to compare the dialogue of the two works because [the novel] *Slamanje Duse*, a written work, depicts much more of the characters' inner thoughts and monologues than is possible on film. Nevertheless, in *Slamanje Duse*, the characters' thoughts and conversations are verbose and analytical, while the dialogue in [the film] *Blood and Honey* is short, urgent, and sparse.”); see also Y'Barbo, *supra* note 130 (summarizing cases).

¹⁴¹ 789 F.2d 157, 162 (2d. Cir. 1986).

¹⁴² *Id.* at 163 (“A snapshot of a single moment in a dance sequence may communicate a great deal. It may, for example, capture a gesture, the composition of the dancers' bodies or the placement of the dancers on the stage. . . . A photograph may also convey to the viewer's imagination the moments before and after the split second recorded . . .”).

works share the frantic and surreal mood of women dominating men in a hyper-saturated, claustrophobic domestic space.”¹⁴³

By contrast, another court found substantial similarity between a photo and a video unlikely because video is “a wholly dissimilar and dynamic medium, in which camera angles, lighting, and focus are changing at a rate of 29.4 frames per second.”¹⁴⁴ The courts differ in their emphasis on the importance of movement to the overall expressiveness of the performed work, and also — explicitly in *Horgan* — in how much weight they give to the viewer’s own ability to imagine movement from looking at a still photo.¹⁴⁵ This latter consideration should not count in favor of infringement, residing as it does in the audience and not in the works.

Likewise, in a recent videogame infringement case, the court reasoned that infringement had to be evaluated in the context of the experience of gameplay rather than simply looking at screenshots: “It is as difficult to compare two video games by looking at a few screen shots and reading written descriptions of game play as it is to compare two movies by looking at posters and reading excerpts of screenplays.”¹⁴⁶ These latter cases are better reasoned. They attend to the actual works and the ways that different media make different meanings. Explicit attention to narrative techniques, distinct from subject matter, “mood,” and other considerations, could aid courts in identifying when performance elements matter.

Problems determining infringement can also occur when performance is the way a work is communicated to a factfinder, even though the work itself is not a work of performance. Professor Jamie Lund’s empirical work on music infringement cases provides further reason to be skeptical about infringement judgments when performance elements may influence perceptions even as factfinders lack the vocabulary to explain those perceptions, or even lack awareness that the performance elements matter. Lund demonstrates that when mock jurors are asked to assess the similarity of two musical works using standard instructions given to actual juries, they give enormous significance to the performance elements of the sound recording.¹⁴⁷ Her controlled experiments showed that performance style

¹⁴³ *LaChapelle v. Fenty*, 2011 WL 2947007, at *5 (S.D.N.Y. July 20, 2011).

¹⁴⁴ *Gordon v. McGinley*, 2011 WL 3648606, at *6 & n.5 (S.D.N.Y. Aug. 18, 2011).

¹⁴⁵ 789 F.2d at 162 (holding that a viewer of one photo would intuitively understand the movements that must have occurred before and after the photo was taken, and that one familiar with the underlying ballet would recognize even more of the choreography from the still photo).

¹⁴⁶ See *Spry Fox, LLC v. Lolapps, Inc.*, No. C12-147RAJ, order at 11 (W.D. Wash. Sept. 18, 2012).

¹⁴⁷ Jamie Lund, *An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement*, 11 VA. SPORTS & ENT. L.J. 137, 175 (2011) (“[P]laying sound recordings for jurors invites jurors to compare the wrong thing — the similarity of the performances, rather than the similarity

can make two very distinct musical works sound similar, or two very similar musical works sound different. These jurors are performing the wrong task, legally, but their failure to follow instructions is understandable given the actual effects of performance on our experience of a written text or score.¹⁴⁸ Lund's results suggest that performance matters most when the works are less similar and least when the musical works are nearly identical. This means juries are far more likely to produce false positives — mistaken findings of infringement — than false negatives — mistaken findings of no infringement — when they try to understand musical works through performances.¹⁴⁹

Lund's work also sheds light on the controversial *Newton v. Diamond* decision, in which the Ninth Circuit held that the Beastie Boys didn't infringe a musical work when they sampled a short portion of it, given that they had a license to sample the corresponding sound recording.¹⁵⁰ The composer's specific way of playing his score, using a technique known as overblowing, was part of the licensed sound recording, not the unlicensed musical work, and thus couldn't be considered as part of the infringement inquiry.¹⁵¹ This reasoning can be criticized for discounting elements of musical works that can't be or at least aren't represented in standard notation.¹⁵² But the court was presented with a system in which there are two works embodied in every piece of recorded music, and it's understandable that the court allocated the performance elements to the sound record-

of the compositions. . . . [W]hen given a jury instruction on substantial similarity, 86.4% of participants who heard the songs performed similarly . . . said that the songs were substantially similar—a significant majority. Participants who heard the songs performed differently went the exact opposite direction with 84.8% of participants finding that the songs were not substantially similar. These results suggest potential for pervasive unpredictability in the application of the law.”)

¹⁴⁸ *Id.* at 139-40 (“The jurors are being asked to look beyond the performance as expressed in the recording, and focus on the underlying musical ideas embodied in the recording. Yet playing an audio recording invites the juror to make the wrong comparison by comparing the sound recordings rather than the compositional elements underlying each recording. . . . Playing sound recordings to juries in a Composition Copyright case . . . creates an unavoidable risk that the jury will reach the wrong conclusion.”)

¹⁴⁹ Lund, *supra* note 147, at 152.

¹⁵⁰ *Newton v. Diamond*, 388 F.3d 1189, 1191-92 (9th Cir. 2004).

¹⁵¹ *Id.* at 1193-94 (the infringement analysis could consider only compositional elements, not elements “unique to Newton's performance,” and the court had to filter out the licensed elements of the sound recording).

¹⁵² Newton's own expert stated that “[T]he copyrighted score of ‘Choir’, as is the custom in scores written in the jazz tradition, does not contain indications for all of the musical subtleties that it is assumed the performer-composer of the work will make in the work's performance. The function of the score is more mnemonic in intention than prescriptive.” *Id.* at 1194.

ing.¹⁵³ If performance elements were part of the musical work, then the statutory license for covers could become much more complicated. The statutory license explicitly allows the performer to modify a composition to suit his or her style, but not to alter the “fundamental character or melody” of the work.¹⁵⁴ This provision reflects specific Western norms about what musical works are, but it also gives cover artists greater certainty about what they can do. If the rule were otherwise, a performer incapable of Newton’s overblowing technique might not be allowed to make a cover, despite the statutory license.

Newton-type problems are only going to increase in intensity as Western music shifts further away from written scores. Infringement claims may routinely involve scores reconstructed after the fact, and thus potentially shaped to seem as similar as possible to the accused work.¹⁵⁵ More generally, careful consideration of performance elements in infringement claims may require courts to go beyond the terms with which they are familiar — plot and melody primary among them — and consider narrative techniques, rhythm, and other features that may affect similarity judgments.

These difficulties suggest that courts should be skeptical about performance-based or cross-genre infringement, where verbatim copying is not at issue and factfinders are likely to have trouble identifying the contributions of performance elements to an accused work.

VI. CONCLUSION

It’s difficult to regulate properly without being able to define the regulated object. This is a persistent problem with performed works, whose boundaries and even whose authors are often ill-defined. Outdated concepts of creativity focused on sole authors, wholly unsuited to most works of performance, and unclear ideas about the protectable aspects of audiovisual works help give copyright its reputation for unpredictability and litigation risk. This situation benefits very few people. Although formalistic solutions have obvious costs and inherent arbitrariness at the edges, it is worth considering default categories of protected authors and presump-

¹⁵³ Given Professor Lund’s results, the dissent’s willingness to accept that “a reasonable listener would recognize the sampled segment even if it were performed by the featured flautist of a middle school orchestra” may be overconfident. *Newton*, 388 F.3d at 1196 (Graber, J., dissenting).

¹⁵⁴ 17 U.S.C. § 115 (2006).

¹⁵⁵ See Lund, *supra* note 147, at 143 (“Commentators have argued that because music is increasingly composed using audio recording equipment without ever being written down, the scope of Composition Copyright should reflect the distinctive elements of a song as embodied by the recording.”) (footnote omitted).

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tions against cross-genre infringement. Manageability, at this point in our copyright history, may be more beneficial than a regime that claims to protect every instance of creativity in any form — especially when that promise is so often unrealized.