

Sex, Drones & Videotape: Rethinking Copyright's Authorship-Fixation Conflation in the Age of Performance

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*For more than two centuries, the Copyright Act has eschewed the task of defining authorship. However, with the decoupling of the act of creation from the act of fixation and the dramatic advance of technology, the issue of authorship has gained renewed relevance in recent years, as questions of authorship have permeated numerous high-profile legal controversies. To cite a few examples, the metaphysics of authorship lay at the heart of copyright squabbles involving Naruto (the crested macaque who famously took a selfie), Cindy Lee Garcia (the actress who received death threats for her appearance in the controversial movie *The Innocence of Muslims*, and, less obviously, Terry Bollea (the wrestler professionally known as Hulk Hogan who bankrupted Gawker Media with a sex-tape lawsuit).*

*With its exegesis of the Garcia v. Google decisions (both Judge Kozinski's original opinion and the Ninth Circuit's resounding reversal en banc), its reconsideration of the Supreme Court's seminal decision in *Burrow-Giles Lithographic Co. v. Sarony*, and its analysis of authorial inquiries raised by interviews, drone and surveillance footage, bootleg recordings, paparazzi photographs and classroom note-taking, this Article identifies and critiques the problematic juridical conflation of copyright's authorship and fixation requirements. As the Article argues, copyright's authorship-as-fixation regime rests on a faulty premise, betrays copyright law's role in recognizing and rewarding creativity and denies copyright interests to the very individuals who have provided significant, if not the most important, original contributions to works within copyright's traditional subject matter. As a result, the Article calls for a fundamental reconsideration of the concept of authorship, including the issue of performer copyrights, in order to better align copyright law with its utilitarian goals, the realities of the creative process and broader public policy.*

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TABLE OF CONTENTS

INTRODUCTION	1321
I. COPYRIGHT'S UNEASY JURISPRUDENCE ON AUTHORSHIP: AN INTRODUCTION	1321
A. COPYRIGHT'S ELUSIVE AND ILLUSIVE DEFINITION OF AUTHORSHIP.....	1321
B. AUTHORSHIP AND THE CREATION-FIXATION CONVERGENCE...	1322
C. RETHINKING AUTHORSHIP.....	1325
II. PERFORMANCE ANXIETY: <i>GARCIA V. GOOGLE</i> AND THE INCOMPLETE DEBATE OVER PERFORMER AUTHORSHIP.....	1327
A. KILLING KOZINSKI'S <i>GARCIA</i>	1327
1. <i>The Precarious Position of Performance in Copyright Law</i>	1327
2. <i>Garcia I, Unloved</i>	1328
3. <i>Why Contracts and the Works-Made-For-Hire Doctrine Do Not Save Garcia I</i>	1330
4. <i>Why the Implied License Doctrine Does Not Save Garcia I</i>	1333
5. <i>Copyright Cherry-Picking and Garcia I's First Amendment Problem</i>	1336
B. RESURRECTING KOZINSKI'S <i>GARCIA</i>	1337
1. <i>The Problematic Authorship-Fixation Conflation</i>	1338
2. <i>The Authorship-Fixation Conflation in Action: The Interview Cases</i>	1339
3. <i>The Authorship-Fixation Conflation and the Limits to Judicial Pushback</i>	1343
III. DEBUNKING THE AUTHORSHIP-AS-FIXATION PRESUMPTION	1345
A. SCRUTINIZING THE LEGAL GROUNDS FOR AN AUTHORSHIP- AS-FIXATION REGIME.....	1345
B. OF BONO, <i>BOLLEA</i> AND BOOTLEGS: CREATIVE EFFORTS IN FRONT OF, AND BEHIND, THE CAMERA.....	1348
C. MONKEY SEE AND MONKEY SUE: AUTHORSHIP AND THE MONKEY SELFIES.....	1355
D. <i>GARCIA II</i> AND THE CASE OF THE DISAPPEARING COPYRIGHT(S).....	1358
E. RECONSIDERING <i>BURROW-GILES</i>	1363
CONCLUSION	1369

INTRODUCTION

I. COPYRIGHT'S UNEASY JURISPRUDENCE ON AUTHORSHIP:
AN INTRODUCTION

A. COPYRIGHT'S ELUSIVE AND ILLUSIVE DEFINITION OF AUTHORSHIP

Copyright law is full of definitions. Section 101 of the Copyright Act provides an exhaustive list, elucidating the specific meaning of all manner of terminology—from such general and fundamental concepts as “derivative work[s],” “public display,” and “publication” to such occasionally relevant terms as “gross square feet,” “children,” and “establishment.”¹ But despite the litany of copyright-related terms for which the Copyright Act provides definition, there is a striking omission: the words “author” or “authorship.”²

Authorship, of course, forms the very basis of our copyright regime. The Constitution's Copyright Clause, which empowers Congress to provide intellectual property protection for creative work, dictates that such rights will vest in “Authors.”³ Not surprisingly, therefore, authorship is repeatedly referred to throughout the course of the Copyright Act. 17 U.S.C. § 102, for example, provides an illustrative list of various types of works of “authorship.”⁴ § 201, to take another example, tells us that absent a work made for hire arrangement, the default rule in copyright law holds that copyright ownership vests in the “author.”⁵ But, neither section gives us a better sense of exactly what constitutes authorship and, just as importantly, who the author might be. And therein lies the rub. For all of copyright's statutory and regulatory authority and its enormous body of interpreting jurisprudence, there is a surprising dearth of analysis on one of its most basic concepts.⁶

As it turns out, through the annals of modern copyright interpretation, the Copyright Office and the federal courts have

1. 17 U.S.C. § 101 (2012).

2. See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231 (9th Cir. 2000) (noting that “the Copyright Act does not define ‘author,’” but, oddly enough, that it does define “joint work”).

3. U.S. CONST. art. I, § 8, cl. 8 (providing Congress with the authority to, *inter alia*, “secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings”) (emphasis added).

4. 17 U.S.C. § 102 (2012).

5. 17 U.S.C. § 201 (2012).

6. The legislative record behind the 1976 Copyright Act suggests that Congress intentionally left the neighboring concept of ‘work of authorship’ undefined by design, to accommodate potential changes in technology and modalities of expression. See H.R. REP. NO. 94-1476, at 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664 (“The phrase ‘original works of authorship’ . . . is purposely left undefined,” since, among other things, “[a]uthors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take”); Diana C. Obradovich, Note, *Garcia v. Google: Authorship in Copyright*, 31 BERKELEY TECH. L.J. 785, 788 n.26 (2016). However, the same legislative history appears to have little say about the actual term “author.”

generally presumed that authorship vests in the person controlling the equipment that fixes a creative work in a tangible medium—the producer/engineer on a musical recording; the director behind the camera; the photographer taking the snapshot. This concept is best captured in the Supreme Court’s most recent (but more than a quarter-century old) language on the subject. In *Community for Creative Non-Violence v. Reid* (“CCNV”), the Court noted that, “[a]s a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”⁷ This statement, however, begs two critical questions. First, whence does the Supreme Court derive the doctrine of authorship-as-fixation? And, second, if authorship-as-fixation is “a general rule,” what are the exceptions which the Court implicitly acknowledges with its circumscribed language?

On the first question, the Court points us to a single citation to support its view: § 102 of the Copyright Act. However, this reference sheds little light on, or support for, the Court’s contention. § 102 makes no statement about authorship-as-fixation. Instead, it simply states that “[c]opyright protection subsists . . . in original works of authorship fixed in a tangible medium.”⁸ If anything, § 102 goes out of its way to avoid saying *in whom* copyright subsists. And it certainly does not imply that copyright vests in the person who actually fixes a work in a tangible medium. Authorship-as-fixation might be one way to read the authorship requirement, but it certainly is not the only way.

And this leads to the second question: if there are exceptions to the general rule of authorship-as-fixation, one can and should fairly ask why authorship cannot vest in someone else, such as those in front of the camera or those behind the scenes who contributed the creative elements expressed in the fixation. Yet the Court has never provided satisfactory guidance on what circumstances and conditions would warrant the vesting of authorship in such individuals. Indeed, the idea of authorship-as-fixation, although regularly presumed by courts when treating issues of ownership and dictated by the Supreme Court as a general rule, has surprisingly thin legal support.

B. AUTHORSHIP AND THE CREATION-FIXATION CONVERGENCE

Although the lack of jurisprudence on such a fundamental matter in copyright law might be surprising, the issue has not received much play until very recently for a number of reasons. First, since the earliest days of copyright law, such ontological questions of authorship have not arisen in litigation because of what we will call the *creation-fixation*

7. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1988).

8. 17 U.S.C. § 102.

convergence. In the past, the very person providing the creative fuel for a copyrightable work was typically the same person who fixed it in a tangible medium. Recall that, at the time of the framing, copyright protection only extended to books, charts, and maps.⁹ For these types of subject matter, there was no distinction between those in front of the proverbial camera and those who were behind it. They were one and the same. The writer who came up with the creative storylines and characters, and then gave them life with unique selections of word strings, was the very same person who fixed the word in a tangible medium by way of quill, pen, or typewriter.

However, that began to change with the expansion of copyright law into visual and audio arts. Such subject matter only began to receive federal copyright protection in the past century or so (the latter half of the nineteenth century, in the case of paintings and photographs,¹⁰ and the latter half of the twentieth century, in the case of sound recordings¹¹). And, such subject matter often decoupled the act of creation and fixation. Specifically, in these forms of artistic expression, real human subjects often perform in the work and, other than in the case of “selfies,” someone else captures their performances. In paintings and photographs featuring individuals, the subjects contribute to the final product with their positioning, expressions and other creative choices. In movies, actors contribute to the final product with their delivery, intonation, body language, and myriad other creative nuances. In sound recordings, the people making the actual noise contribute with their syncopations, rhythm, and style. Thus, in the performing and visual arts, not all of the creativity involved in the project lies in the hands of the person behind the camera who is hitting the record button. In fact, much of the creative input comes from individuals appearing in front of the camera. In addition, there is also significant creative contribution from those who may be behind the camera—the make-up artist, the costume designer, the lighting operator, and maybe even the long-suffering assistant key grip.

Second, the advance of digital technology has further highlighted the problem of the creation-fixation gap. In the past, the act of producing commercially viable creative works was largely the province of professionals—the Hollywood studios, the major labels, the big publishers and other corporate media entities. Such parties use

9. See Copyright Act of 1790, 1 Stat. 124 (1790) (only extending copyright protection to books, charts, and maps).

10. Congress extended copyright protection to photographs in 1865, see Copyright Act of 1865, ch. 126, 13 Stat. 540 (1865), and paintings and drawings in 1870, see Copyright Act of 1870, ch. 230, 16 Stat. 198 § 86 (1870).

11. In 1971, Congress extended federal protection to sound recordings fixed after February 15, 1972. See Sound Recordings Act, Pub. L. No. 92-140, 85 Stat. 391 (1971).

contractual measures to legally preclude any question regarding authorship. As a result, all individuals who worked on a movie, wrote an article or had a song recorded would have assigned any conceivable copyright interest they might have had in the work to the relevant corporate entity financing the production. Actors would sign contracts that transferred any rights they might have in a motion picture to the studio; sound engineers, record producers, and performers would contract away any rights they might have to the record label; and subjects would sign releases waiving certain rights they might have that would encumber the unfettered use of photographs of them by the photographer.¹²

But, with every member of modern society now armed with a smartphone (featuring a camera) in their pockets and a networked computer at their desks, the tools for the creation, publication and distribution of copyrighted works to the four corners of the earth are at everyone's fingertips. Consequently, the sophisticated corporation, with its ability to mold the notion of authorship via contract, no longer automatically mediates the terms under which creative works reach the public. The explosion of amateur social media has given us all the ability to record videos or capture images and share them instantly through the world on Tumblr, Facebook, Vine, Snapchat, Twitter, and Instagram. As a result, the question of authorship has come to the forefront of copyright in previously unappreciated ways.

It should therefore come as no surprise that questions of authorship have permeated numerous recent high-profile legal controversies. The metaphysics of authorship were clearly an issue in the cases of *Naruto*, the crested macaque who famously took a selfie,¹³ *Cindy Lee Garcia*, the performer who received death threats for her appearance in the controversial movie *The Innocence of Muslims*¹⁴ and less obviously, *Terry Bollea*, the wrestler professionally known as Hulk Hogan who bankrupted Gawker Media for posting intimate footage of him shot on a hidden surveillance camera.¹⁵ By combining an analysis of these cases, relevant statutory and legislative authority and hypotheticals involving

12. As John Shulman noted in Congressional testimony many decades ago, the issue of default rules for copyright vesting is often irrelevant to industry as "the contract between the author and the picture company will establish the status, whether [the work] is a work made for hire or whether it is not. We have that all the time. . . . So many of the things that were spoken about here as being difficult are not really so because if you have a sound law, the rest is handled by contract." *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before the Subcomm. No. 3 of the H. Comm. on the Judiciary, 89th Cong. 1717* (1965) (statement of John Schulman), reprinted in 7 *OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 1717* (George S. Grossman ed., 1976).

13. *Naruto v. Slater*, No. 15-cv-04324-WHO, 2016 BL 25049 (N.D. Cal. Jan. 28, 2016).

14. *Garcia v. Google, Inc. (Garcia I)*, 743 F.3d 1258 (9th Cir. 2014), amended and superseded by 766 F.3d 929 (9th Cir. 2014), rev'd by 786 F.3d 733 (9th Cir. 2015) (en banc).

15. *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325 (M.D. Fla. 2012).

bootleg recordings, the paparazzi, and classroom note-taking by students, this Article critiques the problematic juridical conflation of copyright's authorship and fixation requirements and calls for a fundamental reconsideration of the concept of authorship in order to better align it with copyright's utilitarian goals, the realities of the creative process and broader public policy.

C. RETHINKING AUTHORSHIP

Part II of this Article therefore begins with an exegesis of Cindy Lee Garcia's infamous lawsuit against Google, which gave rise to the contemporary debate over the meaning of authorship and the Copyright Act's ability to vest performers with independent copyright interests in their creative output. After assessing the potential problems with the seemingly unreserved embrace of performer copyrights by the initial Ninth Circuit panel in *Garcia v. Google* ("*Garcia I*"),¹⁶ Part II critiques *Garcia I*'s excessively sanguine position that recognition of performer copyrights would not fracture ownership rights, would not undermine the functioning of the licensing marketplace, and would not cause serious First Amendment problems. Specifically, *Garcia I* too readily believed that both the works-made-for-hire doctrine and implied-license defense would resolve such issues in most instances. For this reason, among others, the *Garcia I* opinion rightfully generated widespread concern and rebuke.

But the strong reaction to the *Garcia I* decision resulted in an unfortunate knee-jerk dismissal of its merits *in toto*. As a result, Part II also flips the narrative and challenges the conventional wisdom of *Garcia I* by arguing that the decision actually raised serious and timely questions about copyright's problematic treatment of authorship. As we detail, the explosion of performance-related subject matter, the de-coupling of creation and fixation, technological changes facilitating the development and (profitable) distribution of works embodying performances, and changes in the work-made-for-hire doctrine have combined to bring the issue of authorship to the forefront of copyright jurisprudence. And, thus far, just like the Copyright Act they are charged with interpreting, courts have not fully grappled with the concept.

By reversing the initial panel and announcing a rule that unnecessarily conflates copyright's authorship and fixation requirements in a way that denies the possibility of performance copyrights, the Ninth Circuit's *en banc* decision in *Garcia v. Google* ("*Garcia II*")¹⁷ reflects a troubling judicial trend that devalues the important creative contributions of individuals other than those who literally fix a work in a

16. *Garcia I*, 743 F.3d at 1262–65.

17. *Garcia v. Google, Inc. (Garcia II)*, 786 F.3d 733 (9th Cir. 2015) (*en banc*).

tangible medium, simply to avoid the parade of horrors that recognition of performance copyrights might unleash. This authorship-as-fixation regime has therefore artificially limited authorial inquiries and, when courts have faced alternative theories of copyright, they have badly mangled basic copyright principles, such as the originality doctrine, in the process.

By analyzing cases involving copyright claims to interviews (one of Reverend Jerry Falwell¹⁸ and the other of a convicted child molester¹⁹), unfixed musical performances (musical compositions featured on U2's *Songs of Innocence*), surveillance recordings (Hulk Hogan's sex tape lawsuit against Gawker),²⁰ and acts of animal creativity (the Monkey Selfie incident),²¹ Part III of this Article illustrates how the default rule of authorship-as-fixation is both legally tenuous and intellectually incoherent in that it betrays copyright law's role in recognizing and rewarding creativity and denies copyright interests to the very individuals who have provided significant, if not the most important, original contributions to works within copyright's traditional subject matter. As it turns out, even the origins of the doctrine—the Supreme Court's 1884 decision in *Burrow-Giles Lithographic Co. v. Sarony*²²—stem from the suspect's need to identify a singular “master mind” behind the creative process and an over-reading of the foundational case's actual holding, which focused on whether Congress could extend copyright protection to photography.

In short, courts have given short shrift to the possibility of performer copyrights and the recognition of creative contributions from individuals who may not happen to fix works in tangible form. All told, the Article calls for a broad conversation about performer rights and the entire conception of authorship-as-fixation—not just as a matter of doctrinal consistency within copyright's four corners but also as a matter of public policy in a society where the tools of surveillance are at everyone's fingertips.

18. *Falwell v. Penthouse Int'l, Ltd.*, 521 F. Supp. 1204 (W.D. Va. 1981).

19. *Taggart v. WMAQ Channel 5 Chicago*, Civil No. 00-4205-GPM, 2000 WL 1923322 (S.D. Ill. Oct. 30, 2000).

20. *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325 (M.D. Fla. 2012).

21. *Naruto v. Slater*, No. 15-cv-04324-WHO, 2016 BL 25049 (N.D. Cal. Jan. 28, 2016).

22. *Burrows-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

II. PERFORMANCE ANXIETY: *GARCIA V. GOOGLE* AND THE INCOMPLETE DEBATE OVER PERFORMER AUTHORSHIP

A. KILLING KOZINSKI'S *GARCIA*

1. *The Precarious Position of Performance in Copyright Law*

As Rebecca Tushnet has observed, the relevance of performance to copyright law has increased dramatically over the decades: “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.”²³ Yet, despite its growing cultural and economic import, performance is not governed by a clear and consistent rights regime, and the idea of performance copyrights remains controversial at best. For example, certain types of works enjoy a public performance right while others do not, such as musical compositions versus sound recordings.²⁴ Certain types of performances need not be fixed in a tangible medium to acquire copyright-like protections while most others do, that is, musical performances versus all other types of performances.²⁵ And, most importantly for our purposes, courts have not fully or satisfactorily contended with the issue of authorship as it relates to performance. To be sure, performances fixed in a tangible medium, for example, recordings of dancing, surfing, storytelling, lecturing, theatrical acting, and singing, enjoy protection as works under the subject matter of copyright. But the authorship of such works remains a live question.

Per the Supreme Court’s ruling in *Burrow-Giles*, and its dicta a century later in *CCNV*,²⁶ courts have assumed that the individual who fixes a performance in a tangible medium should generally (but perhaps not always) receive recognition as the author. In part, the appeal of such a default rule lies not so much in what it affirmatively achieves, but in the serious headaches that it avoids. If the law granted copyright interests, such as authorship, to every person who had a creative contribution to a work, rights would quickly grow fractured, voluminous and unwieldy. Such balkanization would adversely impact the alienability of intangible rights to creative content and the market for licensing works. In short, performer copyrights are fraught with complexity. And, as we will see,

23. Rebecca Tushnet, *Performance Anxiety: Copyright Embodied and Disembodied*, 60 J. COPYRIGHT SOC’Y U.S.A. 209, 209 (2013).

24. See 17 U.S.C. § 106(4), (6) (2010) (providing for a public performance right in musical composition but not sound recordings unless those sound recordings are digitally transmitted).

25. See *infra* Part II.A., II.B.

26. See *supra* note 5 and accompanying text.

this complexity has created a knee-jerk reaction against any suggestion that performer copyrights might exist.

2. *Garcia I, Unloved*

The furor over the *Garcia v. Google* case²⁷ epitomizes this tendency. In the case, Cindy Lee Garcia sought to enjoin Google from continuing to play the movie *Innocence of Muslims* on YouTube.²⁸ Garcia had a brief role in the movie, but it was the circumstances of her appearance on camera that gave rise to the case's unusual facts. Though spun by producers as a breezy Arabian adventure movie (under the obfuscating working title *Desert Warrior*), *Innocence of Muslims* was, in fact, a direct and unabashed polemic indicting Islam.²⁹ To make matters worse, the movie's director took Garcia's performance—solicited under false pretenses—and overdubbed it so that she appeared to be asking such things as “Is your Mohammed a child molester?”³⁰ Understandably concerned about the grave threats she began to receive when the movie's thirteen-minute trailer was distributed on YouTube, and the resulting *fatwa* issued against her, Garcia turned to copyright law to limit the number of people who would be able to see the extended trailer and final cut and to make her condemnation of the movie known.³¹

For a time, Garcia's gambit succeeded. In a 2014 opinion by Judge Alex Kozinski, the Ninth Circuit recognized Garcia's authorial interests in the trailer.³² Sympathetic to Garcia's troubling plight, Kozinski recognized that she had a copyright interest in her performance—which was, after all, a creative work of authorship fixed in a tangible medium, thereby meeting the basic requirements for copyright protection.³³ Furthermore, she did not grant a license to the filmmakers to use her performance in the manner embodied in the final cut. As a result, to Kozinski, the final cut of *Innocence of Muslims* constituted an infringement of Garcia's copyright interests, and she naturally had the ability to enjoin further distribution of the work, especially under the circumstances.³⁴

27. *Garcia v. Google, Inc. (Garcia I)*, 743 F.3d 1258 (9th Cir. 2014).

28. The DMCA safe harbor was not at issue since Garcia sought an injunction and the DMCA safe harbor does not apply to equitable relief. See 17 U.S.C. § 512(a)–(d), (j) (2011) (limiting the DMCA safe harbor to monetary relief).

29. *Garcia v. Google, Inc. (Garcia II)*, 786 F.3d 733, 737 (9th Cir. 2015).

30. *Id.*

31. *Garcia I*, 743 F.3d at 1268 (“Garcia has shown that removing the film from YouTube will help disassociate her from the film's anti-Islamic message and that such disassociation will keep her from suffering future threats and physical harm.”).

32. *Garcia I*, 743 F.3d at 1258.

33. *Garcia II*, 786 F.3d at 749 (Kozinski, J., dissenting).

34. The Court initially enjoined YouTube from further publication of the entire movie, but it later issued an amended order clarifying the initial order dated February 19, 2014 (presumably

It would be difficult to overstate the resounding disgust that this decision provoked on seemingly all sides of the copyright spectrum. The opinion was roundly and widely condemned as “truly awful,”³⁵ “butcher[ing] copyright law,” “wrong on the law, terrible for Hollywood, even worse for the Internet, and doesn’t even make things right for the poor actress,”³⁶ and “incredibly troubling.”³⁷ In short, critics suggested that, if it were left standing, the decision would doom our copyright system.

All of these criticisms precipitated the unthinkable: an unholy alliance of two of the Ninth Circuit’s most powerful vassals, Hollywood and Silicon Valley. Though at diametric odds over copyright law for much of the past two decades, the likes of Adobe, Kickstarter, Tumblr, Twitter and Pinterest joined forces with major broadcasters, news organizations and other media companies to rally to have the decision overturned. No less than twenty-three amicus briefs were ultimately filed.³⁸ And in the end, an *en banc* panel resoundingly reversed the decision, with a near unanimous opinion that contained only a single dissenting vote—Kozinski’s.

Of course, recognition of Garcia’s independent copyright interest in (parts of) the final cut did raise a significant problem: that rights to any creative enterprise with multiple contributors could “quickly become entangled in an impenetrable thicket of copyright.”³⁹ The issue of performer copyrights therefore leaves us with a conundrum. On one hand, it appears that copyright law does not expressly preclude performer copyrights; in fact, it seems to affirmatively support them since, on the face, Garcia’s performance appears to meet the three general prerequisites for copyright protection: originality, authorship and

because of the sweeping nature of the injunction and the serious First Amendment consequences thereof) and limiting the injunction to only portions of the movie featuring Garcia. See Order Denying Appellee’s Second Emergency Stay Motion, *Garcia v. Google, Inc.*, No. 12-57302 (9th Cir. Feb. 28, 2014) (“This order does not preclude the posting or display of any version of ‘Innocence of Muslims’ that does not include Cindy Lee Garcia’s performance.”).

35. See Eric Goldman, *Internet Law Professors File Amicus Brief in ‘Innocence of Muslims’ Case—Garcia v. Google*, TECH. & MARKETING L. BLOG (Apr. 16, 2014), <http://blog.ericgoldman.org/archives/2014/04/internet-law-professors-file-amicus-brief-in-innocence-of-muslims-case-garcia-v-google.htm>.

36. James Grimmelmann (@grimmelm), TWITTER (Feb. 26, 2014, 2:01 PM), <https://twitter.com/grimmelm/status/438796071113097216>.

37. Mike Masnick, *Horrific Appeals Court Ruling Says Actress Has Copyright Interest in ‘Innocence of Muslims,’ Orders YouTube to Delete Every Copy*, TECHDIRT (Feb. 26, 2014, 12:29 PM), <https://www.techdirt.com/articles/20140226/12103626359/horrific-appeals-court-ruling-says-actress-has-copyright-interest-innocence-muslims-orders-youtube-to-delete-every-copy.shtml>.

38. See *Garcia v. Google: 12-57302*, U.S. CTS. FOR THE 9TH CIRCUIT, http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000725 (last updated July 6, 2015, 12:40 PM).

39. *Garcia v. Google, Inc. (Garcia I)*, 743 F.3d 1258, 1265 (9th Cir. 2014).

fixation.⁴⁰ On the other hand, courts have rarely grappled with issues related to performer copyrights since it appears that their consideration has little practical import in the real production of creative works. Yet, how could this be? The answer lies not in the authorship doctrine, but in other surrounding copyright principles that usually (but not always) render the issue of performer rights legally moot. As Kozinski points out, “copyright interests in the vast majority of films are covered by contract, the work for hire doctrine or implied licenses.”⁴¹ Based on this premise, Kozinski reaches the sanguine conclusion that the problems raised in *Garcia* are “extraordinarily rare,”⁴² and recognition of performer copyrights would not fracture interests in creative works in a way that would undermine the functioning of the marketplace for their licensing and sale.

3. *Why Contracts and the Works-Made-For-Hire Doctrine Do Not Save Garcia I*

Kozinski’s glib assurance regarding the exceedingly uncommon nature of the *Garcia* situation is not entirely convincing, however. It is certainly true that, in professional productions with legal oversight, contracts almost universally take away the possibility of copyrights vesting in performers. But modern technology has facilitated an explosion in the rate at which we, as a society, create amateur content—works that come to life without the benefit of legal counsel and carefully drafted contracts. And it has also enabled such amateur content to enjoy unprecedented economic value, via cheaper distribution and monetization models such as YouTube.⁴³ As a result, situations like *Garcia*’s are increasingly likely to occur.

To see why, consider that, in situations where performer copyrights earn recognition and there are no formal written contracts to contend with the attendant consequences, one is left with only the work-made-for-hire or implied licensing doctrines to deal with the issue of fractured rights. Yet neither doctrine is sufficiently able to do so. To understand why, it is helpful to examine each doctrine more closely.

With respect to works-made-for-hire, the reformulation of the doctrine with the passage of the 1976 Copyright Act has largely foreclosed its ability to address the fracturing of rights that recognition of performance copyrights might precipitate. As one of the hallmarks of the

40. 17 U.S.C. § 102(a) (2012) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression.”).

41. *Garcia I*, 743 F.3d at 1265.

42. *Id.* at 1267.

43. The very problem described in *Garcia I* would not have been far less likely to have arisen a generation ago, as the movie featuring *Garcia*’s performance would not have enjoyed cheap, easy worldwide distribution.

Act, the revisions to work-made-for-hire doctrine took their current shape in order to make application of the doctrine more exact and, purportedly, artist-friendly.⁴⁴ In short, the 1976 Act made it far more difficult for creative works to be deemed “made for hire” such that the copyright initially vests with hiring parties rather than actual creators. As a result, under current law, there are only two ways to achieve work-made-for-hire status: either (1) an employee must make a work in the scope of her employment;⁴⁵ or (2) a party must specially commission a work in writing and it must fit into one of nine statutory buckets of subject matter eligible for work-made-for-hire treatment.⁴⁶ This was a sharp departure from prior law.

The 1909 Copyright Act recognized works made for hire, but there was not a consistent standard applied until the mid-1960s, when the Ninth Circuit formulated the “instance and expense” test, which found that:

[W]hen one person engages another, whether as employee or as an independent contractor, to produce a work of an artistic nature, that in the absence of an express contractual reservation of the copyright in the artist, the presumption arises that the mutual intent of the parties is that the title to the copyright shall be in the person at whose instance and expense the work is done.⁴⁷

The test was adopted by other circuits, notably the Second.⁴⁸ In application, the “instance and expense” test would deem a work made-for-hire when “the motivating factor in producing the work was the employer who induced the creation” and the hiring party possessed the right and ability to “direct and supervise the manner in which” the work was performed.⁴⁹ Thus, the test gave rise to a general “presumption that a commissioning party is the statutory author of [a] commissioned

44. As Anne Marie Hill notes, the “exploitation of authors was a major motivating force behind the 1976 revision of the work for hire doctrine.” See Anne Marie Hill, *The “Work for Hire” Definition in the Copyright Act of 1976: Conflict Over Specially Ordered or Commissioned Works*, 74 CORNELL L. REV. 559, 566 (1989). She also notes that, in the 1976 Act, “[t]he broad presumption of the 1909 Act that initial ownership automatically vests in the employer has been limited to traditional employer-employee relationships under clause one [of § 101’s work-made-for-hire definition] and extends to commissioned works only in limited instances under clause two.” *Id.* at 571–72.

45. 17 U.S.C. § 101 (2012); 17 U.S.C. § 201(b) (2001).

46. 17 U.S.C. § 101. Courts are split as to whether the writing must occur before the creation of the work or if it can occur afterwards. Compare *Playboy Enterprises, Inc. v. Dumas*, 53 F.3d 549, 559 (2d Cir. 1995) (allowing a writing after the creation of the work so long as it memorializes the parties’ agreement, “either explicit or implicit, made before the creation of the work”), with *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 412–13 (7th Cir. 1992) (“The writing must precede the creation of the property” to qualify as viable special commission agreement).

47. *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965).

48. See *Brattleboro Publishing Co. v. Windmill Publishing Corp.*, 369 F.2d 565, 567–68 (2d Cir. 1966); *Murray v. Gelderman*, 563 F.2d 773, 775 (5th Cir. 1977).

49. *Dumas*, 53 F.3d at 554.

work”⁵⁰—regardless of the technical employment status of the worker, the existence of a written agreement specially commissioning the work or deeming the worker a W-2 employee, or whether the work fits into one of the nine statutory buckets of allowable special commission subject matter.⁵¹

Although it was perhaps not its intent, the pre-1976 work-made-for-hire standard allowed courts to eschew the authorship dilemma. For example, Garcia indisputably worked at the instance and expense of *The Innocence of Muslims* filmmakers, and, under the 1909 Act, any copyright she might have had to her performance would likely belong to them as a default matter. While that is no longer the case under the 1976 Act, hiring parties have responded to new work-made-for-hire rules by attempting to preempt copyright claims by contributing workers. When they can obtain written contracts, hiring parties typically include protective “belt-and-suspenders” copyright ownership terms in standard engagement terms.⁵² These terms dictate that a worker’s output is deemed “made for hire,” but even if it is ultimately found to be ineligible for such treatment, all rights to the work are transferred to the hiring party anyway.

However, such a route-around still has several key disadvantages. First, the duration of the copyright of the work is impacted. Second, and perhaps most importantly, a transfer of copyright is subject to termination provisions under the Copyright Act, whereas a work made for hire is specifically excluded from such provisions. Thus, if a young musician signs a recording and publishing deal with a major label in 1985, and the deal’s immediate work product—sound recordings and musical compositions—is deemed “made for hire,” the work product enjoys protection until 2080,⁵³ and the copyrights will never unilaterally revert to

50. Hill, *supra* note 44, at 566 (citing *Brattleboro*, 369 F.2d at 567).

51. See 17 U.S.C. § 101 (limiting special commissioning to only works “for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas.”).

52. A typical clause might state that “any and all services provided by You under this Agreement and all the Results and Proceeds thereof are specifically commissioned by the Company, shall constitute ‘works-made-for-hire’ under the United States and international copyright laws and shall be the exclusive property of the Company. Notwithstanding the foregoing, in the event any of the Results and Proceeds are deemed not to be a work made for hire, You hereby irrevocably assign and/or irrevocably grant to Company, in consideration of the compensation provided hereunder, all exploitation rights of every kind and nature, pursuant to copyright (including all renewals and extensions thereof) and all neighboring rights (to the maximum extent permitted in law) in and to such Results and Proceeds, and all rights to such Results and Proceeds, shall be owned by the Company solely and exclusively, for the duration of the rights in each country, in all languages, formats and media, now known or hereinafter devised, throughout the universe.” On file with Author.

53. This assumes publication that same year and no congressional extensions in the copyright term going forward. See 17 U.S.C. § 302(c) (2011) (setting the copyright term at ninety-five years from publication or 120 years from creation, whichever is shorter).

the artist. Alternatively, if the works do not qualify as “made for hire,” the copyright endures for seventy years from the date of the artist’s death. Most significantly, in 2020, the artist can unilaterally terminate⁵⁴ the copyright transfer provisions in the record deal (albeit after leaping through a byzantine series of procedural hurdles) and can re-obtain the copyrights to her musical compositions and (arguably) her sound recordings.⁵⁵

More importantly, in situations where there is no written contract, the work-made-for-hire doctrine is unlikely to help matters. Thus, the work-made-for-hire doctrine no longer helps to avoid or minimize problems arising from performer copyrights. Parties can only specially commission works through a written instrument,⁵⁶ and, even then, only certain types of works can qualify for special commissioning.⁵⁷ And, the only remaining way to achieve “made for hire” status generally requires a formalized employment relationship.⁵⁸ In other words, if we are dealing with non-professionals who are unlikely to have a contractual relationship in place to deal with the copyright issues, the work-made-for-hire doctrine is unlikely to provide any additional protection against the fracturing of rights.

4. *Why the Implied License Doctrine Does Not Save Garcia I*

That leaves implied licenses as the only remaining doctrinal bulwark against the barbarians of performer interests knocking at copyright’s gates. While Kozinski cautions us that implied licenses should be read broadly in copyright law, so as to avoid fracturing of rights and unnecessary complications in the distribution of works involving creative contributions from numerous individuals, he does not doubt that the makers of *Innocence* violated the scope of any conceivable implied license Garcia could have granted for use of her performance. Yet, at the same time, he confidently notes that “[w]ere she now to complain that the film has a different title, that its historical depictions are inaccurate, that her scene is poorly edited or that the quality of the film isn’t as she’d

54. 17 U.S.C. § 203(3) (2010).

55. There is an argument as to whether sound recordings can be specially commissioned in writing and thereby constitute works made for hire by contract.

56. 17 U.S.C. § 101 (requiring all special commissioning arrangement to be “expressly agree[d] in a written instrument signed” by the parties).

57. *Id.* (limiting special commissioning to only works “for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas”).

58. There is some wiggle room here. W-2 employment status is not dispositive on the question of whether someone is an employee or an independent contractor for the purposes of the Copyright Act. Rather, it is one of twelve factors used to determine whether a hiring party is an employee under the general common law of agency, which the Supreme Court has applied to copyright law. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1988).

imagined, she wouldn't have a viable claim that her implied license had been exceeded."⁵⁹ Unfortunately, however, we are not given any real guidance on how to distinguish between such instances—which apparently do not exceed the scope of a general implied license when performers act in a movie—and the facts of the *Garcia* incident—which apparently did.

Kozinski's opinion seems to indicate that the makers of *The Innocence of Muslims* did not enjoy an implied license for the copyrightable elements of Ms. Garcia's performance because they had put those performance elements to an unanticipated use—a fraudulent one, at that.⁶⁰ But there are many uses that go beyond those anticipated by performers or implied in any license they provide for their (potentially) copyrightable contributions. For example, actors from the early days of Hollywood certainly never thought their performances would be publicly performed outside of theatrical release—certainly not through VHS or DVD, on broadcast television or cable, on demand through pay-per-view systems, or streaming on the Internet. And, in related contexts, courts have previously declined to extend an implied license for such expansive rights.⁶¹ Moreover, it is standard for an actor to bemoan the fact that his performance has been substantially altered or minimized from a film in which she thought she would have a substantial role.⁶² If the actor owns a copyright in his performance, then a use outside of the scope of the license could give rise to an infringement claim.

Moreover, the problem with implied licenses also extends far beyond the world of acting and motion pictures. Implied licenses are, by their very nature, imprecise; they are, after all, implied through conduct.

59. *Garcia v. Google, Inc. (Garcia I)*, 743 F.3d 1258, 1266 (9th Cir. 2014).

60. *Id.* at 1266–67.

61. *Cohen v. Paramount Pictures*, 845 F.2d 851 (9th Cir. 1988) (“[I]n 1969—long before the market for videocassettes burgeoned—Cohen could not have assumed that the public would have free and virtually unlimited access to the film in which the composition was played; instead, he must have assumed that viewer access to the film ‘Medium Cool’ would be largely controlled by theatres and networks. . . . The holder of the license should not now ‘reap the entire windfall’ associated with the new medium.”). *Id.* at 854. More importantly, however, the *Cohen* case included a contractual term that reserved all rights not expressly granted by the written license to the original copyright holder. *Id.*

62. For example, countless actors have found their performances on the proverbial “cutting room floor,” including most of Johnny Depp’s performance in *Platoon*, see JOHNNY DEPP: MOVIE TOP TEN 27 (Jack Hunter ed., 1999), and the entirety of Eric Stoltz’s performance as Marty McFly in *Back to the Future*, see LAURENT BOUZEREAU, THE CUTTING ROOM FLOOR 50–51 (1994). This is a version of a problem faced by talent of all types in Hollywood, who often risk their creative work being removed from final cuts or butchered in ways unimaginable to them by a studio or producer. For example, from 1968 through 2000, to give limited protection to directors victimized by such a situation, the Directors Guild of America allowed directors who did not want their name associated with a work to petition to have their credit replaced with the fictional “Allen Smithee” pseudonym. See DIRECTED BY ALLEN SMITHEE (Jeremy Braddock & Stephen Hock eds., 2000).

And if the subjects of copyrighted works have independent interests in those works, it is unclear how implied licenses would work. In this regard, Kozinski's reliance on implied license raises more questions than it answers. Forcing those who fix works of authorship in a tangible medium to rest their rights on implied licenses could wreak havoc on various areas of copyright law.

Consider photojournalism and paparazzi work. The law maintains that photographers and/or their newspapers/agencies own the copyrights to their creative output and that the subjects of these photographs are typically without any copyright interests in them. In part, this allocation of rights exists because of the First Amendment and the need to allow the paparazzi and photojournalists to report on public figures and issues of public concern. Imbuing individuals in front of the camera with copyright interests in their performance would dramatically alter the operation of paparazzi work and photojournalism. The subjects of such photos never sign contracts giving away their rights, and their contributions to the photographs are unlikely to be deemed works-made-for-hire. As a result, we are left with only implied licenses to save the day. But, the waters of implied license are murky and infested with all sorts of sharks.

Photojournalists and paparazzi would have to rest on a grant of an implied license in order to exploit the images they take of public figures. While one might argue that the paparazzi and photojournalism enjoy an implied license every time they capture someone's image, that might only be true when the subjects of their photographs amble on public streets. Even in those cases, if the subjects manifestly resist their fixation in a tangible medium (via a scowl, evasive action or a punch) or implore "don't photograph me"—as they often do—such steps would seem to negate the possibility of an implied license. Consequently, the likes of Sean Penn, George Clooney and other public figures with contentious relationships with the paparazzi might possess the right to enjoin unapproved uses of their image by the press. This would create a significant First Amendment problem, especially for individuals who are involved in matters of public interest but, for whatever reason, would rather not receive any press coverage.

Historically, taking photographs in such contexts typically has not required performer permission (or payment). A reversal of this policy, which would be tantamount to empowering a performer veto, would have far-reaching consequences. Public figures could not only suppress unpleasant mug shots but also enjoin distribution of embarrassing videos that show them engaged in less than savory activities, including engaging in criminal conduct (that they deny). Recognition of performer rights could have halted dissemination of footage showing Baltimore Ravens running back Ray Rice beating his then-fiancée on a security video

captured in an Atlantic City hotel elevator,⁶³ Toronto Mayor Rob Ford smoking crack on the sly,⁶⁴ or swimmer Ryan Lochte yucking it up with his teammates as he returned to the Olympic Village in Rio after purportedly being robbed at gunpoint.⁶⁵

Furthermore, even where implied licenses (or contracts) seem to preempt the issue of fractured rights, those transfers/licenses are precariously limited in copyright law. Specifically, the unique termination provisions embodied in § 203 of the Copyright Act (which do not apply if the copyrighted contributions are works made for hire or if there is no copyright protection available for performances) mean that any rights acquisitions that depend on contract or implied licenses are subject to unilateral termination in as early as thirty-five years.⁶⁶ So, while Kozinski may contend that almost all motion picture performances include the grant of an implied license to a movie maker to use the performance, that implied license is terminable in thirty-five years, creating a serious issue for future exploitation of Hollywood content.

5. *Copyright Cherry-Picking and Garcia I's First Amendment Problem*

All told, neither the work-made-for-hire doctrine nor implied license provides much relief from the possibility of fractured rights if we go down the road of granting performers copyright interests. And the original *Garcia* decision badly underestimates the harm that this could do to the functioning of the copyright regime and the collateral consequences on such changes in the law to important free speech rights. The *en banc* panel that reversed that decision rightfully expressed reservations about a potential future dominated by “‘copyright cherry picking,’ which would enable any contributor from a costume designer down to an extra or best boy to claim copyright in random bits and pieces of a unitary motion picture without satisfying the requirements of the Copyright Act.”⁶⁷ And, as we have seen, the cause for concern extends even further than the *en banc* panel suggests, implicating issues of the public interest and the First Amendment.

63. *Ray Rice Dragging Unconscious Fiancée [Video]*, TMZ (Feb. 19, 2014, 2:01 PM), <http://www.tMZ.com/2014/02/19/ray-rice-unconscious-fiancee-atlantic-city-video-arrest/>.

64. Tom Scocca, *Here, at Last, Is the Rob Ford Crack Video*, GAWKER (Aug. 11, 2016, 11:10 AM), <http://gawker.com/here-at-last-is-the-rob-ford-crack-video-1785147722>.

65. One could argue implied consent in these situations, but it would be difficult to prevail on such a theory, especially if the subjects had no knowledge that they were on surveillance video. For a further discussion on the growing use of copyright law as a powerful weapon to suppress the dissemination of factual information and censor one's political and social enemies, see John Tehranian, *The New Censorship*, 101 IOWA L. REV. 245 (2015).

66. 17 U.S.C. § 203 (2010).

67. *Garcia v. Google, Inc. (Garcia II)*, 786 F.3d 733, 737 (9th Cir. 2015).

Admittedly, the widespread criticism of the original *Garcia* decision was not limited to its unabashed embrace of performance copyrights. The decision had a number of troubling free-speech implications and, among other things, appeared to deviate from basic standards for the issuance of preliminary injunctive relief by silencing expressive activities with the power of judicial force even though it found that Garcia's copyright claim was "fairly debatable."⁶⁸ A full week before it even released its decision in the case, the panel bizarrely issued an order (*sub rosa* no less) enjoining Google from making any use of the entire work⁶⁹—even though Garcia herself had only claimed a copyright interest in her specific performance,⁷⁰ which constituted only a small portion of the movie.⁷¹ Moreover, the panel issued the gag order without any consideration of the monumental First Amendment implications of such a move.⁷² In short, the immediate and widespread criticism of the decision is understandable.

B. RESURRECTING KOZINSKI'S *GARCIA*

Despite its flaws, the original *Garcia* decision was not without its merits. Specifically, it raised fundamental questions about copyright's buggy treatment of authorship—serious queries entirely ignored by the *en banc* panel and absent from the copyright discourse for far too long. Indeed, for all that was troubling about Kozinski's opinion, there was a great deal of value in it—something lost in the shuffle to condemn it wholesale.

In particular, the *en banc* panel's conception of authorship and its derogation of performer copyrights bear closer examination. As Kozinski wrote in his dissent to the *en banc* panel's decision, the majority "artificially shrinks authorial rights by holding that a performer must personally record his creative expression in order to retain any copyright interest in it."⁷³ This idea of authorship-as-fixation has long been hinted

68. *Garcia v. Google, Inc. (Garcia I)*, 743 F.3d 1258, 1265 (9th Cir. 2014).

69. See Google Motion for Emergency Stay on Mandatory Injunction, No. 12-57032, Dkt. #44, at 3 (9th Cir. Feb. 27, 2014) (noting that "[o]n February 19, 2014, nearly eight months after the argument on the appeal, the panel issued a sweeping mandatory injunction [that]... ordered Google to take down 'all copies' of the video 'from YouTube.com' and from any other platforms under Google's control' and to 'take all reasonable steps to prevent further uploads of 'Innocence of Muslims' to those platforms.'").

70. *Garcia I*, 743 F.3d at 1262 ("Garcia doesn't claim a copyright in 'Innocence of Muslims' itself; far from it. Instead, she claims that her performance within the film is independently copyrightable and that has retained an interest in that copyright.").

71. *Garcia II*, 786 F.3d at 736 (noting that Garcia provided just a "five-second acting performance").

72. See Google Motion for Emergency Stay on Mandatory Injunction, *supra* note 69, at 3-4 (noting that the panel "imposed an unprecedented gag order; it prohibited Google from publicly disclosing the order until the merits opinion issued.").

73. *Garcia II*, 786 F.3d at 753 (Kozinski, J., dissenting).

by courts considering copyright claims brought by various types of performers, including actors, interviewees, porn stars, photographic subjects and musicians. But, with the *en banc* decision in *Google v. Garcia*, this notion became the apparent law of a circuit for the first time. In the process, the very decision itself raised serious questions about the soundness of such a view.

I. *The Problematic Authorship-Fixation Conflation*

To illustrate some of the concerns raised by the *en banc* panel's conflation of authorship and fixation, imagine a commercial service that offers college students notes from professors' lectures with the promise that they will never have to attend class again to perform well on their exams. The service obtains its product from "students" who they pay to attend course sessions and to take copious notes (or record the lecture). Keen to keep students coming to class, and perhaps to prevent a commercial enterprise from profiting through the unauthorized exploitation of their creative labors, professors might look for a way to shut down the service, and copyright law might provide such a vehicle. However, copyright's authorship doctrine represents a major stumbling block.⁷⁴ Using the default rule of authorship-as-fixation, the copyright holder to the notes is arguably the "students," or, in the case of works made for hire, the company.⁷⁵

Vesting copyright in the note-takers seems intuitively problematic, evading both our basic sense of the equities and the copyright regime's purported goal of incentivizing creativity and the production of knowledge. After all, in most cases, the notes or recordings largely reflect the intellectual labor and carefully crafted expressions of the professor, even if they are ultimately fixed in a tangible medium by someone else. If the professor had prepared her own lecture notes in advance of class, one could argue that the "student" notes or sound recording of the lecture constitute unauthorized derivatives of the professor's lecture notes and therefore technically infringe the professor's copyright.⁷⁶ But if such an argument is unavailing, or if the professor works from memory, the professor would need to claim a performance copyright in order to secure rights in her creative efforts and to pursue an infringement claim

74. There is also an implied-license issue. Arguably, real students have an implied license to create derivative versions of their professor's lecture in the form of notes. But individuals who illicitly attend the class solely to provide notes to the commercial service may not enjoy such an implied license, thereby rendering their output into a copyright infringement.

75. If the act of recording is done without permission and in violation of the law, there is an argument that the "students"/company would not enjoy a copyright to the recording since it is an "illegal" work. See Tehranian, *supra* note 65 (discussing copyright and illegal works).

76. At one time, websites such as necr-notes.com had a "thriving business selling crib notes to thousands of introductory college courses across the country." See Kirsten Stewart, *U. Debates Close-Note Commerce*, SALT LAKE TRIBUNE, at C1 (Oct. 31, 2002).

against the note service.⁷⁷ Without such rights, efforts to shut down the note-taking service would face significant hurdles.

2. *The Authorship-Fixation Conflation in Action: The Interview Cases*

Yet, as the *en banc* opinion in *Garcia* reflects, courts have generally resisted granting copyright interests to anyone other than those who literally fix creative output in a tangible medium.⁷⁸ In so doing, they have often engaged in bizarre machinations to deny basic copyright principles and avoid the apparently unsavory result of recognizing copyright interests for those in front of, rather than behind, the camera. Two cases involving copyright claims to interviews powerfully illustrate this dynamic in action.

In *Taggart v. WMAQ Channel 5 Chicago*,⁷⁹ an Illinois federal court declined to consider the possibility that the subject of a news interview with an NBC affiliate, WMAQ, could have a copyright interest in WMAQ's recording of the interview. The facts of the case make the plaintiff's motivations readily apparent and explain why the matter, however misguided, may have ended up court. In an interview he had granted to WMAQ, Taggart discussed his conviction for aggravated criminal sexual assault of two boys in a summer camp that he used to run. After admitting that naked boys would regularly share his sleeping bag with him at these camps, he protested the interviewer's characterization of the activities as molestation. When the interviewer asked Taggart how he would put it, he responded, "learning experience."⁸⁰

Not surprisingly, Mr. Taggart regretted doing the interview and, in an effort to suppress its broadcast, sued for copyright infringement. Among other things, he claimed that, although he sat for the interview, he did not consent to its publication. The court balked at Taggart's

77. Notably, the special provisions of § 1101 that protect bands from bootlegging would not apply here since the professor's "performance" is not musical in nature.

78. *But see* *Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic*, No. 97 Civ. 9248(HB), 1999 WL 816163, at *5 (S.D.N.Y. Oct. 13, 1999) (holding, in rejecting a defendant's motion to dismiss, that "[t]he fact that [plaintiff] did not literally perform the filming, i.e., by diving to the wreck and operating the cameras, will not defeat his claim of having 'authored' the illuminated footage. . . . All else being equal, where a plaintiff alleges that he exercised such a high degree of control over a film operation—including the type and amount of light used, the specific camera angles to be employed, and other detail-intensive artistic elements of a film—such that the final product duplicates his conceptions and visions of what the film should look like, the plaintiff may be said to be an 'author' within the meaning of the Copyright Act."). However, as we detail later, the *Titanic* case still rested the plaintiff's authorship case on his close relationship to the fixation, in that he conceived, planned, guided, controlled and reviewed every aspect of the fixation.

79. *Taggart v. WMAQ Channel 5 Chicago*, Civil No. 00-4205-GPM, 2000 WL 1923322, at *4 (S.D. Ill. Oct. 30, 2000).

80. *Id.* at *2.

claims and, on a motion to dismiss, found that Taggart could not possibly own a copyright interest in his interview responses: “Courts have not, and cannot, recognize a proprietary interest where there is no tangible embodiment of the expression of an idea. . . . the utterances made during an interview are not an expression of an idea for the purpose of copyright law, they are simply an idea, and thus not subject to copyright protection.”⁸¹ As the court explained, a ruling to the contrary would raise grave concerns for the functioning of the news industry and the freedom of the press. “Affording such protection would make each vocalization a piece of property that is afforded the formidable protection of copyright law. Furthermore, affording such protection to materials gathered in the daily task of the news reporter would essentially bring the industry to a halt.”⁸²

There is no doubt that the court was appropriately concerned about the impact a plaintiff’s victory might have on the rights of a free press. As the court presciently noted, granting an interviewee a copyright interest could lead biographers and journalists to face infringement liability for, among other things, publishing words that an interviewee (or his/her heirs) may later regret or want unpublicized. But the court did not need to distort basic copyright protection principles to vindicate these concerns. In fact, the court’s willingness to assume away the possibility that an interviewee might have a copyright interest in his comments directly contravened existing precedent.

Copyright law’s remarkably low originality threshold suggests that mere utterances (so long as they are fixed in a tangible medium) can enjoy copyright protection, especially when they take the form of a series of multi-sentence narratives (as they would in an interview). As the Supreme Court famously held in *Feist*, the originality requirement merely necessitates a “modicum of creativity.”⁸³ So courts have not hesitated to grant copyright protection for a furniture wax label that merely “laud[s] the product and instruct[s] in its use,”⁸⁴ star pagination in legal opinions,⁸⁵ the phrases “meter drop” and “rolling stock,”⁸⁶ and used car valuations,⁸⁷ to take just a few examples.⁸⁸

81. *Id.* at *4.

82. *Id.*

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

84. *Drop Dead Co. v. S.C. Johnson & Son, Inc.*, 326 F.2d 87, 91 (9th Cir. 1963).

85. *West Publ’g Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219 (8th Cir. 1986).

86. *Cook v. Robbins*, 232 F.3d 736 (9th Cir. 2000) (noting opinion withdrawn and de-published following settlement prior to effectuation of opinion’s mandate).

87. *CCC Information Servs. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994).

88. *See, e.g., Justin Hughes, Size Matters (or Should) in Copyright Law*, 74 *FORDHAM L. REV.* 575 (2005) (assessing instances where courts have granted copyright protection to even “microworks” such as short phrases).

Meanwhile, recognition of an interviewee's copyright interest does not inextricably preclude recognition of the court's laudable concerns about suppression of the Fourth Estate. In fact, the court could have arrived at the same result—that the plaintiff simply does not have a viable infringement claim—without having to employ a faulty methodology on the issue of copyright authorship. Specifically, the court could have found that anyone who sits for a TV news interview is implicitly consenting to the publication of that interview (and, with it, the interviewee has granted a license for the use of any copyrighted material he contributes to the interview). After all, television news stations are not in the business of simply recording interviews for their own internal use. In short, the case seems to be a classic example of the old adage that bad facts make bad law.

Yet, the *Taggart* court is not alone in distorting copyright doctrine to avoid the apparently undesirable result of giving performers copyright interests in their creative output. In one of his many litigation battles with pornographers, Reverend Jerry Falwell lost a claim that he owned a copyright interest in a series of interviews conducted by two freelance journalists. Falwell apparently did not realize where the interviews might be published and, when they appeared in *Penthouse Magazine*, he was so disgusted that he sued for, *inter alia*, copyright infringement. The court resoundingly rejected his claim, reasoning that granting Falwell a copyright interest for his interview responses could lead to the protection of “every utterance”—a state of affairs that would lead the courts to be “inundated with claims from celebrities and public figures all of whom may argue that their expressions should also be afforded the extraordinary protection of copyright.”⁸⁹

While the court's concerns about the litigation floodgates are certainly reasonable, it is fair to wonder if it is too late to act on that front, and the court's logic is premised on faulty assumptions. First, contrary to the court's language, copyright is not an “extraordinary protection.”⁹⁰ If anything, as noted earlier, the only aspect of copyright protection that is extraordinary is how low the threshold is for protection.⁹¹

Second, any gatekeeping function previously served by the fixation requirement has been rendered all but moot with the explosion of digital technologies that enable everyone to regularly fix the most quotidian of ‘expressions’ in a tangible medium. For example, it is estimated that, every two minutes, we now take as many photographs as all of humanity

89. Falwell v. Penthouse Int'l, Ltd., 521 F. Supp. 1204, 1207 (W.D. Va. 1981).

90. *Id.*

91. See *supra* notes 66–70 and accompanying text.

took in the entire nineteenth and twentieth century's combined.⁹² As a result, a whopping 1.8 billion digital images are uploaded per day to the Internet.⁹³ Each and every one of these works (of authorship, fixed in a tangible medium) likely enjoys copyright protection.⁹⁴ The absence of formalities for the vesting and subsistence of copyright means that anyone with access to a smartphone creates dozens of protected works of dubious literary and intellectual achievement each and every day. And we can rush to the courthouse to prevent the unauthorized infringement of such works with little difficulty.⁹⁵

In the process of rubbishing the plaintiff's copyright claims, the *Falwell* court also invoked an outmoded calculus that conditioned copyright protection on literary or intellectual merit. "Plaintiff cannot seriously contend that each of his responses in the published interview setting forth his ideas and opinions is a product of his intellectual labors which should be recognized as a literary or even intellectual creation," noted the court.⁹⁶ The *Taggart* decision also echoed fealty to the procedural step of evaluating the worth of the plaintiff's contributions as a part of the validity analysis. Using remarkably similar language as the *Falwell* court, the court in *Taggart* opined that, "with no disrespect to how diverse, distinctive, aberrant, eccentric, odd or bizarre one's comments, thoughts and opinions may be, those expressions simply do not rise to the level of a literary or intellectual creation that enjoys the protection of the copyright law."⁹⁷

Yet, at the turn of the twentieth century, the Supreme Court firmly denounced the use of such aesthetic judgments in copyright cases. In *Bleistein v. Donaldson*, the Court found there was no basis to deny the benefits of copyright protection to an advertisement featuring renderings

92. Rose Eveleth, *How Many Photos of You Are Out There in the World?*, THE ATLANTIC (Nov. 2, 2015), <http://www.theatlantic.com/technology/archive/2015/11/how-many-photographs-of-you-are-out-there-in-the-world/413389/>.

93. Dan Frommer, *Mary Meeker's 2014 Internet Trends Report: All the Slides Plus Highlights*, QUARTZ (May 28, 2014), <https://qz.com/214307/mary-meeker-2014-internet-trends-report-all-the-slides/>.

94. See Terry S. Kogan, *Photographic Reproductions, Copyright and the Slavish Copy*, 35 COLUM. J. L. & ARTS 445, 484 (2012) (noting that "courts and commentators have opined that virtually any photograph satisfies the minimal creativity requirement for copyright protection" and that "[t]his presumable includes vacationers' amateur photographers taken with point-and-shoot cameras"); *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999) ("There is little doubt that many photographs, probably the overwhelming majority, reflect at least a modest amount of originality required for copyright protection.").

95. For a further discussion of some of the litigation fall-out from such a state of affairs, including the massive exposure ordinary people would face assuming maximum enforcement of copyright law to their quotidian activities, see JOHN TEHRANIAN, *INFRINGEMENT NATION* (2012).

96. *Falwell v. Penthouse Int'l, Ltd.*, 521 F. Supp. 1204, 1208 (W.D. Va. 1981).

97. *Taggart v. WMAQ Channel 5 Chicago*, Civil No. 00-4205-GPM, 2000 WL 1923322 (S.D. Ill. Oct. 30, 2000).

of circus performers, despite its prosaic commerciality.⁹⁸ Justice Oliver Wendell Holmes' majority opinion exhorted judges to expurgate judgments about literary worth and intellectual value from copyright law,⁹⁹ cautioning that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."¹⁰⁰ The *Taggart* and *Falwell* courts' reliance on long-rejected notions of literary merit flies in the face of *Bleistein* and a long-line of binding authority regarding appropriate considerations for determining protectability.

One can certainly understand why the *Taggart* and *Falwell* courts reached their ultimate conclusions. After all, recognition of these types of infringement claims would threaten to "tramp[le] upon fundamental constitutional freedoms by . . . convert[ing] what is essentially a private contractual dispute into a broad-based attack on these principles of freedom of speech and press which are essential to a free society."¹⁰¹ But the rationales adopted by *Taggart* and *Falwell* were problematic. The courts failed to consider the possibility that something other than the putative author's failure to personally fixate the "work" in question might have doomed the infringement claims. Indeed, in both suits, the defendants seemingly enjoyed a simple implied license defense. But instead, by relying on the authorship-as-fixation doctrine to dispose of the infringement claims, the *Taggart* and *Falwell* courts unnecessarily doubled down on the troublesome conflation of authorship with fixation and, in the process, betrayed foundational copyright principles on originality and aesthetic neutrality.

3. *The Authorship-Fixation Conflation and the Limits to Judicial Pushback*

Even in the rare instances where courts have entertained the possibility of authorship by someone who did not literally fix a creative work in a tangible medium, the putative author's relationship to the act of fixation drives the authorial calculus. As such, even these cases provide little hope for performers seeking to earn copyright for their creative efforts. In *Lindsay v. The Wrecked and Abandoned Vessel*

98. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1902).

99. *Id.*

100. *Id.*

101. *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250 (N.Y. 1968) (rejecting infringement claims based on common law copyright brought by the Hemingway Estate against a biographer who had published Hemingway's oral amblings with him as part of his book on the life of Papa).

R.M.S. Titanic,¹⁰² for example, a district court rejected a defendant's motion to dismiss that argued infringement claims brought by Alexander Lindsay failed since Lindsay could not be deemed the author of the allegedly infringed work as a matter of law.¹⁰³ In the suit, Lindsay claimed authorship over certain illuminated underwater footage of the Titanic wreck that the defendants had exploited without payment or authorization. Even though Lindsay "did not literally perform the filming, i.e., by diving to the wreck and operating the cameras,"¹⁰⁴ the court still found that Lindsay could state a claim of authorship.¹⁰⁵ Importantly, however, the court allowed for this possibility only because of Lindsay's exceedingly close position to the actual fixation, which effectively rendered him a constructive fixer.

The shooting of underwater footage of the Titanic, which lies deep below the ocean surface, posed a number of logistical challenges and necessitated the development and use of special high illumination light towers.¹⁰⁶ Since Lindsay did not dive to the ship himself, he did not literally shoot the footage.¹⁰⁷ But the court excused his lack of actual fixation because he so closely conducted the fixing from a vessel above water in conditions that were unusual due to the submarine nature of the shoot. Among other things, the court took particular notice of the fact that Lindsay had conceived and planned the fixation by "personally construct[ing]" the "huge light towers" needed to realize the shoot;¹⁰⁸ guided the fixation by providing "storyboards and the specific directions . . . to the film crew regarding the use of the light towers [sic] and the angles from which to shoot the wreck;"¹⁰⁹ controlled the fixation by exercising "exclusive authority over what was included in the footage;"¹¹⁰ and reviewed the fixation by screening the film footage on a

102. *Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic*, No. 97 Civ. 9248(HB), 1999 WL 816163 (S.D.N.Y. Oct. 13, 1999).

103. *Id.* at *5.

104. *Id.*

105. In so holding, the *Titanic* court hewed to a vision of 'mastermind' consonant with the Supreme Court's holding in *Burrow-Giles*, which deemed Sarony the author of the Oscar Wilde photograph since the work captured his "original intellectual conceptions," *Burrows-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884), even though he too had not actually fixed work in a tangible medium. In fact, it was Sarony's long-time cameraman who literally clicked the proverbial button on the camera. See Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 434 (2004). Similarly, in *Titanic*, the court accepted the possibility of Lindsay's authorship because his contributions (by way of conceiving, planning, guided, controlling and reviewing every aspect of the fixation) were the product of his "original intellectual conceptions." *Titanic*, 1999 WL 816163, at *4.

106. *Titanic*, 1999 WL 816163, at *1-2.

107. *Id.* at *4.

108. *Id.* at *3.

109. *Id.* at *4.

110. *Id.* at *6.

daily basis to ensure that the film crew was “following [his] directions.”¹¹¹ In short, Lindsay conceived, planned, guided, controlled and reviewed every aspect of the fixation.

Thus, the court had no trouble holding—on a motion to dismiss, where the factual claims by a plaintiff are presumed true—that Lindsay had sufficiently alleged that he was “the driving force behind the final film product at issue,”¹¹² and, therefore, pled sufficient facts to potentially establish his authorship of the footage. As the court concluded, “where a plaintiff alleges that he exercised such a high degree of control over a film operation—including the type and amount of light used, the specific camera angles to be employed, and other detail-intensive artistic elements of a film—such that the final product duplicates his conceptions and visions of what the film should look like, the plaintiff may be said to be an ‘author’ within the meaning of the Copyright Act.”¹¹³ All told, while the *Titanic* case is notable for its unusual embrace of a broader notion of authorship that does not require the author to do the fixing, its authorial analysis is still fundamentally grounded in the relationship of authorship to the act of fixation. As a result, while the *Titanic* holding might provide (slim) hope of authorship for someone closely directing the fixation of a work, it provides no quarter for performers claiming authorial interests as they typically have little to no relationship to the fixation of a work.

III. DEBUNKING THE AUTHORSHIP-AS-FIXATION PRESUMPTION

A. SCRUTINIZING THE LEGAL GROUNDS FOR AN AUTHORSHIP-AS-FIXATION REGIME

As the *Taggart* and *Falwell* cases illustrate, the courts have regularly gone out of their way to deny copyright protection to performers, often undermining basic copyright principles in the process. Either implicitly or explicitly, courts have suggested that such creative activities—even if imbued with originality—cannot receive copyright protection because they are not fixated by their originators. Instead, they have opined, if anyone is the copyright holder to tangible works fixating such creative output, it is the person most responsible for the act of fixating, not the act of creating.¹¹⁴ For example, in rejecting the interviewee’s claim of a copyright interest in the recording of his interview, the *Taggart* court

111. *Titanic*, 1999 WL 816163, at *6.

112. *Id.*

113. *Id.* at *5.

114. Of course, one could argue that the act of fixing is an act of creation and that act of fixing is not without significant creative decision-making in many cases. At the same time, however, there is often relevant creative activity that gives rise to the performance itself and, on many occasions, such creativity is at least, if not more, effervescent than that leading to the fixing.

concluded, in dicta, that, “if anyone was the ‘author,’ it may very well have been the cameraman who fixed the ideas into a tangible expression, the videotape.”¹¹⁵ The *en banc* panel in *Garcia v. Google* even went a step further in rejecting actress Cindy Lee Garcia’s copyright claim in her performance by claiming that, fatally, “she never fixed her acting performance in a tangible medium;”¹¹⁶ that is, the performance was fixed by someone other than her—writer-director Mark Basseley Youssef and his crew.¹¹⁷ As the court concluded, “however one might characterize Garcia’s performance, she played no role in fixation.”¹¹⁸ In the process, the court seemingly announced an express requirement that an author must fix her own creative output (or, at the very least, play a substantial role in the act of fixing) to obtain a copyright interest in it.

But such a position conflates copyright’s fixation requirement with copyright’s authorship requirement and creates an entirely new requirement that mandates the author do the fixing. This purported condition of protection has never been expressly dictated by the Constitution or the Copyright Act.¹¹⁹ Indeed, the relevant section of the U.S. Code that embodies the fixation requirement, section 102(a), merely deems that a work of authorship need be fixed to earn copyright protection—notably, *it does not say by whom*.¹²⁰ Meanwhile, section 101 defines “fixed” to include embodiment in a tangible medium either “by or under the authority of the author.”¹²¹ The *Garcia* court waived away the “under authority” portion of the statute by stating that “Garcia claims she never agreed to the film’s ultimate rendition or how she was portrayed in *Innocence of Muslims*, so she can hardly argue that the film

115. *Taggart v. WMAQ Channel 5 Chicago*, Civil No. 00-4205-GPM, 2000 WL 1923322 (S.D. Ill. Oct. 30, 2000).

116. *Garcia v. Google, Inc. (Garcia II)*, 786 F.3d 733, 743 (9th Cir. 2015).

117. *Id.* at 737.

118. *Id.* at 744.

119. Admittedly, the Constitution does suggest that authors receive copyright in “their” writings. U.S. CONST. art. I, § 8, cl. 8. Depending on the interpretation of “their,” one could make a plausible argument that the fixation does, in fact, need to be done by the author, but it appears that no court has expressly grappled with that issue.

120. 17 U.S.C. § 102(a) extends the subject matter of federal copyright protection to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated.” 17 U.S.C. § 102(a) (2012).

121. 17 U.S.C. § 101 (2012). Thus, for example, the fixation of player performances in a baseball game by television networks can give rise to club copyrights over the telecasts of the games. *See Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663 (7th Cir. 1986). But, in this instance, the preexisting employee-employer relationship between the performer and fixer attenuates the concerns that would otherwise arise. *Id.* at 670 (“Because the Players are employees and their performances before broadcast audiences are within the scope of their employment, the telecasts of major league baseball games, which consist of the Players’ performances, are works made for hire within the meaning of § 201(b). . . . Thus, in the absence of an agreement to the contrary, the Clubs are presumed to own all of the rights encompassed in the telecasts of the games.”) (citations omitted).

or her cameo in it was fixed ‘by or under [her] authority.’¹²² But such a position confuses the film’s “ultimate rendition” with its actual fixation, which first occurred with its recording on the set. The latter was arguably done under Ms. Garcia’s authority, as she gave a performance knowing full well that she was going to be recorded on film.¹²³

A more measured analysis of the purposes behind the fixation requirement suggests numerous problems with the courts’ rush to conflate the authorship and fixation requirements into an additional mandate that the author actually do the fixing. The fixation requirement, which purportedly derives from the Constitution’s reference to “writings” as the subject matter of federal copyright protection,¹²⁴ dictates that a copyright cannot vest in an expression of an idea that does not have a tangible embodiment.¹²⁵ Thus, a speech, dance performance, parade or sporting event has no copyright protection unless it is fixed in a tangible medium. While there are debates as to whether fixation is constitutionally required,¹²⁶ it is an express part of the 1976 Copyright Act, and it is said to serve a variety of purposes,¹²⁷ including advancing evidentiary interests¹²⁸ that, among other things, help define the “metes and bounds” of a copyrighted work.¹²⁹ But it is worth nothing that, by virtue of ensuring that written documentation of a work’s creation exists, the fixation requirement fulfills its evidentiary interests regardless of

122. *Garcia v. Google, Inc. (Garcia II)*, 786 F.3d 733, 744 (9th Cir. 2015).

123. Of course, this does raise the issue as to whether there should be a difference in copyright ability between performances where the performer is aware that he or she is being recorded (i.e., *Garcia*) or not (i.e., a surreptitiously recorded sex tape).

124. U.S. CONST. art. I, § 8, cl. 8.

125. 17 U.S.C. § 102(a).

126. See, e.g., Megan Carpenter & Steven Hetcher, *Function Over Form: Bringing the Fixation Requirement into the Modern Era*, 82 *FORDHAM L. REV.* 2221, 2236 (2014) (noting that, although “numerous courts and commentators have seen fixation as a constitutional requirement . . . fixation de jure did not exist prior to the 1976 Act [and] the U.S. copyright system functioned without the fixation requirement for nearly the first two centuries of its existence.”).

127. For example, Doug Lichtman notes that justifications have ranged from the preservation of our cultural heritage to the need to “narrow copyright’s purview.” See Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 *DUKE L.J.* 683, 723–24, 729–30 (2003). On this latter view, it appears that any such gatekeeping function of the fixation requirement has been rendered all but moot by the explosion of digital technologies that enable everyone to regularly fix in a tangible medium the most quotidian activities. As Lichtman points out, “so much expression is fixed—personal correspondence, school reports, even messages left upon telephone answering machines—that it simply does not resonate to say that fixation is designed to solve the problem of an overly inclusive copyright regime.” *Id.* at 729–30.

128. See, e.g., Russ VerSteeg, *Jurimetric Copyright: Future Shock for the Visual Arts*, 13 *CARDOZO ARTS & ENT. L.J.* 125, 132 (1994) (noting fixation’s critical role in ensuring that “a copyright claimant will be able to provide a court documentary evidence of the copyrightable subject matter”); Gregory S. Donat, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers*, 97 *COLUM. L. REV.* 1363, 1400 (noting that without the fixation requirement, “copyright law would forever be mired in disputes over the definition and boundaries of the works claiming copyright protection.”).

129. Carpenter & Hetcher, *supra* note 126, at 2240 (“fixation helps to define the metes and bounds of a copyright work.”).

whether it is the author who does the actual fixing or not. Moreover, the courts' insistence on fixation technicalities in this context is particularly ironic in light of the statute's express lenience in another context: permanence. As Doug Lichtman notes, "the most striking aspect of the fixation requirement is that an acceptable tangible embodiment does not need to survive for any significant period of time."¹³⁰

Meanwhile, demanding that the author of a work and its recorder necessarily be one and the same elevates form over function in copyright's fixation requirement and threatens to allow minute and seemingly irrelevant procedural differences to trigger wildly different outcomes. For example, if Garcia had incidentally recorded herself on a smartphone while practicing for her shoot, she would have fixed her performance in a tangible medium and likely earned a copyright therein. She could then use that copyrighted work to argue that the makers of *Innocence of Muslim* infringed the recorded performance when they created an unauthorized derivative version in their final cut.¹³¹ Similarly, if Falwell or Taggert had scrawled notes on a cocktail napkin in last-minute preparation for their interviews, they would possess a copyright in those notes. They could then have argued that Penthouse and WMAQ had infringed their notes by creating unauthorized derivative versions of them by publishing interviews containing answers based on those notes.¹³²

B. OF BONO, *BOLLEA* AND BOOTLEGS: CREATIVE EFFORTS IN FRONT OF, AND BEHIND, THE CAMERA

Although one can have a reasonable debate about whether the inquisitor or the subject makes for a high-quality interview, it is not uncommon for the person in front of the camera to contribute far more, creatively speaking, to the ultimate expressive work captured in a tangible medium than the person behind the camera. In these increasingly frequent instances, as our student notes hypothetical illustrated,¹³³ the intellectual coherence of the default rule of authorship-as-fixation can begin to unravel.

Consider an example from the world of musical performance. On August 22, 2010, at a concert in Helsinki, U2 performed a previously unrecorded song, *Every Breaking Wave*, before a packed house at

130. Lichtman, *supra* note 127, at 716; *see also* 17 U.S.C. § 101 (2012) (requiring that a physical embodiment need only be "sufficiently permanent or stable to permit [a work] to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration").

131. *See* 17 U.S.C. § 106(2) (2011) (securing the exclusive right for copyright holders to prepare derivative versions of their protected works); 17 U.S.C. § 101 (defining derivative work quite broadly as any "work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted").

132. 17 U.S.C. § 101.

133. *See supra* notes 74-76 and accompanying text.

Olympic Stadium.¹³⁴ A random fan made an audiovisual recording of this first-time performance on his iPhone and later uploaded it to YouTube, where it was viewed almost a half million times.¹³⁵ The authorship-as-fixation doctrine would dictate that all copyright interests in the work would vest in the fan. Of course, one could question just what constitutes ‘the work.’ It could simply be the fan’s particular visual selection of angles from which to view the band. But the recording also captures a song that had never been fixated before and, without a doubt, the fan captured that ephemeral combination of sounds in a tangible medium. And although the fan exercised precious little creativity in so doing, he arguably met the minimum threshold required by *Feist* by choosing the equipment, audiovisual settings, beginning and end point, and capture angles and location to make the recording. Thus, one might argue that the fan is no different than the studio owner who uses her recording equipment to capture the performance of a band and earns the copyright thereto as a default rule.

If copyright in the recording does, in fact, vest in the fan, copyright’s default rules begin to raise some significant concerns. After all, the fan’s copyright could potentially have far reach, extending to sound-alike recordings.¹³⁶ Absent any contractual obligations to the contrary, the fan might enforce his copyright interest in the work against any third

134. Daniel Kreps, *U2 Debut Another New Song on European Tour*, ROLLING STONE (Aug. 23, 2010), <http://www.rollingstone.com/music/news/u2-debut-another-new-song-on-european-tour-20100823> (quoting Bono as saying “No one has heard this before—not even us.”).

135. U2gigs.com, *U2 Helsinki 2010-08-21 Every Breaking Wave (New Song)*, YOUTUBE (Aug. 21, 2010), <https://www.youtube.com/watch?v=q9C-z-dljsY> (capturing the Aug. 21, 2010 performance).

136. This issue has arisen in the analogous context of bands re-recording their greatest hits in order to circumvent bad record deals and re-channel to themselves revenues from exploitation of their most famous sound recordings. For example, in 2007, veteran Southern California punk rockers Social Distortion put out an album of greatest hits. Six of the twelve tracks on the album were not original recordings, but, instead, re-recordings of their most famous songs. See *Social Distortion—Greatest Hits Discography*, DISCOGS, <https://www.discogs.com/Social-Distortion-Greatest-Hits/release/2564606> (last visited Aug. 5, 2017). By re-recording the songs, Social Distortion presumably avoided having to get a license from their old record label (who owned the copyright to the sound recordings) to release those songs. Instead, the band could simply rely on the fact that they did not require permission of the record label since they owned the rights to the underlying musical compositions and could create new recordings of those as they saw fit. In a worst-case scenario, Social Distortion could even rest on the compulsory mechanical license and argue that their re-recordings were merely cover versions of the originals (even though the colloquial understanding of the term implies a completely different artist doing a version of someone else’s songs) if they follow the appropriate procedures under 17 U.S.C. § 115 and related regulations. Of course, the project of re-recording one’s greatest hits is quite different from doing a live album or an acoustic album, where the ultimate recordings will (and are meant to) sound fundamentally different. In the case of re-recording, the artist typically attempts to make the sound recording sound exactly the same, often going through grueling measures to achieve such an effect. See, e.g., Glenn Tilbrook, *How Squeeze Seized the Keys to Their Back Catalogue*, THE GUARDIAN (Oct. 25, 2010, 5:17 AM), <https://www.theguardian.com/music/musicblog/2010/oct/25/squeeze-back-catalogue-up-junction> (noting the painstaking, three-year process that the members of the band Squeeze undertook to re-record their hits so that they would sound the same as the original recordings).

party—perhaps even against the band itself.¹³⁷ Specifically, it is not implausible under such a scenario to argue that U2’s later act of releasing an updated version of the song—as part of the (ill-fated) *Songs of Innocence* album which populated itself on the world’s iPhones on December 9, 2014—constituted an act of infringement.¹³⁸

It is the absence of the normal creation-fixation convergence that gives rise to the problems in this scenario. Under ordinary circumstances, the fan’s fixation of the musical performance at a concert would constitute an infringing “bootleg” recording—an unauthorized reproduction/derivative version of the copyrighted musical composition¹³⁹—and would enjoy no copyright protection.¹⁴⁰ But in this instance, there is no musical composition with copyright protection because it has (presumably) never been fixed in a tangible medium. As a result, there is presumably nothing illicit about the “bootleg,”¹⁴¹ and it will enjoy its own independent copyright protection. In fact, one might reasonably wonder if, so long as the recording is captured with sufficiently good technology (something eminently possible these days),

137. For example, John Fogerty was infamously sued for infringing himself. Although a jury ultimately rejected the claim, the case survived summary judgment and went through extensive appeals (including a Supreme Court opinion) and Fogerty ultimately had to bear his own fees in defending the allegations. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994).

138. One could argue that Bono did not copy (or even have access to) the recording of the performance, so he could not have infringed it, even if there is substantial similarity between the audio track of the August 10, 2010 recording and the U2 recording released on December 9, 2014. The independent creation defense might also be invoked. However, if Bono consulted the YouTube recording in his re-working of the song, that might complicate matters significantly.

139. *See* 17 U.S.C. § 106(2) (2011) (granting copyright holders the exclusive rights to prepare derivatives based on their work).

140. Works that constitute infringements that are infringements themselves are not entitled to copyright protection. *See* 17 U.S.C. § 103 (2011) (“[P]rotection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”); 1–3 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT, § 3.06 (1978). Thus, works that constitute unauthorized derivatives do not receive copyright protection, no matter how original or meritorious they might be. *See Pickett v. Prince*, 207 F.3d 402, 406–07 (7th Cir. 2000) (denying copyright protection to any portion of an unauthorized derivative work) (Posner, J.); *Eden Toys, Inc. v. Florelee Undergarment Co., Inc.*, 697 F.2d 27, 34 n.6 (2d Cir. 1982); *Gracen v. Bradford Exch.*, 698 F.2d 300, 303 (7th Cir. 1983); *Sobhani v. @Radical.Media, Inc.*, 257 F. Supp. 2d 1234, 1238 (C.D. Cal. 2003) (“Accordingly, if a work is derived from a previous work, and the new work thereby infringes a copyright in the previous work, then the new work is an unauthorized (and infringing) derivative work.”); *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL206431, at *10 (C.D. Cal. 1989) (“[N]o part of an infringing derivative work should be granted copyright protection.”). The legislative history behind the 1976 Copyright Act firmly supports this position. As the House of Representatives noted “the bill prevents an infringer from benefiting, through copyright protection, from committing an unlawful act.” H.R. REP. NO. 94-1476, at 57 (1976), *as reprinted in* 1976 U.S.S.C.A.N. 5659, 5671. Thus, an authorized bootleg recording of a music composition constitutes an unauthorized derivative version of that musical composition and, as a result, likely has no copyright.

141. *See, e.g., Dowling v. United States*, 473 U.S. 207, 214–16 (1985) (noting that convicted bootlegger did not challenge copyright infringement judgment against her, which relied on a theory of infringement of musical compositions for the creation of the sound recording).

the fan can now exploit the recording with unfettered rights to reproduce, distribute, and license it for global use.¹⁴²

If we take a step back from the facts and return to basic principles, we quickly see that the relative balance of the creative contributions by the various parties to this “work” make such a result almost absurd. The random fan’s minimal contributions to creative aspects of the recording pale by comparison to those of Bono and the Edge, whose singing and guitar playing form the ingenuity captured in “the work.” In short, the fan appears to be nothing more than a mechanical scrivener of Bono and Edge’s “creative spark.” It therefore seems strange (at best) to vest the copyright interest in the fan rather than the band. Of course, as Rebecca Tushnet has argued, “manageability rather than creativity is generally the basis for the rights allocations and distinctions copyright law makes,”¹⁴³ and perhaps things are that way for good reason. But with our U2 example, we begin to see the manageability arguments break down, thereby suggesting that such default rules for copyright vesting could have perverse consequences in certain situations.

Such concerns have not gone unnoticed. In fact, they led to the passage of a federal anti-bootlegging scheme in § 1101 of the Copyright Act, which codified the Uruguay Round Agreements Act § 512 in 1994. Section 1101 provides a limited, albeit significant, exception to the default rule of authorship-as-fixation. Specifically, it provides musical performers the equivalent of a copyright interest in their unfixed acts and enables them to bring an infringement claim, with copyright remedies, against anyone who, without their authorization, fixes their act in a tangible medium and seeks to publicly distribute that recording.¹⁴⁴ Thus, under § 1101, the fan recording in the U2 example would constitute an infringing work and, therefore, would not enjoy its own copyright protection.¹⁴⁵

Section 1101 represents a sharp and fundamental departure from the authorship-as-fixation assumptions that seem to permeate the rest of copyright law. But the provisions of section 1101 are carefully

142. Contract law might get in the way, depending on the nature of terms and conditions of admittance to the concert, but enforcement is questionable and the remedies are quite different (and substantially worse) than for copyright infringement.

143. Tushnet, *supra* note 23, at 211.

144. There is a question as to whether such performances can be registered so as to qualify for the recovery of statutory damages and attorneys’ fees, so plaintiffs moving for relief under this provision of the Copyright Act might, in practice, be limited to recovery of actual damages alone.

145. Although some scholars have questioned the constitutionality of section 1101, courts have generally upheld its validity by suggesting that the commerce clause (rather than copyright clause) permitted its passage. See Craig W. Dallon, *The Anti-Bootlegging Provisions: Congressional Power and Constitutional Limitations*, 13 VAND. J. ENT. & TECH. 255, 257 (2011) (noting “a sharp division among copyright scholars” on the issue, but concluding that “the [court] decisions to date [on the issue] evince a growing consensus upholding these provisions.”).

circumscribed, applying only to musical performances.¹⁴⁶ As a result, they do not cover the myriad endeavors of so many others who find themselves in front of the camera contributing creatively to works of authorship. Such individuals might include innovative skateboarders whose daring rides or epic wipeouts (captured by third parties) could end up as profitable viral videos on YouTube; professional lecturers, such as academics, whose presentations are potentially subject to unauthorized exploitation by for-profit companies; amateur sexual performers whose bedroom fireworks recorded by others can generate significant audiences and revenues for “NSFW” websites; interviewees whose colorful and thoughtful musings attract eyeballs for newspapers, magazines and other media outlets in which they are featured; and numerous other forms of creative output (much of which has economic value) where there may not be a creation-fixation convergence. Section 1101’s narrow reach necessarily begs the question as to whether anything—besides Congress’s solicitude to targeted lobbying efforts by powerful interest groups—can justify the fact that only musical performers, and not other such creatives operating in front of the camera, enjoy an exception to the authorship-as-fixation rule.

Indeed, there are numerous instances where the creative efforts of those in front of the camera clearly exceed the creative efforts of those behind it. For example, with each passing year, surveillance technologies monitor and record a greater percentage of our daily existence. Besides the human rights and privacy issues that such practices raise, the emergence of the surveillance society has also produced some intriguing copyright issues. These issues have further challenged the propriety of a strict authorship-as-fixation rule.

In 2012, with the quiet help of his Silicon Valley benefactor, Peter Thiel,¹⁴⁷ Hulk Hogan launched a multi-pronged legal attack against Gawker Media when the entity published excerpts of a leaked video of Hogan (whose legal name is Terry Bollea) having sex with the wife of his best friend, Bubba the Love Sponge. While the main focus on Hogan’s claims rested on the invasion of privacy, as part of a strategy to obtain a preliminary injunction against Gawker,¹⁴⁸ Hogan’s legal team added a

146. See 17 U.S.C. § 1101 (2011) (extending the protections of the anti-bootlegging provision only to “live musical performances”).

147. Andrew Ross Sorkin, *Peter Thiel, Tech Billionaire, Reveals Secret War with Gawker*, N.Y. TIMES (May 25, 2016), http://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html?_r=0.

148. The strategy failed. Bollea’s application for a preliminary injunction on the copyright claims was rejected by a federal court. See *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325, 1331 (M.D. Fla. 2012). Bollea’s subsequent application for a preliminary injunction on the privacy invasion claims in a separate state court proceeding was initially granted, but then overturned as a prior restraint in violation of the First Amendment by a Florida’s Second District Court of Appeals. See *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196 (Fla. Dist. Ct. App. 2014).

copyright infringement claim to the federal portion of his lawsuit.¹⁴⁹ Of course, to bring such a claim, a plaintiff needs standing and, in the copyright context, that means demonstrating either ownership of or beneficial interest in the protected work.¹⁵⁰ Formalities-wise, the quickest way to claim copyright ownership is to prove that the plaintiff is the author. Hogan could have made such an argument, though existing precedent and the authorship-as-fixation doctrine would make such a position an uphill battle. So, instead, he obtained the copyright from Bubba the Love Sponge through a transfer of interests via written agreement.¹⁵¹ And, although the court ultimately rejected Hogan's request for a preliminary injunction (and Hogan subsequently dropped his infringement claim), the court never addressed the threshold issue of whether Bubba the Love Sponge was, in fact, the author of the work and whether he had any rights at all to grant to Hogan.¹⁵² Indeed, under the authorship-as-fixation regime, it was simply assumed that he did since he superintended the fixation of the work in a tangible medium.

But further analysis raises serious questions about Bubba's ability to claim authorship and an initial vesting of the copyright interest to the videotape. First, one might argue that there was no copyright interest in the tape at all. After all, the tape was effectively no more than surveillance footage taken by a pre-positioned indiscriminate recording device with little, if any, human intervention involved in the actual reduction of the 'work' to a tangible medium.¹⁵³ Although copyright's

149. *Bollea*, 913 F. Supp. 2d at 1327 (“Plaintiff commenced this action by filing a five-count complaint against Defendants asserting claims for (1) invasion of privacy by intrusion upon seclusion, (2) publication of private facts, (3) violation of the Florida common law right of publicity, (4) intentional infliction of emotional distress, and (5) negligent infliction of emotional distress. Following the hearing on the original Motion for Preliminary Injunction, Plaintiff filed a First Amended Complaint adding a new claim for copyright infringement.”).

150. 17 U.S.C. § 501(b) (2011) (limiting standing for infringement claims to “the legal or beneficial owner of an exclusive right under a copyright”); *McCormick v. Amir Const. Inc.*, 279 Fed. Appx. 470, 471 (9th Cir. 2008) (“Section 501(b) [of the Copyright Act] grants standing to sue under the Copyright Act only to one owning a copyright”) (citing *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005)).

151. The copyright registration for the video, see *The Unauthorized Video*, Copyright Registration Number PAu003639502 (Nov. 3, 2012), lists Bubba the Love Sponge as its author and bring the registration in the name of Terry Gene Bollea by virtue of a transfer (via written agreement). As Hogan's attorney, Charles Harder, explained, “Bubba owned and operated the recording machinery, therefore when we settled with him, Bubba transferred to Hulk all of the rights of the tape.” Eriq Gardner, *How to Keep a Celebrity Sex Tape Off the Internet*, THE HOLLYWOOD REPORTER: ESQ. (May 22, 2013, 8:00 AM), <http://www.hollywoodreporter.com/thr-esq/celebrity-sex-tape-how-keep-526546>.

152. The only language in the decision remotely related to the issue of standing and ownership was the court's notation that “Plaintiff now contends that he recently obtained and registered a copyright for the Video.” *Bollea*, 913 F. Supp. 2d at 1327.

153. The question of copyright in surveillance footage does not appear to have ever been addressed, though it was raised in a case involving a casino suing for infringement of their surveillance footage, where the defendant argued that the video lacked sufficient creativity for copyright protection. See Defendant's Motion for Summary Judgment at *4-6, *Southwest Casino and Hotel*

originality requirement is hardly demanding, it does require some level of human creativity, and there appears to be a distinct lack of it in the production of the video—at least behind the camera. Specifically, Bubba the Love Sponge did little, if anything, to contribute to the creative qualities of the film. He simply owned the camera which recorded whatever came within the view of its lens, as it pointed in a stationary position from the corner of the room. Since the film was simply the product of a passive, fixed surveillance camera, Bubba made no real creative, authorial choices—certainly none of the “disposition, arrangement or representation” flowing from “arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, [or] suggesting and evoking the desired expression”¹⁵⁴ that the *Burrow-Giles* court deemed to be the *sine qua non* of photographic authorship.

This leads to a second issue. While it might be difficult to argue that Bubba contributed in any meaningful creative way to the video, both Hulk and Bubba’s (now former) wife, Heather Clem, certainly seem to have done so with their vital role in all of the video’s proverbial thrills, spills and (quite literally) bellyaches.¹⁵⁵ Without delving too deeply into the particular artistry involved all around, Hogan and Clem contributed original (though admittedly banal) dialogue and performed coital hijinks of the most mundane order. While Fellini’s *8½* it was not, their creative efforts at least appeared to exceed the meager threshold of *Feist* and those of the putative author, Bubba the Love Sponge.

In the end, the Hulk Hogan sex tape illustrates the ways in which the authorship-as-fixation can break down, especially in a world of mass surveillance where we all have panoptic recording devices at our fingertips. At a minimum, it calls into question whether fixation of copyrightable subject matter should always generate a copyright interest. In the case of passive stationary cameras that automatically record anything that comes before their lenses, there is almost certainly no creative effort that can sustain the low bar for copyright protection. In

Corp. v. Flyingman, No. CIV-07-0949 (W.D. Okla. Aug. 28, 2008). As David Vaver argued, “whether scenes taken by an automatic surveillance camera are authored by anyone is doubtful: the person responsible for positioning the camera is no Atom Egoyan. Such authorless films may have no copyright at all.” DAVID VAVER, INTELLECTUAL PROPERTY LAW: COPYRIGHT, PATENTS, TRADEMARKS 54–55 (1997).

154. *Burrows-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

155. Of course, if Hogan and Clem’s creative contributions as performers gave rise to a copyright interest, they would likely constitute joint authors of the work. And therein lies the rub—for Hogan’s lawyers, at least. Besides the uphill battle they would have faced in making a performance copyright claim, they would certainly have been reluctant to do so if the consequence would be the vesting of joint author in Heather Clem as well. A joint author possesses the right to unilaterally license rights to the work, so, in that event, Gawker could have debunked any infringement claim that Hogan might have brought by simply obtaining a license from Heather Clem.

the case of slightly more active forms of surveillance, including drones, Google Glasses or certain voyeuristic recordings, it is reasonable to ask whether the final product meets *Feist*'s originality standard. Moreover, if such footage gives rise to a copyright interest, it is fair to wonder why it should not vest in the performer, whose creative efforts inevitably exceed that of the person superintending the fixation.

C. MONKEY SEE AND MONKEY SUE:¹⁵⁶ AUTHORSHIP AND THE MONKEY SELFIES

Lest we essentialize the problems with the authorship-as-fixation regime as a plebiscite on performer rights, it is critical to note that the presumption does not simply create problems for those in front of the camera; it can also lead to anomalous results for individuals working behind the camera—including photographers—who provide creative contributions to a work but may not literally snap the shot or hit record on the camera. Thus, although the authorship-as-fixation regime usually plays in favor of photographers, in certain cases—as illustrated by the infamous Monkey Selfie incident—it can also dilute, if not entirely destroy, their rights claims.

In 2014, news articles across the world told the story of the so-called “Monkey Selfies”—a series of provocative, anthropomorphic shots of a Celebs crested macaque living on the Indonesian island of Sulawesi that the macaque took itself using the equipment of photographer David John Slater. The photographs featured the macaque wearing a series of human-like expressions, posing and vamping for the camera, profoundly aware, seemingly, of the audience behind the camera. A controversy ensued when Slater claimed he owned the copyright to the image and, either individually or through his agents at the Caters News Agency, requested that websites such as Techdirt, Wikipedia and others refrain from making use of the photograph without permission and payment.

By 2015, the legal squabble found its way to the federal courts when Naruto, the macaque allegedly featured in the Monkey Selfies, filed suit against Slater and his publisher through his Next Friends—non-profit People for the Ethical Treatment of Animals and primatologist Dr. Antje Engelhardt.¹⁵⁷ Naruto argued that he, and not Slater, was the

156. See Brief of Defendant-Appellees David John Slater and Wildlife Personalities, Ltd. at *1, *Naruto v. Slater*, No. 16-15469 (9th Cir. Aug. 25, 2016).

157. The Next Friends claimed that Naruto (a male macaque) was the macaque featured in the Monkey Selfies. See *Naruto v. Slater*, No. 15-cv-04324-WHO, 2016 WL 362231, at *1 (N.D. Cal. Jan. 28, 2016). But Blurb's Motion to Dismiss challenges this claim and states that the macaque in the Monkey Selfies was a different macaque—one that was female. See Defendant Blurb, Inc.'s Notice of Motion and Motion to Dismiss the Complaint for Copyright Infringement at *3-4, *Naruto v. Slater*, No. 15-cv-04324-WHO (N.D. Cal. Nov. 6, 2015). For the purposes of this section, we will assume that it was, in fact, Naruto in the photographs.

author of the Monkey Selfies and owned the copyrights thereto. In the process, he lodged infringement claims against Slater for Salter's unauthorized commercial exploitation of the Monkey Selfies. The gravamen of Naruto's claim was simple: he had fulfilled all the criteria needed for a human being to earn copyright protection in the Monkey Selfies and, as such, he should enjoy the same.¹⁵⁸ As he stated in his Complaint, "[h]ad the Monkey Selfies been made by a human using Slater's unattended camera, that human would be declared the photographs' author and copyright owner."¹⁵⁹

Ultimately, a federal district court dismissed the case by finding that non-humans could not, as a matter of law, constitute authors under the Copyright Act.¹⁶⁰ In reaching this decision, the court deferred to the view of the United States Copyright Office, which had expressly rejected the possibility of non-human authorship in its Compendium of Copyright released in December 2014.¹⁶¹ The judgment, however, is not *res judicata*, and the case is still pending on appeal before the Ninth Circuit.¹⁶²

The incident and its ensuing lawsuit garnered widespread media coverage by triggering a conversation that lay at the intersection of animal rights and property rights: whether non-humans could own copyrights. But the case also raised less sexy, but equally important, questions about performer rights, behind-the-scenes creative efforts and the authorship-as-fixation regime. Putting aside Naruto's place in the animal kingdom, the authorship-as-fixation regime would vest the copyright to the photograph in Naruto if—as the plaintiff claimed and Slater's own published accounts of the photograph's provenance seemed to suggest¹⁶³—Naruto literally pressed the shutter button of the camera and snapped the shot himself.

But such a result seems to betray the tremendous creative contributions of Slater to the final work—a profoundly charming and evocative image that speaks to the macaque's intelligence, self-awareness and sense of play. Even though Slater had let the macaque hit the shutter button, the work was a product of Slater's own design and fulfilled his creative vision to highlight, through art, the agency of the macaque—a critical theme of his work, which sought to poignantly communicate the

158. *Naruto*, 2015 WL 5576925, at *5.

159. *Id.*

160. Order Granting Motions to Dismiss, *Naruto v. Slater*, No. 15-cv-04324-WHO (N.D. Cal. Jan. 28, 2016).

161. See COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 313.2 (3d ed. 2014) ("To qualify as a work of 'authorship' a work must be created by a human being. Works that do not satisfy this requirement are not copyrightable.") (citations omitted).

162. See *Naruto v. Slater*, No. 16-15469 (9th Cir. 2016).

163. See *Naruto*, 2015 WL 5576925, at ¶ 34; DAVID JOHN SLATER, WILDLIFE PERSONALITIES 11 (2014).

acuity and sentience of macaques in a striking visual.¹⁶⁴ As a result, Slater had no compunction about claiming ownership of the image copyrights because, in his view, he was the “master mind” of the work; he had engineered the shot after nuanced creative efforts and applied knowledge from long periods observing and working with the macaques.¹⁶⁵ Among other things, Slater allegedly made numerous critical artistic choices, including those pertaining to “camera lens width, positions and settings (e.g., predictive autofocus, motorwind, and flashgun).”¹⁶⁶ If true, these elements—from luring the subject to controlling the lighting, shading and positioning—seem to echo the creative contributions upon which the *Burrow-Giles* decision rested authorship.¹⁶⁷ And, ironically, although *Burrow-Giles* gave rise to modern authorship-as-fixation jurisprudence, the decision itself put no value on who actually clicked the camera shutter. In fact, in that case, the individual who snapped the shot was Benjamin Richard, not Napoleon Sarony—the putative “photographer” in whom the Court vested authorship.

Thus, even if Slater did not ultimately depress the shutter button on his camera, he would seem to have, at a minimum, provided critical creative contributions to the final work. In turn, he would appear to meet the basic requirements to earn a copyright interest in the Monkey Selfies—a result that any strict reading of the authorship-as-fixation doctrine would deny him.¹⁶⁸ Yet, absent reconsideration of the authorship-as-fixation doctrine, we are left with the unusual result that the Monkey Selfies—creative works fixed in a tangible medium—may

164. SLATER, *supra* note 163, at 11 (“My experience of these monkeys suggested that they were not just highly intelligent but were also aware of themselves. . . . It was only a matter of time before one pressed the shutter resulting in a photo of herself. She stared at herself with a new found appreciation, and made funny faces—in silence—just as we do when looking in a mirror.”).

165. See Brief of Defendant-Appellees David John Slater and Wildlife Personalities, Ltd. at 3–4, *Naruto v. Slater*, No. 16-15469 (9th Cir. Aug. 25, 2016) (“Slater, an award-winning nature photographer, set up what became the Monkey Selfie in the course of several grueling days in an Indonesian jungle. Developing a keen understanding of their subjects is a critical skill for any professional photographer, and that was vital here for Slater as he slowly built a trustful, friendly relationship with a group of crested macaque monkeys.”). As Slater himself explained, “It was my artistry and idea to leave [the macaques] to play with the camera and it all in my eyesight. I knew the monkeys were very likely to do this and I predicted it. I knew there was a chance of a photo being taken.” Hayden Smith, *Can Monkey Who Took Grinning Self-Portrait Claim Copyright?*, METRO (July 14, 2011, 10:38 PM), <http://metro.co.uk/2011/07/14/can-monkey-who-took-grinning-self-portrait-claim-copyright-77773/> (quoting Slater).

166. See Brief of Defendant-Appellees David John Slater and Wildlife Personalities, Ltd. at 4, *Naruto v. Slater*, No. 16-15469 (9th Cir. Aug. 25, 2016).

167. *Burrows-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

168. This, of course, assumes the validity of *Feist*'s low originality threshold. It is also worth noting that the macaque appearing in the Monkey Selfies may also have a copyright interest—both as a result of the performative contributions he made and because of his role in formally fixing the work in a tangible medium.

have no copyright. The macaque apparently cannot enjoy any copyright interest since he does not belong to the correct species, and Slater cannot enjoy any copyright interest since he did not click the magic button.

D. *GARCIA II* AND THE CASE OF THE DISAPPEARING COPYRIGHT(S)

The issue of the disappearing copyright is not unique to the Monkey Selfies. In his dissent in *Garcia II*, Judge Kozinski observed that Garcia's dramatic performance faced a similarly ignominious fate. As Kozinski noted, "Garcia's dramatic performance met all of the requirements for copyright protection: It was copyrightable subject matter, it was original and it was fixed at the moment it was recorded. So," he asked rhetorically, "what happened to the copyright?"¹⁶⁹ We are left asking this same question for a wide range of creators whose activities similarly seem to fall outside the scope of the courts' reigning interpretation of authorship, despite meeting the basic requirements for copyright.

Specifically, despite its fetishization of fixation, *Garcia II*'s definitive rejection of performer copyrights does not just impact the rights of artists appearing in front of the camera. Consider, for example, the first published decision to rely upon *Garcia II*: the Second Circuit's holding in *16 Casa Duse, LLC v. Merkin*.¹⁷⁰ Issued just days after *Garcia II*, the *Casa Duse* decision illustrates the wide-ranging consequences of *Garcia II*, including its ability to circumscribe the rights that even creatives behind the camera, such as directors, long thought they possessed.

In the suit, production company Casa Duse made a movie entitled *Heads Up* with Alex Merkin serving as the director. Casa Duse proceeded with Merkin's involvement despite Merkin's repeated refusal to sign a standard work-made-for-hire or assignment agreement pertaining to his work on the project—one signed by other cast and crew and similar to those typically in place for any professional project in the movie industry.¹⁷¹ Although the parties subsequently came close to reaching a deal over the terms of their relationship, they never did.¹⁷² So when Casa Duse tried to screen the movie at film festivals using footage shot by Merkin, Merkin and his legal counsel objected and raised claims of copyright infringement.¹⁷³ Casa Duse ultimately sought declaratory judgment to quiet title over the film,¹⁷⁴ and the controversy ended up before the Second Circuit, which declined to give Merkin any copyright interest in the final version of the film or the raw footage.¹⁷⁵

169. *Garcia v. Google, Inc. (Garcia II)*, 786 F.3d 733, 749 (9th Cir. 2015) (Kozinski, J., dissenting).

170. *16 Casa Duse, LLC v. Merkin*, 791 F.3d 247 (2d Cir. 2015).

171. *Id.* at 251.

172. *Id.* at 252.

173. *Id.* at 253.

174. *Id.*

175. *Id.* at 261.

With respect to the former issue, the court held that Merkin's directorial contributions could not sustain any claim of copyright in the final version of the film (which made use of raw footage captured by Merkin). Although Merkin may have made "original artistic expressions . . . which are arguably fixed in the medium of film footage,"¹⁷⁶ the court found that his directorial contributions were simply constituent parts of a work of authorship, such as a film and not a work of authorship by themselves, as mere direction is not within the subject matter of copyright. As the court posited, "[a]uthors are not entitled to copyright protection except for the 'works of authorship' they create and fix."¹⁷⁷ To support its view, the court pointed to the recent decision in *Garcia II* to suggest that recognition of independent copyright interests for creative and even fixed contributions to a final work of authorship such as a film would "result in [a] legal morass[,] . . . [making] Swiss cheese of copyrights."¹⁷⁸

Despite its purported obeisance to *Garcia II*, *Casa Duse* charted unprecedented new ground with its holding on Merkin's claim to a copyright interest in the final film. After all, *Garcia II* imbued the act of fixation with authorial primacy, denying Garcia any copyright interest in the final work because, at the end of the day, "she played no role in fixation."¹⁷⁹ By sharp contrast, Merkin did not just play a (substantial) role in the fixation of *Heads Up*, he literally fixed the work in a tangible medium.¹⁸⁰ And, of course, Merkin provided substantial creativity. But his combination of creativity and fixation was apparently not enough to earn a copyright interest in the raw footage, the rights to which vested in *Casa Duse* alone.

However, *Casa Duse* could be read as consonant with *Garcia II* in that it reaffirmed and extended *Garcia II*'s erosion of intellectual property rights that artists might have in the product of their creative labor. *Garcia II* rejected the possibility that performers might enjoy independent copyright interests in their creative output. Similarly, *Casa Duse* seemingly stripped away the possibility that directors might enjoy the independent copyright interests they have in raw footage of their work that is placed in an "integrated" work of authorship, like a final cut of a film.¹⁸¹ Specifically, the court held that Merkin could not be the

176. *Id.* at 247.

177. *Id.*

178. *Id.* (citing *Garcia v. Google, Inc. (Garcia II)*, 786 F.3d 733, 742 (9th Cir. 2015)).

179. *Garcia v. Google, Inc. (Garcia II)*, 786 F.3d 733, 744 (9th Cir. 2015).

180. *Casa Duse*, 791 F.3d at 258.

181. The court attempted to limit the reach of its holding by stating that:

Our conclusion in the present case does not suggest that motion picture directors such as Merkin may never achieve copyright protection for their creative efforts. The director of a film may, of course, be the sole or joint author of that film, such that she or he can secure

author of the raw footage because the producer, and not Merkin, had the final say and ultimate control over the creation of the raw footage.¹⁸² But such a rejection of Merkin's authorship claim wholly circumvents the strictures of the modern works-made-for-hire doctrine. Indeed, a close reading of the holding exemplifies just how judicial contortions on authorship questions and use of the *Garcia II* precedent can badly subvert bedrock copyright principles.

Under the modern work-made-for-hire doctrine, authorship vests in hiring, rather than creating, parties (in other words, as a work made-for-hire) in only two circumstances: where the creator is an employee of the engaging party or where the creator has executed an appropriate special commission agreement in writing with the engaging party.¹⁸³ Merkin, by the admission of both parties, was neither an employee of Casa Duse nor the signatory of a special commission agreement with Casa Duse.¹⁸⁴ As a matter of black letter law, therefore, the raw footage to *Heads Up* was legally precluded from constituting a work-made-for-hire. Ordinarily, the footage's ineligibility for work-made-hire status would mean that, ipso facto, the copyright to the footage would vest in Merkin and remain with him unless and until he executes an assignment agreement. But the *Casa Duse* court conveniently made no mention of this key implication of the work-made-for-hire doctrine. Instead, with a "little magic; a little sleight of hand,"¹⁸⁵ the court undid the work-made-for-hire rules and managed to find that the hiring party (Casa Duse)—at whose instance and expense Merkin created—earned the copyright to the raw footage. Just how the court achieved such an act of judicial legerdemain bears further examination.

As we have previously discussed, the modern work-made-for-hire standard adopted by the 1976 Copyright Act put an end to the "instance-and-expense" test, which had previously enabled hiring parties to deem virtually all works created on their behalf as "made for hire."¹⁸⁶ Specifically, the "instance-and-expense" test almost uniformly vested copyright in hiring parties rather than the actual creators they engaged. The *Casa Duse* court brought back the instance-and-expense test—repudiated with the 1976 Copyright Act's amendments to the

copyright protection for the work . . . But a director's contribution to an integrated 'work of authorship' such as a film is not itself a "work of authorship" subject to its own copyright protection.

Id. at 258–59.

182. Importantly, both parties agreed that Merkin's efforts could not be deemed works-made-for-hire as Merkin was not an employee and had never executed a sufficient special commission agreement. *Id.* at 256.

183. See 17 U.S.C. § 201(b) (2001).

184. *Casa Duse*, 791 F.3d at 256.

185. Jessica Litman, *What Notice Did*, 96 B.U. L. REV. 717, 741 n.137 (2016).

186. See *supra* notes 43–50 and accompanying text.

work-made-for-hire doctrine—by introducing it as the effective standard for determining the broader notion of authorship.

First, the court argued that, where “multiple individuals lay claim to the copyright in a single work, the dispositive inquiry is which of the putative authors is the ‘dominant author.’”¹⁸⁷ But courts have typically used the “dominant author” inquiry to assess whether two or more parties claiming creative contributions to a copyright work had sufficient intent to become joint authors, rather than to resolve a controversy between a hiring party and its creative labor.¹⁸⁸ Nevertheless, the Second Circuit employed the inquiry and, in the process, drew on three factors to carry it out: decision-making authority, billing and written agreements with third parties.¹⁸⁹ Based on these factors, the court determined that Casa Duse, and not Merkin, was the “dominant author” of the raw footage and, therefore, the copyright holder.

When one takes a step back from the court’s analytical framework, the problems in the court’s reasoning become clear. Importantly, none of the three factors used by the court to determine the “dominant author” measure Merkin’s creative contribution, the scope of his originality, or even his role in the fixation of the work of authorship—the traditional focus of any authorship query. Instead, the factors represent nothing more than proxies to ascertain at whose instance and expense a work was made. Admittedly, the *Casa Duse* court did not expressly discuss the terms “instance” or “expense” at any point. But, its application of the “dominant author” rubric to determine in whom authorship should vest effectively reintroduced the primacy of instance-and-expense in a case with competing claims between a hiring party and a creator—the precise scenario in which the work-made-for-hire doctrine governs the vesting of rights. When the court emphasized that, among other things, “Casa Duse initiated the project; acquired the rights to the screenplay; selected the cast, crew and director; controlled the production schedule; and coordinated (or attempted to coordinate) the film’s publicity and release,”¹⁹⁰ it was telling us that the work was made at Casa Duse’s

187. *Casa Duse*, 791 F.3d at 260.

188. The idea of a “dominant author” comes from *Childress v. Taylor*, where the Second Circuit considered “the standards for determining when a contributory to a copyrighted work is entitled to be regarded as a joint author,” *Childress v. Taylor*, 945 F.2d 500, 501 (2d Cir. 1991), and, only in passing, made two references to the concept. *See id.* at 508. The *Childress* court rejected attempts by actress Taylor to claim joint authorship of a play written by long-time playwright Childress when Taylor merely provided underlying research materials regarding the subject of the play (the life of ‘Moms’ Mabley) and, “[a]s the actress expected to portray the lead role . . . also made some incidental suggestions, contributing ideas about the presentation of the play’s subject and possibly some minor bits of expression.” *Id.* at 509.

189. *Casa Duse*, 791 F.3d at 260.

190. *Id.*

instance and expense, Casa Duse's (minimal, if not non-existent) role in the creative aspects of the work be damned.

To appreciate just how untethered the court's analysis is from fundamental copyright principles, it is worth considering how differently the Supreme Court approached the authorial determination in the *Burrow-Giles* decision over a century ago. In *Burrow-Giles*, it was "arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, [or] suggesting and evoking the desired expression" that constituted the essence of photographic authorship.¹⁹¹ Control of such fundamentally non-creative business and legal decisions as calendaring, hiring, publicity, and rights acquisition did not constitute any part of the authorial inquiry. In short, while *Burrow-Giles*'s authorial inquiry focused on who provided the (pre)dominant creative contribution, *Casa Duse*'s authorial inquiry focused on who provided the dominance, period.

All told, as Jay Dougherty has argued, *Casa Duse* "undermines the careful balance that Congress struck in the 1976 Act in dealing with what kinds of commissioned works could be works made for hire."¹⁹² The decision brought back, by judicial fiat, the instance-and-expense test expressly overridden by statute a generation ago and, in the process, subverted the functioning of the 1976 Act's work-made-for-hire doctrine. Issued just days after *Garcia II*, the decision rested heavily on the logic of *Garcia II*, finding that acceptance of Merkin's claims would undermine filmmaking's inherently collaborative process by subjecting final cuts to innumerable individual copyright claims.¹⁹³ In the process, *Casa Duse* gave immediate credence to Kozinski's dissent in *Garcia II*, which warned that "the majority is wrong and makes a total mess of copyright law, right here in the Hollywood Circuit."¹⁹⁴ With the undermining of long-held practices and understandings in the motion picture industry and the creation of a "mutant species of work for hire,"¹⁹⁵ the impact of *Garcia II* is already being felt, from performer rights to even broader questions of authorship impacting directors.

191. *Burrows-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 55 (1884).

192. Jay Dougherty, *The Misapplication of "Mastermind": A Mutant Species of Work for Hire and the Mystery of Disappearing Copyrights*, 39 COLUM. J.L. & ARTS 463, 468 (2016).

193. *Casa Duse*, 791 F.3d at 258 (reaffirming *Garcia II* and, on the basis of its holding, finding that acceptance of Merkin's claims would undermine filmmaking's collaborative process by subjecting final cuts to innumerable individual copyright claims).

194. *Garcia v. Google, Inc. (Garcia II)*, 786 F.3d 733, 749 (9th Cir. 2015) (Kozinski, J., dissenting).

195. See Dougherty, *supra* note 192, at 468 (noting, tongue-in-cheek, that Casa Duse has benefited lawyers who, like the author, regularly represent production companies like the author since, "I don't really have to deal with paperwork anymore it looks like—at least for anything that didn't previously exist before the film separately. I don't have to worry about work for hire agreements.").

E. RECONSIDERING *BURROW-GILES*

In short, *Garcia II* and its progeny threaten to widen the disconnect between the avowed teleological aim of the copyright regime—the rewarding of creativity—and copyright’s apparent vesting rules, which seem to deny authorship status to a wide range of creators on the grounds. To better understand this reading of the law by the courts, which has fetishized authorial singularity and the control of fixation, it is instructive to look back to the starting point of American authorship jurisprudence: *Burrow-Giles Lithographic Co. v. Sarony*.¹⁹⁶

In 1865, Congress extended, by statute, the subject matter of copyright to include the product of a recent invention: the photographic camera.¹⁹⁷ But it was unclear whether Congress had the authority to do so, as the Constitution only authorizes grants of copyright protection to “authors” for their “writings.”¹⁹⁸ In 1884, the Supreme Court finally confronted this question. In *Burrow-Giles*, the Court asked whether the creation of a photograph—namely, a posed shot of Oscar Wilde taken in 1882 by Napoleon Sarony—involved sufficient human originality to constitute a work of authorship. In short, the Court had to ascertain whether photography was more science or art; whether it merely represented an act of mechanical reproduction facilitated by a scientific process involving the transmission of light or it constituted the product of a series of deliberate creative decisions made by a human being.¹⁹⁹ In a much heralded and widely cited decision,²⁰⁰ the court concluded the latter, thereby affirming the extension of copyright protection to the then-new technology of photography.

But besides deciding the issue of whether photography constituted a work of authorship, *Burrow-Giles* did something else altogether: it vested the copyright to the particular image in question to the photographer—the individual *behind* the camera. To understand the consequence of this decision, consider that, in 1884, such a conclusion was by no means foregone, and the court could have identified significant creative contributions from a variety of sources. For example, authorship could just as well have vested in the person *in front of* the camera. After all, “self-proclaimed aesthete” Oscar Wilde added key expressive elements to the photograph at issue with his carefully constructed

196. *Burrow-Giles*, 111 U.S. 53.

197. Copyright Act of 1865, ch. 126, 13 Stat. 540 (Act of March 3, 1865).

198. U.S. CONST., art I, § 8, cl. 8.

199. Or, as Christine Haight Farley has put it, the court had to ask: “Was it a scientific process involving the mere transmission of light, or did the resulting product reflect the genius of a Romantic author?” Christine Haight Farley, *The Lingering Effects of Copyright’s Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 409 (2004).

200. *Id.* at 386 (noting that “it is a well-known case in copyright law frequently cited for propositions about the originality standard.”).

persona, expression and “trademark look with his head resting on his hand.”²⁰¹ In addition, there were other individuals behind the scenes who possessed viable claims to authorship. Benjamin Richard, Sarony’s long-time cameraman and collaborator, actually clicked the shutter and, in the process, contributed “creative choices in the precise timing to click the shutter, the angle of the shot, the frame, the focus, the distance from the subject, [and] the centering of the subject.”²⁰² And it is entirely possible that an unknown make-up artist and costumer helped set out the distinctive compositional elements of the scene, which featured tapestries, fur and a carefully mounded rug on which Wilde rested his foot.

Yet the court did not consider these alternative sources of authorship at all. As Christine Haight Farley points out, it is “reasonable to question why the Court had chosen not to locate authorship in other practices” besides the directorial activities of the photographer.²⁰³ The answer, at least in part, may come from a key fact established at the outset of the opinion: Wilde and Sarony had expressly contracted away the issue (at least vis-à-vis each other) and entered into an agreement that specifically deemed Sarony, and not Wilde, the “author, inventor, designer, and proprietor of the photograph.”²⁰⁴

The existence of this contract—long overlooked by readers of the case—is critical for at least two reasons. First, at a minimum, the contract appears to preclude consideration of Wilde’s authorial role. Thus, while subsequent observers and courts have frequently read *Burrow-Giles* to stand for the proposition that the author is the person behind the camera, it says nothing of the sort. In fact, such a possibility was *not at issue in the case*. Instead, the court was merely considering whether photographs were works of authorship such that the extension of copyright protection to them came within the scope of the Constitution’s Copyright Clause.

The existence of the contract is also significant for another reason. It suggests that, even if photographs did come under the scope of copyright protection, it was not at all clear at the time in whom those rights would vest. Sarony and Wilde had elected to decide the matter contractually. But, absent a contract, various parties, including the photographer and the subject, may have made viable claims to authorship. Indeed, *Burrow-Giles* actually suggests that the question of who could be an author was at least open for discussion. After all, as previously mentioned,²⁰⁵ works

201. *Id.* at 433.

202. *Id.* at 434.

203. *Id.* at 433.

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

205. *See supra* notes 7–8 and accompanying text.

in the performance and visual arts, where creation and fixation might diverge, were an entirely new addition to copyrightable subject matter.

That said, *Burrow-Giles* did carefully circumscribe the options available for the formal vesting of authorship. It did so by conceptualizing authorship in manifestly unitary terms that encouraged the conferring of rights in a single “master mind.” In the past century, this notion of a “master mind” has permeated the annals of copyright jurisprudence and has strongly nudged courts in the direction of conflating authorship and fixation.

The idea of vesting copyright in a singular “master mind” entered the copyright lexicon directly from an English case, *Nottage v. Jackson*,²⁰⁶ which was decided just months before *Burrow-Giles*. In *Nottage*, the Court of Queen’s Bench had its first major foray into the world of photographic copyrights, and its decision in the matter would become one upon which the *Burrow-Giles* court extensively relied.²⁰⁷ In fact, *Nottage* was the only case law cited in the entire *Burrow-Giles* decision.

Nottage was an infringement action brought by George Swan Nottage and Howard John Kennard, the owners of the London Stereoscopic and Photographic Company.²⁰⁸ Nottage and Kennard claimed that the defendants had unlawfully misappropriated their photograph of the Australian cricket team. The defendants demurred, claiming that Nottage and Kennard could not maintain the action since they were not the authors of the photograph in question. Unlike *Burrow-Giles*, the *Nottage* court did not ascertain the validity of a statute which had extended copyright protection to photography. Instead, it determined who, as between two competing theories, would be the author of the cricket photograph: Nottage and Kennard, on one hand, or their employee-photographer (a certain Mr. Reynolds, whom Nottage and Kennard had sent at their behest to the Oval cricket-grounds in Kenington, some fifty miles away, to take a portrait of the Australian national team), on the other. The court chose the latter option.²⁰⁹ And, in

206. *Nottage v. Jackson*, 11 Q. B. Div. 627 (1883).

207. *Burrow-Giles*, 111 U.S. at 59 (“The question here presented is one of first impression under our constitution, but an instructive case of the same class is that of *Nottage v. Jackson*, 11 Q. B. Div. 627.”).

208. *Nottage*, 11 Q. B. Div. at 627.

209. Interestingly, the *Nottage* decision served to invalidate the concept of work-made-for-hire under UK copyright law for many years. See, e.g., Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455, 486–87 (1991) (noting how romantic Anglo-American notions of authorship, as epitomized by *Nottage*, cut against the recognition of a work-for-hire doctrine). This aspect of the *Nottage* holding was certainly not adopted in the United States, where work-made-for-hire were, at a minimum, implicitly recognized by the Supreme Court in *Bleistein*. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 248 (1903) (“There was evidence warranting the inference that the designs belonged to the plaintiffs, they having been produced by persons employed and paid by the plaintiffs in their establishment to make those very things.”); see also I.T. Hardy, *An Economic Understanding of Copyright Law’s Work-Made-for-Hire*

the process, all three members of the panel—Lord Justice Cotton, Lord Justice Bowen and Justice Brett, the Master of the Rolls—undertook a similar approach for determining the question of authorship by looking at who, among several options, was best suited for the task.²¹⁰ Cotton formulated authorship as vesting in the “master mind” behind the work;²¹¹ Bowen said the author is “the man in fact who . . . is most nearly the effective cause of the representation when complete;”²¹² and Brett proclaimed that the author is the person who “effectively is as near as he can be[] the cause of the picture which is produced.”²¹³

By locating authorship in the “master mind,” or the person who is most clearly the *but-for* cause of the final work, all three justices made an identical assumption in their reasoning: that authorship is singular and the rights associated with authorship should vest in a sole individual.²¹⁴ Bowen expressly addressed the issue, rationalizing that, since the statute used the singular term “author” and the term of protection was deemed to be the natural life of said author, the statute did not envision “the case of an author being more than one person.”²¹⁵ And, in a move that might make certain modern-day court critics shudder with horror, the Supreme Court directly adopted this notion of a single “master mind” wholesale—from a foreign court applying a different law under a legal system lacking a Constitution, no less. *Burrow-Giles* conceptualizes authorship in strictly unitary terms as “*he* to whom anything owes its

Doctrine, 12 COLUMBIA-VLA J.L. & THE ARTS 181, 181 n.1 (1988) (noting that the work-made-for-hire doctrine was first codified in the U.S. with the Copyright Act of 1909, but that the *Bleistein* decision gave the doctrine its first Supreme Court recognition and that “lower courts had been dealing with the concept for decades before that.”).

210. *Nottage*, 11 Q. B. Div. at 627.

211. *Nottage*, 11 Q.B. Div. at 627 (“In my opinion, ‘author’ involves originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph.”).

212. *Id.*

213. *Id.* (finding that authorship vests in the person who effectively is as near as he can be, the cause of the picture which is produced, that is, the person who has superintended the arrangement, who has actually formed the picture by putting the persons in position, and arranging the place where the people are to be—the man who is the effective cause of that.”).

214. Interestingly, the justices rejected the idea that the authorship could vest in a single *corporate* body as a work-made-for-hire. *See id.*

215. Bowen added that,

The person who drew this section evidently thought that in ninety-nine cases out of a hundred there would only be one author. The idea of there being two authors seems never to have presented itself to him, which shows he took rather the notion I have formed in common with the rest of the court as to the definition of the term.

Id. Brett also struggled with the contention that two individuals could be deemed authors: “Can two people be the authors of a photograph? It is difficult to say; but if they are, for whose life is it to last?” he asked. *Id.*

origin; originator; maker; **one** to who completes a work of science or literature.”²¹⁶

As a foundational decision, *Burrow-Giles*’s concept of the “master mind,” which epitomizes the romantic notion of “solitary authors” birthing original works “ex nihilo through their intellectual labors,”²¹⁷ pervades our jurisprudence and “lies at the normative heart of our vision of copyright.”²¹⁸ For example, the concept is central to the reigning joint authorship standard, which makes the possibility of joint authorship exceedingly difficult to achieve. As courts have generally held, joint authorship cannot occur unless there is express intent on the part of **both** parties to perceive themselves as co-authors and to enter into a co-authorship relationship.²¹⁹ In effect, this standard threatens to give dominant collaborators “the power to unilaterally ‘will away’ joint work status by forming the subjective intent to deny joint authorship to other collaborators.”²²⁰ Entities with superior bargaining power will typically preempt the possibility of such co-authorship claims via contractual means, by having the weaker party assign all aspects of his or her work to the entity. But, even when they (often negligently) fail to take such steps, courts have protected them from a loss of full control over collaborative works with the narrow reading of the joint authorship doctrine, which simply allows them to deny the possibility of joint authorship by reliance

216. *Burrows-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58 (1884) (emphasis added).

217. Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 *YALE L.J.* 186, 188 (2008).

218. *Id.*

219. *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000); *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991); see also Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 *EMORY L.J.* 193 (2001) (arguing that courts have privileged intention over creative effort in formulating the joint authorship doctrine). While the express definition of ‘joint work’ in the Copyright Act has an intent requirement (*i.e.*, that the “work is prepared . . . with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole”), see 17 U.S.C. § 101, indicating that the intent requirement could be read in a variety of ways that can make the possibility of joint authorship far more or far less likely. As Shyamkrishna Balganesesh has argued, intent could be viewed as an intent to merge one’s individual contributions (the process), a desire to conceive of oneself as a co-author (the end), or a desire to enter into a co-authorship relationship (legal). See, e.g., Shyamkrishna Balganesesh, *Unplanned Coauthorship*, 100 *VA. L. REV.* 1683, 1699–1700 (2014) (“While intention certainly entailed a scrutiny of the parties’ state of mind—either subjective or objective—the legislative history was silent on the question of what the intention needed to be directed at to meet the definition’s requirement. Was it sufficient if the parties evinced an intention to collaborate in the production of the work? Or did they need to additionally carry an intention to become coauthors as a legal matter, by producing a work of joint authorship and recognizing its consequences? Not surprisingly, courts have struggled to answer these questions—despite their continuing emphasis on the idea of intention.”).

220. LaFrance, *supra* note 219, at 224. The Ninth Circuit has acknowledged this problem and clarified that the intent requirement should be read objectively, rather than subjectively. See *Aalmuhammed*, 202 F.3d at 1234 (“We say objective manifestations because, were the mutual intent to be determined by subjective intent, it could become an instrument of fraud, were one coauthor to hide from the other an intention to take sole credit for the work.”).

on their intent to take full credit for the work.²²¹ Some courts have even justified these results by explicitly appealing to the need to protect “master minds” from hangers-on or lesser talents swooping in and receiving authorship credit. As the Second Circuit posited in *Childress v. Taylor*, its leading case on the joint authorship doctrine, the requirement of intent is particularly important when “one person . . . is indisputably the dominant author of the work and the only issue is whether that person is the sole author or she and another . . . are joint authors”²²² and, therefore, “care must be taken . . . to guard against the risk that a sole author is denied exclusive authorship status simply because another person render[s] some form of assistance.”²²³ Meanwhile, such reluctance to recognize co-authorship appears to betray the realities of the artistic process and the multiplicity of important, original and creative contributions in the development of works protected under the Copyright Act.

Most significantly for our purposes, the “master mind” heuristic has led courts to approach authorship as a search for a single person in whom to vest rights.²²⁴ This, in turn, gives rise to a strong temptation to bestow rights automatically in the one who fixes the work in a tangible medium. After all, while many individuals can appear before the camera or assist in wardrobe, scene-setting and make-up behind the scenes, the fixer is usually singular—only one person literally clicks the button on the camera. The fixer is also readily knowable, since the image (in both the development process of yore and the instant production process of

221. See, for example, *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998), where the plaintiff’s independently copyrightable contributions were merged into the final version of the play *Rent* but the joint authorship claim was defeated because, among other things, the defendant/credited-author billed himself as a sole author and intended to retain sole discretion as to the final version of the play.

222. *Childress v. Taylor*, 945 F.2d 500, 508 (2d Cir. 1991).

223. *Id.* at 504. Oddly enough, as Mary LaFrance notes, courts generally presume that co-authorship creates a duty to split profits evenly amongst co-authors. See LaFrance, *supra* note 219, at 194 (citing relevant cases stating same); see also 1–6 NIMMER ON COPYRIGHT § 6.08 (2016) (“In the absence of agreement to the contrary, the traditional approach has been that all joint authors share equally in the ownership of the joint author . . . even when it is clear that their respective contributions to the joint work are not equal.”). But a default 50-50 split is merely a presumption, at best; courts are, in fact, free to allocate co-authorship shares along different lines if it comports with the parties’ intention or better reflects the “relative portion [of] their individual [creative] contributions” to the final work. See 1–6 NIMMER ON COPYRIGHT § 6.08 (acknowledging that the Copyright Act adopted the rule that “joint authors were to be treated as tenants in common in their ownership of the joint work” and that “[i]t has long been recognized that tenants in common ‘need not have equal shares in the property’”); see also 17 U.S.C. § 201(a) (2001) (not dictating any particular share allocation for co-authors).

224. As various commentators have noted, the idea of the “master mind” is a key concept in the romantic conception of authorship, which conceptualizes authors as solitary geniuses whose mythic individual efforts result in the creation of original works *ex nihilo*. See JAMES BOYLE, SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 51–60 (1997); James Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U.L. REV. 625, 629 (1988); Jaszi, *supra* note 209, at 455–63.

today) usually remains with him or her—thereby making identification of authorship more ascertainable. Crediting norms also favor the fixer, as his or her identity is usually memorialized. Master minds, after all, are known and do not toil in obscurity or anonymity. Thus, even though the *Burrow-Giles* court was precluded from considering the subject of the photograph as a source of authorship, it is perhaps not surprising that we have (over)read *Burrow-Giles* as announcing a default standard vesting copyright in the person behind the camera—a move that triggered a century-long move towards the conflation of authorship and fixation in copyright jurisprudence.

CONCLUSION

Although we have gone through more than two centuries of copyright jurisprudence without having fully grappled with the notion of authorship, the decoupling of creation from fixation and large-scale technological advances have brought those days to an end. The *Garcia v. Google* case is emblematic of the types of fundamental questions—both about the nature of authorship and the recognition of creative contributions by those who do not literally fix works in a tangible medium—that courts will have no choice but to address in the coming years. As such, *Garcia* represents only the opening salvo in the coming battle over authorship. But it was a dramatic broadside: in a watershed moment, authorship-as-fixation became the law of a circuit for the very first time.

While the Supreme Court's dicta some three decades ago in *CCNV*²²⁵ appeared to embrace a default position of authorship-as-fixation, it was not absolute in its conviction. With some circumspection, the Court noted that it was a “general” rule that copyright vests in the individual who fixes a creative work.²²⁶ Thus, the Supreme Court left room for instances where authorial interests could vest in someone not responsible for capturing a creative work in a tangible medium. The *en banc* panel in *Garcia* did something else altogether by flatly rejecting the plaintiff's copyright claim because “she played no role in the fixing” of the claimed work.²²⁷ In the process, the court seemingly announced a bright-line rule mandating that “a performer must personally record his creative expression in order to retain any copyright interest in it.”²²⁸ And, unlike the Supreme Court in *CCNV*, the issue of authorship-as-fixation was central to the resolution of *Garcia*. Thus, authorship-as-fixation now

225. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1988).

226. *Id.* at 737.

227. *Garcia v. Google, Inc. (Garcia II)*, 786 F.3d 733, 744 (9th Cir. 2015).

228. *Id.* at 753 (Kozinski, J., dissenting).

threatens to become the unmalleable standard for the vesting of copyright interests.

Our exegesis of *Garcia* and related cases that challenge the authorship-as-fixation regime—including those involving animal selfies, sex tapes, peeping toms, surveillance footage, voyeuristic art, and even ordinary photography—suggests that we should not accept such a move without significantly more scrutiny. As we have detailed, courts have badly mangled basic copyright principles in the process of hewing to the authorship-as-fixation orthodoxy, a result that is not surprising given that the doctrine is both legally tenuous and intellectually incoherent. And, as our analysis has demonstrated, a strict authorship-as-fixation rule betrays copyright law's role in recognizing and rewarding creativity and denies copyright interests to the very individuals who have provided significant, if not the most important, original contributions to works within copyright's traditional subject matter.

Recognizing the copyright interests of performers in front of the camera and creative contributors behind the camera—even if they have nothing to do with a work's fixation or that fixation is ultimately controlled by someone else—may well represent an idea fraught with insurmountable landmines. The liberalization of authorship may indeed balkanize rights in such an unwieldy way that it would adversely impact the alienability of intangible rights to creative content and the market for licensing works. It may also have profound First Amendment implications. As a result, our juridical conception of authorship, which typically vests rights in a single “master mind” behind the camera, might constitute a convenient and valuable legal fiction that gainsays such troubles and serves important manageability goals. But it is important to remember that the possibility of performer copyrights does not appear foreclosed by the Copyright Act and, as illustrated, there are many good reasons to consider the concept, particularly in certain circumstances. As such, it is not a matter that should simply be decided by judicial fiat. A broader debate over the issue is needed before authorship-as-fixation becomes the law of the land. Hopefully, this Article represents a small step in that direction.