

Texas Review of Entertainment & Sports Law



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Building Character: How to Grant Actors Limited Copyright Protection for Performances Without Creating a New Species of Copyrighted Work

Makoa Kawabata*

INTRODUCTION

“Is your Muhammad a child molester?”

– *Innocence of Muslims*

Rife with lines like these, it is not hard to see why the 14-minute propaganda video *Innocence of Muslims* sparked a global controversy after its upload to YouTube in 2012. The video sparked violent protests in Afghanistan, Indonesia, the West Bank, the Philippines and Yemen,¹ which led countries like Brazil, Turkey, Singapore and Jordan to order YouTube to take the video down.² The Obama administration even asked YouTube to evaluate whether the video violated YouTube’s terms of service,³ and US Ambassador to the UN Susan Rice initially cited the video as a potential precipitating factor in the 2012 terrorist attacks on the US embassy in Benghazi.⁴ An Egyptian cleric issued a fatwa and

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1. *Fatwa Issued Against ‘Innocence of Muslims’ Film Producer*, TELEGRAPH, Sept. 18, 2012, <http://www.telegraph.co.uk/news/worldnews/middleeast/lebanon/9549664/Fatwa-issued-against-Innocence-of-Muslims-film-producer.html>.

2. *Brazil Court Orders YouTube to Remove Anti-Islam Film*, REUTERS, Sept. 26, 2012,, available at <http://www.reuters.com/article/2012/09/26/us-protests-brazil-idUSBRE88P05A20120926>; *Turkey to Block ‘Innocence of Muslims’ On YouTube*, HUFFINGTON POST, Sept. 26, 2012, http://www.huffingtonpost.com/2012/09/26/turkey-innocence-muslims-youtube_n_1915514.html; *Google Blocks Access to Anti-Islam Film in Singapore*, STRAITS TIMES, Sept. 20, 2012, <http://www.straitstimes.com/breaking-news/singapore/story/google-blocks-access-anti-islam-film-singapore-20120920>; Mohammad Ghazal, *Google Blocks Access to Anti-Islam Film Trailer in Jordan*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTER (Sept. 22, 2012), <http://business-humanrights.org/en/google-blocks-access-to-anti-islam-film-trailer-in-jordan>.

3. Dawn C. Chmielewski, *YouTube’s Role at Issue Over Video that Incited Mideast Violence*, LOS ANGELES TIMES, Sept. 13, 2012,, <http://articles.latimes.com/2012/sep/13/business/la-fi-ct-youtube-accountability-20120914>.

4. *Ambassador Rice: Benghazi Attack Began Spontaneously*, NBC NEWS, Sept. 16, 2012, http://usnews.nbcnews.com/_news/2012/09/16/13896494-ambassador-rice-benghazi-attack-began-spontaneously?lite; *Rice Addresses Turmoil in the Middle East*, NBC NEWS, Sept. 16, 2012, <http://www.nbcnews.com/video/meet-the-press/49051702> (“This is a response to a hateful and offensive video that was widely disseminated throughout the Arab and Muslim world.”).

urged “the Muslim youth in America and Europe to do this duty, which is to kill the director, the producer and the actors and everyone who helped and promoted the film.”⁵

After receiving personal death threats, Cindy Lee Garcia, an actor in the video who had been misled to believe that the project was an adventure film called *Desert Warrior*, sued for an order for the video’s takedown.⁶ In *Garcia v. Google*, Garcia argued that she owned a copyright interest in her performance, independent from the copyright in the video itself, and that she never licensed that copyright to the producer.⁷ The district court treated this as a motion for a preliminary injunction and denied it, but the Ninth Circuit reversed with a 2-1 opinion nearly as controversial among intellectual property experts as the film itself.⁸ Writing for the court, Chief Judge Kozinski found that Garcia was likely to prevail on the merits because:

An actor’s performance, when fixed, is copyrightable if it evinces “some minimal degree of creativity . . . ‘no matter how crude, humble or obvious’ it might be.” That is true whether the actor speaks, is dubbed over or, like Buster Keaton, performs without any words at all. It’s clear that Garcia’s performance meets these minimum requirements.⁹

The court ordered that Google and YouTube immediately remove all copies of *Innocence of Muslims* from their platforms worldwide and prevent future uploads.¹⁰

Circuit Judge N. Randy Smith filed an 18-page dissent,¹¹ and another Ninth Circuit judge made a *sua sponte* request for a vote on whether to rehear *en banc* the panel’s order.¹² Not enough judges voted to rehear,¹³ but in the midst of the proceedings, Garcia applied for copyright registration in her performance with the U.S. Copyright Office, which refused her registration.¹⁴ Subsequently, Google and YouTube petitioned for *en banc* rehearing on the copyright issue¹⁵ and garnered nine supporting *amicus* briefs from a number of unlikely

5. *Fatwa Issued Against ‘Innocence of Muslims’ Film Producer*, *supra* note 1.

6. *Garcia v. Google, Inc.*, 743 F.3d 1258, 1261 (9th Cir. 2014).

7. *Id.* at 1262.

8. Professor David Nimmer, of *Nimmer on Copyright* fame, reportedly agrees with the decision, but his colleague at UCLA School of Law, oft-cited Neil Weinstock Netanel, reportedly called it “a terrible ruling.” Jonathan Handel, *Hollywood Experts Divided on Implications of ‘Muslims’ Ruling*, HOLLYWOOD REPORTER (Feb. 28, 2014), <http://www.hollywoodreporter.com/thr-esq/hollywood-experts-divided-implications-muslims-684607>. The *amici* supporting the Google and YouTube petition for rehearing *en banc* include a number of professors of intellectual property and technology law. See United States Courts for the Ninth Circuit, *Garcia v. Google* (April 15, 2014), http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000725. Volokh Conspiracy contributors are debating the issue online. See Eugene Volokh, *Copyright Meets ‘Innocence of Muslims’: Ninth Circuit Orders Removal of Movie from YouTube, on Copyright Grounds*, VOLOKH CONSPIRACY (Feb. 26, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/26/copyright-meets-innocence-of-muslims-ninth-circuit-orders-removal-of-movie-from-youtube-on-copyright-grounds/>.

9. *Garcia*, 743 F.3d at 1263 (internal citations omitted).

10. *Id.* at 1275, n.9.

11. See *id.* at 1269-78 (Smith, J., dissenting).

12. Eugene Volokh, *Ninth Circuit Judge Calls for Vote on Whether an 11-judge Panel Should Rehear Garcia v. Google Stay Order*, VOLOKH CONSPIRACY (Mar. 6, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/06/ninth-circuit-judge-calls-for-vote-on-whether-an-11-judge-panel-should-rehear-garcia-v-google-inc-stay-order/>.

13. Order of Mar. 14, 2014, *Garcia v. Google, Inc.*, 743 F.3d 1258 (9th Cir. 2014) (No. 12-57302).

14. Mike Masnick, *Google Points Out That Even The Copyright Office Thinks Judge Kozinski’s ‘Innocence of Muslims’ Ruling Is Wrong*, TECHDIRT (Mar. 13, 2014), <https://www.techdirt.com/articles/20140313/01051626558/google-points-out-that-even-copyright-office-thinks-judge-kozinskis-innocence-muslims-ruling-is-wrong.shtml>.

15. Google Inc. and YouTube, LLC’s Petition for Rehearing *En Banc* at 2-3, *Garcia v. Google, Inc.*, 743 F.3d 1258 (9th Cir. 2014) (No. 12-57302).

bedfellows.¹⁶ The petition for rehearing was granted, *en banc* oral argument took place on December 15, 2015,¹⁷ and the court has not issued an opinion as of the publication date of this Article.¹⁸

Google and its supporters – independent filmmakers, Netflix, broadcasters, online sellers like eBay, and silicon valley tech companies like Facebook – seem like unlikely bedfellows, more frequently finding themselves across the trenches from one another in copyright battles. But the *Garcia v. Google* ruling has brought these companies together as they argued that the ruling upsets the bedrock of copyright law on which they have spent decades and billions of dollars building their content creation and distribution businesses.¹⁹ This sentiment is made clearest in one of Google’s emergency motions, where it argued that the ruling “opens the door to an extra in even ‘Gone With the Wind’ contacting Netflix and demanding that it purge every copy of the film from its inventory.”²⁰

This Article argues that, as a general matter, performers who appear in works of authorship like motion pictures do not have copyrightable interests that exist independent of the larger work itself. Section I acknowledges Judge Kozinski’s conclusion that performers’ contributions can meet the minimum requirements for copyright protection (original works of authorship fixed in a tangible medium of expression²¹), but disagrees, arguing that they are instead the uncopyrightable “procedure” or “process” by which works are performed. Section I.A.1. argues that even if performances in motion pictures are eligible to be considered works, many of their elements – including the creative process leading up to the embodiment of the performance and anything characterized as *scènes-à-faire* – cannot come into account in the originality analysis. The section then goes on to note that performances would likely be considered derivative works, which in some courts must meet a higher standard for originality than the “modicum of creativity.”²² The Section concludes by arguing that short or commonplace performances likely cannot meet that heightened requirement. Section I.A.2. argues that a performance in a motion picture is not an independently copyrightable “work” as defined by the Copyright Act,²³ but instead a copyrightable element of the unitary whole, pursuant to the text of the Copyright Act and the reasoning of *Burrow-Giles Lithographic Co. v. Sarony*.²⁴ The section acknowledges the

16. United States Courts for the Ninth Circuit, *supra* note 8 (briefs are from the Electronic Frontier Foundation, News Organizations, California Broadcasters, Floor64 & Organization for Transformative Works, International Documentary Ass’n, Netflix, Inc., Adobe Systems, Professors of Intellectual Property Law and Internet Law Professors).

17. Oral Argument, *Garcia v. Google, Inc.*, 771 F.3d 647 (No. 12-57302), available at <https://www.youtube.com/watch?v=EMTaBkOBR2Q>.

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

19. See generally Brief of *Amicus Curiae* Netflix, Inc., *Garcia v. Google, Inc.*, 743 F.3d 1258 (9th Cir. 2014) (No. 12-57302); Brief of Adobe Systems Inc.; Automattic Inc.; eBay Inc.; Facebook Inc.; Gawker Media, LLC, Iac/Interactivecorp; Kickstarter, Inc.; Pinterest Inc.; Tumblr Inc.; Twitter, Inc.; And Yahoo!, Inc. as *Amici Curiae* in Support of Google And YouTube’s Petition For Rehearing *En Banc*, *Garcia v. Google, Inc.*, 743 F.3d 1258 (9th Cir. 2014)(No. 12-57302); *Amicus Curiae* Brief in Support of Defendants-Appellees Google Inc. And YouTube, LLC by California Broadcasters Association, *Garcia v. Google, Inc.*, 743 F.3d 1258 (9th Cir. 2014) (No. 12-57302).

20. Google Inc. and YouTube, LLC’s Emergency Motion Under Circuit Rule 27-3 for a Stay Pending Disposition of Petition for Rehearing *En Banc* at 17, *Garcia v. Google, Inc.*, 743 F.3d 1258 (9th Cir. 2014) (No. 12-57302) (internal citation omitted).

21. 17 U.S.C. § 102(a) (2012).

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

23. 17 U.S.C. § 102 (2012).

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

counterargument that acting performances should be considered analogous to pantomime or choreographic works, but stirs up trouble for that argument by pointing out more reasons why this characterization would dictate a heightened originality requirement. Section I.A.3. explains why the necessary “control” element of the authorship and fixation requirements are fatal to actors’ claims to copyright in motion-picture performances. Section I.B. draws from the law reviewed in Section I.A. to address and critique the arguments of the parties, the majority and dissenting opinions, and the Copyright Office’s letter in *Garcia v. Google*, concluding that the majority’s reasoning was in error on the issue of copyright for performers in motion pictures.

Section II.A. borrows from character jurisprudence, examining the tests developed for determining when characters in literary, pictorial, and audiovisual works can be copyrightable independent from the works in which the characters appear. Section II.B. concludes that performers are eligible for copyright protection independent from the works in which they appear, but that instances of performer authorship are rare and performers’ copyright interests are, at best, very narrow. The Article closes by drawing from the law on originality (especially as it applies to derivative works), authorship, and fixation as reviewed in Section I to make the argument that a performer in a motion picture is at most eligible for joint authorship of the character as it is depicted, but only when the performance adds creative elements to a character that warrants copyright independent of the motion picture in which it appears.

I. ALL THE WORLD’S A STAGE, AND ALL THE MEN AND WOMEN MERELY PLAYERS²⁵

A. BUT PLAYERS ARE NOT GENERALLY ENTITLED TO COPYRIGHT PROTECTION, AT LEAST ACCORDING TO THE CONSTITUTION

The Constitution granted Congress the power to enact copyright laws in Article I, § 3, clause 8, empowering Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings.”²⁶ In the 1976 Copyright Act, Congress limited the grant of copyright protection to “original works of authorship fixed in any tangible medium of expression,”²⁷ with the rationale for the limitation as follows:

In using the phrase ‘original works of authorship,’ rather than ‘all the writings of an author’ now in section 4 of the statute, the committee’s purpose is to avoid exhausting the constitutional power of Congress to legislate in this field, and to eliminate the uncertainties arising from the latter phrase. Since the present statutory language is substantially the same as the empowering language of the Constitution, a recurring question has been whether the statutory and the constitutional provisions are coextensive. If so, the courts would be faced with the alternative of holding copyrightable something that Congress clearly did not intend to protect, or of holding constitutionally incapable of copyright something that Congress might one day want to protect. To avoid these equally

25. WILLIAM SHAKESPEARE, *AS YOU LIKE IT* act 2, sc. 7; *but see* TOM STOPPARD, *ROSENCRANTZ & GUILDENSTERN ARE DEAD* act 2 (“We’re actors – we’re the opposite of people!”).

26. U.S. CONST. art. I, § 8, cl. 8.

27. 17 U.S.C. § 102(a) (2012).

undesirable results, the courts have indicated that ‘all the writings of an author’ under the present statute is narrower in scope than the ‘writings’ of ‘authors’ referred to in the Constitution. The bill avoids this dilemma by using a different phrase— ‘original works of authorship’— in characterizing the general subject matter of statutory copyright protection.²⁸

Under the Copyright Act, works of authorship include, but are not limited to, eight categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.²⁹

This Section will address the originality, authorship, and fixation requirements, reviewing the law on originality, particularly for derivative works like performances. This Section notes that certain elements of performances are likely to be excluded from the originality analysis under the argument that performances like Garcia’s do not meet the standards for authorship or fixation “by or under the authority of the author” because performers do not have the necessary control over the work or its fixation.³⁰

1. THE ORIGINALITY REQUIREMENT

This Section covers the Constitutional standard for originality, as it applies generally and as it applies to derivative works. The importance of the threshold analysis is readily apparent, and the specific requirements for derivative works will come to bear *infra* Section II.B., which will argue that characters in motion pictures are derivative of source material – the motion picture’s original script or the material on which scripts are based.

a. PERFORMERS HAVE TO GET *FEIST-Y*

Originality is the *sine qua non* of copyright³¹ and a Constitutional requirement for copyright protection.³² However, this element does not seem to present a major obstacle for performers so long as they do not merely copy a preexisting performance.³³

28. H.R. REP. 94-1476, 51, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664.

29. 17 U.S.C. § 102(a) (2012).

30. *See* 17 U.S.C. § 101 (2012).

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

32. *Id.* at 346.

33. *Id.* at 345-46.

In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Supreme Court laid out two lenient requirements for a work to be considered “original” for the purpose of Constitutional analysis and copyright protection. First, the work must be an independent creation. Second, it must exhibit a minimal degree (or “modicum”) of creativity.³⁴ To emphasize how light the burden is, the Court even pointed out that “[o]riginality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.”³⁵ As such, “[T]he vast majority of works make the grade quite easily, as they possess some creative spark,”³⁶ and unless a work’s “creative spark is utterly lacking or so trivial as to be virtually nonexistent,”³⁷ it will be considered an original work.

The Court said that works without the requisite “creative spark” included works that are “so commonplace that it has come to be expected as a matter of course” and works that are “so mechanical or routine as to require no creativity whatsoever.”³⁸ However, it never actually defined what the “creative spark” is. There is disagreement over whether, in determining if a work exhibits the “spark,” courts should look at just the final product, or if they should also take into consideration the creative process leading up to the fixation of a work.³⁹

Creators often invest a significant amount of work and creative energy into making works appear mundane.⁴⁰ For instance, in the motion picture *The Big Lebowski*, the principal actors spent several weeks rehearsing the lines together so their banter would seem like it was just a few friends talking to one another.⁴¹ *Feist* rejected the “sweat of the brow” doctrine, which rewards toil and extends a compilation’s copyright protection beyond selection and arrangement of uncopyrightable facts to the facts themselves when a compiler has expended significant effort in putting together a compilation.⁴²

But in *CCC Information Services v. Maclean Hunter Market Reports*, the Second Circuit seemed to adopt a test for originality that looked not only at the end product, but also the “sweat of the mind” that went into creating it.⁴³ Maclean created and published the “Red Book,” a compilation of used car valuations, updating it eight times a year and tailoring it to specific geographic regions.⁴⁴ The Red Book compiled the editors’ projections for the values of the “average” models of used cars based on “a wide variety of informational sources and their professional judgment.”⁴⁵ CCC’s computer services systematically uploaded “major portions of the Red Book onto its computer network and republish[ed] Red Book information in various forms to its customers.”⁴⁶ The district court ruled that the Red Book was nothing more than a compilation of facts, “selected and organized without originality or creativity, and therefore unprotected under the Supreme

34. *Id.* (citing 1 M. NIMMER & D. NIMMER, COPYRIGHT §2.01 [A], [B] (1990)).

35. *Id.* at 345.

36. *Id.*

37. *Id.* at 359. (citing 1 M. NIMMER & D. NIMMER, COPYRIGHT §1.08 [C][1] (1990)).

38. *Id.* at 362-63.

39. *Garcia v. Google, Inc.*, 743 F.3d 1258, 1264-65 (9th Cir. 2014) (citations omitted).

40. Jenny M. Jones, *THE BIG LEBOWSKI: AN ILLUSTRATED, ANNOTATED HISTORY OF THE GREATEST CULT FILM OF ALL TIME* 92 (2012).

41. *Id.*

42. *Feist*, 499 U.S. at 341.

43. Neil Weinstock Netanel coined this clever expression and used it as an instructional tool in his copyright courses at UCLA School of Law.

44. *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 63 (2d Cir. 1994).

45. *Id.*

46. *Id.* at 64.

Court's teachings in *Feist*.⁴⁷ But the Second Circuit disagreed, concluding that even though the Red Book was a "logical response to the needs of the vehicle valuation market," that did not negate originality.⁴⁸ "To the contrary, the use of logic to solve the problems of how best to present the information being compiled is independent creation" and contained the "creative spark" necessitated by *Feist*.⁴⁹

An artist need only contribute a drop of "sweat of the mind" when creating a work for it to be considered original, even if the output is mundane.⁵⁰ For instance, the Second Circuit reasoned that "[e]lements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved," even when the end result is something that seems so commonplace as a picture of puppies.⁵¹

In *Garcia v. Google*, Judge Kozinski addresses the originality standard by pointing out that "an actor does far more than speak words on a page; he must 'live his part inwardly, and then . . . give to his experience an external embodiment.' That embodiment includes body language, facial expression and reactions to other actors and elements of a scene."⁵² He then argues that in the same way that vocal performances are the expression of an artist's creativity for the purposes of the originality requirement, dramatic performances meet this requirement as well.⁵³ On this analysis, Garcia's performance, as recorded, is at least a copyrightable element of the audiovisual work since it involved choices by the motion picture's author regarding the blocking of the actors, lighting, camera angles, and camera selection, so the final product certainly displays at least a modicum of creativity.⁵⁴

But it is not clear that the creative process leading up to the production of a work should be considered for copyright analysis, and so just as, for example, a photograph or video will not always have the requisite originality, it is not clear that an acting performance will always have the requisite originality either.⁵⁵ The Tenth Circuit in *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.* considered wireframe designs of Toyota cars that Meshwerks had created.⁵⁶ Citing *Feist*, the court wrote that, "in assessing the originality of a work for which copyright protection is sought, we look only at the final *product*, not the process, and the fact that intensive, skillful, and *even creative labor* is invested in the process of creating a product does not guarantee its copyrightability."⁵⁷ So it is unclear whether an actor's internal creative process leading up to the performance should be considered when looking for copyrightable elements of the performance itself, especially when the performance is so brief and limited as to be threatened by the *scènes-à-faire*

47. *Id.* at 64-65.

48. *Id.* at 67.

49. *Id.*

50. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359 (1991).

51. *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992).

52. *Garcia v. Google, Inc.*, 743 F.3d 1258, 1263 (9th Cir. 2014) (citations omitted).

53. *Id.* at 1264 (citing, e.g., *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1141 (9th Cir. 2006) (holding that the plaintiff's claim that the defendant had duplicated her vocal performance, the entirety of which was contained in a copyrighted medium, in a song was within the subject matter of copyright)).

54. *See id.*

55. *Id.*

56. *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258 (10th Cir. 2008). *Infra* Section I.A.1.b. discusses this case in more detail.

57. *Id.* at 1268 (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359-60 (1991)) (first emphasis in original, second emphasis added).

doctrine or the heightened originality requirements for works that resemble choreography or pantomime.⁵⁸

Just because a work is copyrighted does not mean that every element of the work may be protected.⁵⁹ The *scènes-à-faire* doctrine⁶⁰ precludes protection of certain elements of a work when “the expression embodied in the work necessarily flows from a commonplace idea.”⁶¹ Before *Garcia v. Google*, no court had ever ruled on a copyright-infringement suit where the “work” at issue was an acting performance that was part of a motion picture, and so no court has applied the *scènes-à-faire* doctrine to an actor’s performance. However, courts have used *scènes-à-faire* in analyzing literary,⁶² photographic,⁶³ and audiovisual works,⁶⁴ so if courts are to consider performances to be works, then performances are also likely to be subject to *scènes-à-faire* analysis. *Scènes-à-faire* poses a particularly acute threat to short performances like Garcia’s in *Innocence of Muslims*, since time constraints impose limitations on the amount of “originality” an actor can exhibit in his or her performance over and above what is necessary to depict an emotion or deliver a line.⁶⁵ In the same way that “short phrases”⁶⁶ are not eligible for copyright protection even when highly creative,⁶⁷ it is likely that short acting performances are similarly unprotectable since the actor’s available options are necessarily dictated by the idea behind his or her role.⁶⁸

b. . . . AND THEN SOME, IF AUTHORIZING DERIVATIVE WORKS

A “derivative work” is:

[A] 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. A

58. The *scènes-à-faire* doctrine is discussed in more detail *infra* Section I.A.2.

59. *Feist*, 499 U.S. at 348.

60. Translated literally: “scenes that must be done.”

61. *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1082 (9th Cir. 2000). Importantly, some courts treat the *scènes-à-faire* doctrine as a preclusion to copyrightability of a work overall, whereas others treat it instead as a defense to infringement. Compare *Dun & Bradstreet Software Services, Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 214-15 (3d Cir. 2002) (holding that the *scènes-à-faire* doctrine means that copyright protection is denied to common elements of work that are essential to the presentation of the subject matter of the work); *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366, 1375 (10th Cir. 1997) (same) with *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1082 (9th Cir. 2000) (holding that the *scènes-à-faire* doctrine is instead a defense to infringement); *Reed-Union Corp. v. Turtle Wax, Inc.*, 77 F.3d 909, 914 (7th Cir. 1996) (explaining why the *scènes-à-faire* doctrine is separate from the validity of a copyright).

62. See, e.g., *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980).

63. See, e.g., *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 763 (9th Cir. 2003).

64. See, e.g., *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*, 462 F.3d 1072 (9th Cir. 2006).

65. See, e.g., *Swirsky v. Carey*, 376 F.3d 841 (9th Cir. 2004).

66. 37 C.F.R. § 202.1(a) (2004) (“Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents” are not subject to copyright protection.); see also H.R. Rep. No. 90-83, at 14-15 n.1 (1967) (describing “other areas of existing subject matter that this bill does not propose to protect but that future Congresses may want to” and including in the list of “areas of subject matter now on the fringes of literary property but not intended, solely as such, to come within the scope of the bill[.] . . . titles, slogans, and similar short expressions”).

67. This is the predominant rule, but there are exceptions – for instance, there is *dicta* suggesting that “small, highly original phrases” like “Look! . . . Up in the Sky! . . . It’s a Bird! . . . It’s a Plane! . . . It’s Superman!” can sometimes be protected. *Warner Bros. v. Am. Broad. Co.*, 720 F.2d 231, 236, 242 (2d Cir. 1983).

68. *Infra* Section I.B.3. discusses this concept as it applies to *Garcia v. Google* in more detail.

work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship.⁶⁹

The motion pictures in which performers appear are generally derived from preexisting scripts, and even if they are unscripted, they are still based on the creators' "pitches" to the studio that greenlit them.⁷⁰ Alternatively, motion pictures might be considered "joint works" where all the creative contributions, including the script, camerawork, costumes, performances, and sounds, merge into a single unitary whole where the contributing authors "includ[e] the writer of the screenplay, the director, the photographer, the actors, and, arguably, other contributors such as the set and costume designers, *etc.*"⁷¹ This is less frequently the case, but in instances where it is, there would only be one copyrightable work – the motion picture – and joint authorship would be the correct analysis for performers' rights, which is addressed *infra* Section I.A.3.⁷²

In *Gilliam v. ABC*, the court held that a television program was a derivative work, as "a dramatization of the script."⁷³ Monty Python had written screenplays subject to a production contract with the BBC,⁷⁴ which granted the BBC the right to produce and broadcast television versions of the plaintiffs' screenplays, but prohibited it from making alterations without consulting the writers, who retained all rights to the scripts.⁷⁵ ABC licensed Monty Python, then modified it for American television, substantially cutting it and making time for commercials.⁷⁶ ABC argued that the television program was a joint work, where "each contributor possess[ed] an undivided ownership of all copyrighted elements," but the court rejected this argument based on Monty Python's retention of rights, which indicated "that the parties did not consider themselves joint authors of a single work."⁷⁷ The court held that ABC exceeded its license and infringed the copyright in the screenplays by substantially altering the program derived from the written material.⁷⁸

According to the Copyright Office, "[g]enerally, motion pictures by their nature are derivative works. For registration purposes, the motion picture is considered derivative only

69. 17 U.S.C. § 101 (2012). It is important to note that the preexisting work must be copyrightable in order for the following work to be considered "derivative." *Ets-Hokin*, 225 F.3d at 1080. But it need not be the case that the preexisting work be copyrighted for its derivative work to be eligible for copyright. *See, e.g., L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976) ("The underlying work of art may as here be in the public domain."); *Homeowner Options for Massachusetts Elders, Inc. v. Brookline Bancorp, Inc.*, 754 F. Supp. 2d 201 (D. Mass. 2010) *adhered to on reconsideration*, 789 F. Supp. 2d 242 (D. Mass. 2011) (holding that a form based on a public domain document was sufficiently original to constitute a copyrightable derivative work).

70. *See Metrano v. Fox Broad. Co., Inc.*, No. CV-00-02279 CAS JWJX, 2000 WL 979664 (C.D. Cal. Apr. 24, 2000) (not published) (holding that the materials used in a movie pitch, "including the treatment, index cards and tapes, fall within the category of literary and audiovisual works").

71. 1 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.05. *See also* Easter Seal Soc'y for Crippled Children v. Playboy Enterprises, 815 F.2d 323, 337 (5th Cir. 1987) (quoting the same). If this is the case, both the script and the acting performances would be considered elements of the unitary motion picture and joint authorship would be the correct analysis, as *infra* Section I.A.4. addresses.

72. It is nearly impossible for a performer to meet the standard of control necessary to achieve joint authorship status of a motion picture. *See Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 2000).

73. *Gilliam v. American Broadcasting Co.*, 538 F.2d 14, 19 (2d Cir. 1976).

74. But not a work for hire agreement, *id.* at 17.

75. *Id.*

76. *Id.* at 18.

77. *Id.* at 22. This runs afoul of the contemporaneous intent requirement of joint authorship, discussed by *Aalmuhammad* and *infra* Section I.A.4.

78. *Gilliam*, 538 F.2d at 20.

when it incorporates previously registered, published, or public domain material.”⁷⁹ So supposing that the derivative-work analysis is the correct way to approach dramatizations of screenplays, there are three standards for originality in derivative works: the *Batlin*,⁸⁰ *Schrock*,⁸¹ and *Meshwerks*⁸² standards.

The majority in the Second Circuit case *L. Batlin & Son, Inc. v. Snyder* requires that a derivative work exhibit a “substantial variation” from the preexisting work.⁸³ In *Batlin*, the court considered the copyright of the appellants’ plastic “Uncle Sam” toy bank, which was based on, and nearly identical to, a cast-iron bank that was in the public domain.⁸⁴ The appellee, upon learning that the appellant was making plastic Uncle Sam banks, also ordered plastic Uncle Sam banks.⁸⁵ In adjudicating the controversy, the court recognized the need for “an original contribution not present in the underlying work of art.”⁸⁶ And regarding that original contribution, it ruled “that to support a copyright there must be at least some substantial variation, not merely a trivial variation such as might occur in the translation to a different medium.”⁸⁷ It argued that “[t]o extend copyrightability to minuscule variations would simply put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work.”⁸⁸ The Second Circuit confirmed that *Batlin* stands for the proposition that “[t]he law requires more than a modicum of originality” for derivative works.⁸⁹

However, the dissent espoused a different, lower requirement for originality, concluding that “[a]ny ‘distinguishable variation’ of a prior work will constitute sufficient originality to support a copyright if such variation is the product of the author’s independent efforts, and is more than merely trivial.”⁹⁰ The Seventh Circuit adopted a test similar to the *Batlin* dissent’s test in *Schrock v. Learning Curve Int’l, Inc.*⁹¹ It reasoned that “(1) the originality requirement for derivative works is not more demanding than the originality requirement for other works; and (2) the key inquiry is whether there is sufficient nontrivial expressive variation in the derivative work to make it distinguishable from the underlying work in some meaningful way.”⁹² At the outset of the court’s analysis, it assumed that photographs taken of the copyrighted “Thomas & Friends” train-engine characters⁹³ were derivative works of the characters.⁹⁴ The photographs were accurate depictions of the three-dimensional “Thomas & Friends” toys used for advertisement purposes,⁹⁵ and the court’s analysis focused on whether the photographs were sufficiently original to pass

79. Copyright Office, COMPENDIUM II OF COPYRIGHT OFFICE PRACTICES § 480.04, at 400-26.

80. *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir. 1976) (en banc), cert. denied, 429 U.S. 857 (1976).

81. *Schrock v. Learning Curve Int’l, Inc.*, 586 F.3d 513, 521 (7th Cir. 2009).

82. *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1266 (10th Cir. 2008).

83. *Snyder*, 536 F.2d at 487.

84. *Id.* at 488.

85. *Id.*

86. *Id.* (quoting 1 M. NIMMER, THE LAW OF COPYRIGHT §§ 20.2, 93 (1975)).

87. *Id.* at 491.

88. *Id.* at 492.

89. *Waldman Publ’g Corp. v. Landoll, Inc.*, 43 F.3d 775, 782 (2d Cir.1994) (citing *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976) (en banc), cert. denied, 429 U.S. 857 (1976)).

90. *Snyder*, 536 F.2d at 492 (quoting 1 NIMMER ON COPYRIGHT § 10.1 at 34.2).

91. *Schrock v. Learning Curve Int’l, Inc.*, 586 F.3d 513, 521 (7th Cir. 2009).

92. *Id.*

93. More on pictorial characters *infra* Section II.A.

94. *Schrock*, 586 F.3d at 515.

95. *Id.* at 519.

Constitutional muster.⁹⁶ Considering the photographs, the court considered the photographer's "artistic and technical choices," concluding that they "combine to create a two-dimensional image that is subtly but nonetheless sufficiently [the photographer's] own."⁹⁷ It ruled that "[t]he original expression in the representative sample is not particularly great (it was not meant to be), but it is enough under the applicable standard to warrant the limited copyright protection accorded derivative works under § 103(b)."⁹⁸ This is because "the only 'originality' required for [a] new work to be copyrightable . . . is enough expressive variation from public-domain or other existing works to enable the new work to be readily distinguished from its predecessors."⁹⁹

The Tenth Circuit rejected these tests in *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, determining instead that there is no special standard for derivative works.¹⁰⁰ In considering Meshwerks' wireframe versions of Toyota's cars, it "filtered out" everything that was not original expression that transformed the preexisting work, finding that no original expression remained.¹⁰¹ It counseled that courts ought to "separate out that which owed its origin to the putative copyright holder from that which did not, holding only the former copyrightable. In *then* examining the elements that are original to the author, the originality analysis ought to be the same."¹⁰²

* * *

Under none of the *Batlin*, *Schrock*, or *Meshwerks* tests would a rote reading (captured in a sound or video recording to meet the fixation requirement discussed *infra* Section I.A.2.) of a script exhibit sufficient originality to be eligible for copyright as a derivative work.¹⁰³ The only difference between the script and the reading would be the medium, and "[t]he fact that a work in one medium has been copied from a work in another medium does not render it any the less a 'copy.'"¹⁰⁴ The reader's likeness and voice are not copyrightable,¹⁰⁵ so they would not contribute original expression to the preexisting work; they would not add to the "substantial variation" of the *Batlin* test; they would constitute "expressive variation" under the *Schrock* test; and they would be "filtered out" by the *Meshwerks* test.¹⁰⁶ It is unlikely that the mere recording of the performance would contribute an element of originality at all,¹⁰⁷ so the whole enactment would probably be

96. *Id.*

97. *Id.*

98. *Id.* at 519-20.

99. *Id.* at 516 (quoting *Bucklew v. Hawkins, Ash, Baptie & Co., LLP*, 329 F.3d 923, 929 (7th Cir.2003)).

100. *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1266 (10th Cir. 2008).

101. *Id.*

102. *Id.* at 1270 (citing Patry on Copyright § 3:50 ("[T]he standard of originality for derivative works is no different than for nonderivative works.") and Patry on Copyright § 3:55 ("Under the Supreme Court's *Feist* opinion, there is a single test for originality applicable to all works, derivative and nonderivative alike.")).

103. See *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976) (en banc), *cert. denied*, 429 U.S. 857 (1976); *Schrock*, 586 F.3d at 521; *Meshwerks*, 528 F.3d at 1266.

104. NIMMER ON COPYRIGHT § 8.01[B]; see also *Snyder*, 536 F.2d at 491 ("[T]o support a copyright there must be at least some substantial variation, not merely a trivial variation such as might occur in the translation to a different medium."); *Entm't Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1221-24 (9th Cir.1997) (denying copyright protection to 3-D costumes based on 2-D cartoon characters); *Meshwerks*, 528 F.3d at 1266 (denying copyright protection to 2-D models based on cars).

105. *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988).

106. See *Snyder* 536 F.2d at 491; *Schrock*, 586 F.3d at 521; *Meshwerks*, 528 F.3d at 1266.

107. See *Conrad v. AM Cmty. Credit Union*, 750 F. 3d 634, 636-37 (7th Cir. 2014) (reasoning that when a crowd of people recorded a performance on their phones, "[i]t's unlikely that the photos and videos were derivative works; to be such a work, a photograph, or any other copy, must have an element of originality").

considered a “slavish copy” of the preexisting work.¹⁰⁸ But supposing that more expressive performances are eligible for copyright protection, how would courts separate performances with that *Feisty* “spark” (and then some, depending on the test) from those without?

Despite the Court’s admonishment that judges must avoid evaluating the artistic merits of works except within “the narrowest and most obvious limits,”¹⁰⁹ artistic evaluation beyond those limits would be necessary to determine: (1) under the *Batlin* standard, whether a performer’s interpretation of a script is a “substantial variation” from the script; (2) under the *Schrock* standard, whether there is “sufficient nontrivial expressive variation in the derivative work to make it distinguishable from the underlying work in some meaningful way;” and (3) under the *Meshwerks* standard, whether, after “filtering out” all of the contributions that did not originate with the performer, there is still a modicum of creativity. A court could use legal doctrines like merger or *scènes-à-faire* to eliminate some of the elements of performances from the analysis. However, it would necessarily have to evaluate whether performers express sufficient creativity in their “body language, facial expression and reactions to other actors and elements of a scene. Otherwise, ‘every shmuck . . . is an actor [and creator of a derivative work] because everyone . . . knows how to read.’”¹¹⁰

The Article most cited by both the majority and the dissent in *Garcia v. Google*¹¹¹ discussed *Waring v. WDAS Broadcasting Station, Inc.*, a case addressing the issue of originality in performances:

Does the performer’s interpretation of a musical composition constitute a product of such novel and artistic creation as to invest him with a property right therein? It may be said that the ordinary musician does nothing more than render articulate the silent composition of the author. But it must be clear that [highly accomplished actors], or [highly accomplished instrumental artists], by their interpretations, definitely added something to the work of authors and composers which not only gained for themselves enduring fame but enabled them to enjoy financial rewards from the public in recognition of their unique genius; indeed, the large compensation frequently paid to such artists is testimony in itself of the distinctive and creative nature of their performances. . . . [P]roperty rights in intellectual or artistic productions . . . may be acquired by one who perfects the original work or substantially adds to it in some manner . . . The translation of a novel, or its dramatization, vests a distinct property right which is entitled to the same protection as is extended to the original. . . . [I]t is the performer who must consummate the work by transforming it into sound. If, in so doing, he contributes by his interpretation something of novel intellectual or artistic value, he has

108. See, e.g., *Custom Dynamics, LLC v. Radiantz LED Lighting, Inc.*, 535 F. Supp. 2d 542, 549 (E.D.N.C. 2008) (finding no originality in photographs of motorcycle taillights where the “photographs were meant to serve the purely utilitarian purpose of displaying examples of its product to potential consumers, and do not merit copyright protection”); *Oriental Art Printing, Inc. v. Goldstar Printing Corp.*, 175 F. Supp. 2d 542, 546 (S.D.N.Y. 2001) (finding no originality in photographs of Chinese food dishes to sell the food to customers); *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 196-97 (S.D.N.Y. 1999) (finding no originality in photographs that were “slavish copies” of public domain works of art).

109. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359 (1991) (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)).

110. *Garcia v. Google, Inc.*, 743 F.3d 1258, 1263 (9th Cir. 2014) (quoting *Sanford Meisner & Dennis Longwell, Sanford Meisner on Acting* 178 (1987)) (citation omitted).

111. F. Jay Dougherty, *Not A Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 *UCLA L. Rev.* 225 (2001).

undoubtedly participated in the creation of a product in which he is entitled to a right of property, which in no way overlaps or duplicates that of the author in the musical composition. . . . [S]uch a property right inheres in the case of those artists who elevate interpretations to the realm of independent works of art.¹¹²

The Pennsylvania Supreme Court’s discussion of performers whose “genius” “perfects” or “substantially adds . . . something of novel intellectual or artistic value” to the source material seems to require a higher standard than a mere “modicum of creativity” and evokes language of the *Batlin* test for derivative works.¹¹³ But this interpretation skirts around the issue. Even if this is the correct test, the question still remains to be answered, how much “genius” is required to substantially add something to a script? Are only performers of Oscar- or Emmy-winning caliber eligible? Would experts have to testify to resolve the aesthetic issues? Some courts avoid these complications by dismissing outright the notion that performers can create derivative works at all.¹¹⁴

As *infra* Section II.B. argues, using the principles of character jurisprudence to allow for the possibility that performances can be eligible for copyright protection—but only when a performance adds protectable expression to a character eligible for copyright protection independent from the work in which it appears—will make this analysis more focused and legally sound.

2. DON’T HATE THE PLAYER, HATE THE “WORK” REQUIREMENT

In addition to originality, the Constitution requires authorship status of a work for copyright protection.¹¹⁵ The Copyright Act lists eight example categories of copyrightable works in Section 102(a):

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.¹¹⁶

112. *Waring v. WDAS Broad. Station*, 327 Pa. 433, 440 (1937) (citations omitted).

113. *Id.*; *See also* *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976) (en banc), *cert. denied*, 429 U.S. 857 (1976).

114. *See, e.g.*, *Supreme Records v. Decca Records*, 90 F. Supp. 904, 909 (S.D. Cal. 1950) (“There is a line of cases which holds that what we may call generically by the French word representation – which means to perform, act, impersonate, characterize, and is broader than the corresponding English word – is not copyrightable . . . [n]or are . . . gestures or motions of actors. False If recognition were given to the right of ownership in a musical arrangement, we would have to disregard all these cases. We would have to hold that Mr. Charles Laughton, for instance, could claim the right to forbid anyone else from imitating his creative mannerisms in his famous characterization of Henry VIII, or Sir Laurence Olivier could prohibit anyone else from adopting some of the innovations which he brought to the performance of Hamlet.”) (collecting cases).

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

It then states in Section 102(b) that “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”¹¹⁷

Motion pictures, as highly collaborative projects, can be classified as “joint works” (even if they are also derivative of a preexisting work like a novel or even perhaps a script)¹¹⁸ which are defined as works “prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”¹¹⁹ Nearly all of the collaborators’ contributions may be highly creative,¹²⁰ but “those contributions ultimately merge to create a unitary whole.”¹²¹

The Copyright Office, in rejecting Garcia’s application for copyright registration in her dramatic performance in *Desert Warrior*, stated that a “performance [in a motion picture] is either joint authorship or is a contribution under a work made for hire agreement . . . [intended] to be merged into inseparable or interdependent parts of a unitary whole.”¹²² It also stated that Garcia could not assert a claim in “sole authorship of her performance in a portion of the work”¹²³ and that “[t]he same reasoning would apply to the musicians, vocalists or production specialists on a sound recording.”¹²⁴ It went on to hold the following:

The Office has identified at least one exception to the general rule on treating motion pictures as integrated works. Where a separate portion of a motion picture is commissioned, such as a special effects scene that qualifies as a discrete work in itself that is later incorporated into a motion picture, such a separate work may be neither a joint work nor a work made for hire, but rather a work created by an independent contractor. Such an exception is premised on the creation of a stand-alone work that is independently authored, fixed, and sufficiently creative to be considered a separate claim within one or more of the statutory categories of authorship in section 102(a).¹²⁵

However, a performer’s appearance in a motion picture is not a discrete or separate motion picture incorporated into the motion picture.¹²⁶ “Instead, her performance was one

116. 17 U.S.C. § 102(a) (2012).

117. 17 U.S.C. § 102(b) (2012).

118. H.R. Rep. No 94-1476, 94th Cong. 2d Sess. 120 (1976); accord S. Rep. No. 473, 94th Cong., 1st Sess. 103-04 (1975) (including “motion pictures” as an example of joint works under the statute).

119. 17 U.S.C. § 101 (2012).

120. See, e.g., *Aalmuhammed v. Lee*, 202 F.3d 1227,1233-34 (9th Cir. 2000) (“Everyone from the producer and director to casting director, costumer, hairstylist, and “best boy” gets listed in the movie credits because all of their creative contributions really do matter. It is striking in *Malcolm X* how much the person who controlled the hue of the lighting contributed [to the film]”).

121. *Richlin v. Metro-Goldwyn-Mayer Pictures, Inc.*, 531 F.3d 962, 975 (9th Cir. 2008).

122. Letter from Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy and Practices, U.S. Copyright Office, to M. Cris Armenta, Mar. 6, 2014, available at <http://www.artlawreport.com/files/2014/03/Google-Judicial-Notice.pdf>. See also, *Effects Assocs., Inc. v. Cohen*, 908 F.3d 555,556 (9th Cir. 1990).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

of many actors' performances that went into the making of the integrated motion picture that was fixed by others in the creation of the motion picture as a whole."¹²⁷

Performance of a work is in fact distinguished from the work itself in Section 101 of the Copyright Act, as it states that to "perform a 'work'" is "to recite, render, play, dance or act it."¹²⁸ Furthermore, recall Section 102(b)'s limitation on what can be considered a work: no procedure or process can be considered a work, regardless of the form in which it is embodied in a work.¹²⁹ Acting out a script to "consummate the work by transforming"¹³⁰ it from words on a page into something that can be captured in an audiovisual recording more closely resembles the "procedure" or "process" of performing the work. Therefore, a performer's contribution can generally either be (1) a "performance" of the script of a motion picture under Section 101, but not a work; or (2) a creative component merged into the unitary whole of a motion picture, but not a work in and of itself.¹³¹

As explained by the reasoning of *Burrow-Giles Lithographic Co. v. Sarony*, it cannot be the case that every copyrightable contribution to a motion picture is a "work" separately copyrightable from the motion picture itself, any more than Oscar Wilde's "substantial copyrightable creative contribution" of appearing in a photograph or the lithographer's similarly copyrightable efforts were "works" separate from the photograph itself.¹³² For that reason, the "work" requirement disqualifies performances *qua* performance from copyright eligibility, and even if performances in and of themselves are individually copyrightable, performers are very rarely their authors.¹³³

* * *

The most viable counterargument to this position would be that actors' performances should be considered "pantomime" or "choreographic" works¹³⁴ or an analogous unenumerated category of copyrightable work¹³⁵ "because acting involves movement, posture, and gesture, which are analogous to copyrightable pantomime or choreography."¹³⁶ Alternatively, acting performances should be considered "dramatic works."¹³⁷ The Copyright Office Compendium defines "pantomime" as "the art of imitating or acting out situations, characters, or some other events with gestures and body movement," which

127. *Id.*

128. 17 U.S.C. § 101 (2012).

129. 17 U.S.C. § 102(b) (2012).

130. *Waring v. WDAS Broad. Station*, 327 Pa. 433, 440 (1937).

131. *Infra* Section II.B. will argue that there is a third, less readily apparent alternative – that when an actor's performance adds sufficient expression to delineate a character copyrightable independent from the works it appears in, the actor can be eligible for joint authorship of the character.

132. *See Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884) (holding that the author of the protectable work was the photographer).

133. *Id.*

134. *See* 17 U.S.C. § 102(a)(4) (2012).

135. *See Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911, 1919-20 (1996). *Fleet* involved a claim by actors against the distributor of the motion picture alleging violation of their right of publicity in their likeness, a state claim. *See id.* at 1915. The court found the claim preempted by federal copyright law, in part because the performance, once embodied in a motion picture with their consent, was copyrightable.

136. *F. Jay Dougherty, supra* note 108. *See also Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 55 (2d Cir. 1936) ("Speech is only a small part of a dramatist's means of expression; he draws on all the arts and compounds his play from words and gestures and scenery and costume and from the very looks of the actors themselves. Again and again a play may lapse into pantomime at its most poignant and significant moments; a nod, a movement of the hand, a pause, may tell the audience more than words could tell.").

137. *See Fleet*, 50 Cal. App. 4th at 1919-20 ("There can be no question that, once appellants' performances were put on film, they became 'dramatic work[s].'").

“need not tell a story.”¹³⁸ A mere “style” of movement would be an unprotectable idea, and there must be “a significant amount of copyrightable matter in the form of specific gestures”¹³⁹ The Compendium defines “choreography” as “the composition and arrangement of dance movements and patterns[;] . . . static and kinetic successions of bodily movement in certain rhythmic and spatial relationships,” which, like pantomime, “need not tell a story.”¹⁴⁰ As an unenumerated category (that is, before the Copyright Act of 1976), choreography had to be sufficiently “dramatic” – that is, it had to tell a story, portray a character, depict an emotion, or otherwise convey a dramatic concept or idea¹⁴¹ – to qualify for copyright protection.¹⁴² This requirement was abolished by the Copyright Act of 1976,¹⁴³ but the requirement that an author must contribute a “significant amount” of copyrightable matter for a pantomime work and the legislative history’s limitations on choreographic works remain and likely suggest that the threshold for originality is higher than the *Feist* requirement of a mere “modicum of creativity.”¹⁴⁴

Because of the resemblance between acting performances and pantomimes and choreography, it is likely that if acting performances were protectable, they would similarly be subject to a heightened originality requirement. *Waring*’s discussion of “perfecting” or “substantially” adding something to the original work for performances to be considered original, albeit derivative, works of authorship echoes this sentiment.¹⁴⁵ A low bar giving protection to even pedestrian and extremely brief performances (like Garcia’s) would not serve the purpose of the Copyright Act because the monopolies actors would have over such simple dramatic devices like ferociously gesticulating to express anger or crying and wiping away tears to express sorrow would paralyze future productions rather than promoting them. Additionally, it would extend copyright beyond its bounds and run afoul of the merger and *scène-à-faire* doctrines.

3. AUTHORSHIP AND THE OBLIGATION OF FIXATION: AN EXAMINATION OF THESE COMPLICATIONS

The authorship requirement also poses problems for performers, even assuming that a performance is properly classified as a “work.” The author of a work is the person who “superintends the work by exercising control”; the person “who has actually formed the picture by putting the persons in position, and arranging the place where people are to be.”¹⁴⁶ Authorship “requires more than a minimal creative or original contribution to the work.”¹⁴⁷ “After all, in *Burrow-Giles* the lithographer made a substantial copyrightable

138. COMPENDIUM II, *supra* note 76, § 460.01, at 400-21 (1984). This term, however, is not defined in the Copyright Act. See 17 U.S.C. § 102(a) (2012).

139. COMPENDIUM II, *supra* note 76 at § 461.

140. *Id.* § 450.01.

141. See Borge Varmer, *Copyright in Choreographic Works*, reprinted in 1 STUDIES ON COPYRIGHT 105-06 (The Copyright Society of the U.S.A. ed., 1963).

142. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §2.07[B], at 2-69; see 1 Paul Goldstein, Copyright §2.10, at 2:115.

143. *Id.*

144. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §2.07[C], at 2-70 (2000) (arguing that since copyright would not be extended to “social dance steps and simple routines,” choreographic works likely have a heightened originality requirement (quoting H.R. Rep. No. 94-1476, at 54 (1976))).

145. See *Waring v. WDAS Broad. Station*, 327 Pa. 433, 439-41 (1937).

146. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000).

147. *Id.* at 1233 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (quoting Nottage

creative contribution, and so did the person who posed, Oscar Wilde, but the Court held that the photographer was the author.”¹⁴⁸

Burrow-Giles is the instructive case for defining authorship.¹⁴⁹ The Court considered whether a photograph was the “production of an author,” and thus whether it was eligible for protection under the Copyright Clause.¹⁵⁰ On the issue, the Court restated the reasoning of *Nottage v. Jackson*¹⁵¹ – an English case presented with the same issue – noting the *Nottage* judges’ conclusions that the author of a photograph 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” and the “master mind” of the “thing which is to be protected.”¹⁵² The Court went on to state that those views “confirm what we have already said” about authorship, ruling that the photographer was an author, and his photograph eligible for copyright protection.¹⁵³

Importantly, this case demonstrates that a creator need not be the one who physically transcribes a work into a fixed, tangible medium in order to be its author.¹⁵⁴ This principle is illustrated by *Lindsay v. R.M.S. Titanic, Inc.*, where the plaintiff filmmaker planned out a documentary film called “Titanic: A Memorial Tribute,” which was to use high-illumination lighting equipment and follow a salvage dive down to the wreck of the Titanic.¹⁵⁵ He created storyboards reflecting his conception of what the documentary would look like and directed the cinematographers after leading daily planning sessions meant to “provide the photographers with detailed instructions for positioning and utilizing the light towers.”¹⁵⁶ The defense argued that he was not the author of the motion picture since he did not actually do the camerawork, but the court disagreed, finding:

The fact that Lindsay did not literally perform the filming, i.e. by diving to the wreck and operating the cameras, will not defeat his claims of

v. Jackson, 11 Q.B. div. 627 (1883)).

148. *Aalmuhammed*, 202 F.3d at 1233 (citing *Burrow-Giles*, 111 U.S. at 61).

149. See *Burrow-Giles*, 111 U.S. at 56-61 (comparing photographs to other forms of writing and artwork in determining that the photographs were the author for copyright purposes).

150. *Id.* at 56.

151. *Id.*

152. *Id.* at 60.

153. *Id.* at 61.

154. *Lindsay*, an illustrative case on point, is analogous to *Andrien v. Southern Ocean County Chamber of Commerce*, but a better illustrative match for this Article since the controversy is over the authorship of a motion picture despite not being as authoritative. In *Andrien*, the Third Circuit recognized that “a party can be considered an author when his or her expression of an idea is transposed by mechanical or rote transcription into tangible form under the authority of the party.” 927 F.2d 132, 135 (3d Cir.1991). The plaintiff in *Andrien* had received a copyright for a map of Long Beach Island, New Jersey that was created from a compilation of pre-existing maps and the plaintiff’s personal survey of the island. To transform his concepts and the information he had gathered into the final map, the plaintiff hired a printing company to print the map in final form. The plaintiff testified that the maps were made by the printer “with me at her elbow practically” and that he spent time each day at the print shop during the weeks the map was made, directing the map’s preparation in specific detail. In reversing the lower court’s grant of summary judgment against the plaintiff, the court noted that the printers had not “intellectually modified or technically enhanced the concept articulated by Andrien,” nor did they “change the substance of Andrien’s original expression.” *Id.* at 135. See also *Lakedreams v. Taylor*, 932 F.2d 1103, 1108 (5th Cir.1991) (noting that authors may be entitled to copyright protection even if they do not “perform with their own hands the mechanical tasks of putting the material into the form distributed to the public”).

155. *Lindsay v. Wrecked & Abandoned Vessel R.M.S. TITANIC*, 97 CIV. 9248 (HB), 1999 WL 816163, at *2 (S.D.N.Y. Oct. 13, 1999).

156. *Id.* (internal quotation marks omitted).

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 lighting 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.¹⁵⁷

Fixation is another necessary condition for a work to be eligible for copyright protection, and a seemingly insurmountable hurdle for performers like Garcia seeking to have their performances recognized as works of authorship.¹⁵⁸ A work must be fixed in a tangible medium of expression “by or under the authority of the author.”¹⁵⁹ This is a serious problem that foils a performer’s claims to have produced a copyrightable work of authorship for the same reason authorship is a hurdle. A performance itself is not “fixed” until it is recorded, and the fixed work – the actual motion picture – is fixed pursuant to the authority of the “master mind” with “artistic control” of the motion picture, not the actor giving the performance.¹⁶⁰

The instructive cases on whether a performance itself is “fixed,” such that it falls within the subject of copyright, first addressed vocal performances and sound recordings. In *Midler v. Ford Motor Co.*, Ford had licensed “Do You Want To Dance,” a song Midler had made famous by performing, and hired a “soundalike” artist to imitate her performance for a commercial.¹⁶¹ Midler alleged misappropriation under California state law, and Ford argued that her claim was preempted by federal law because the performance fell within the subject matter of copyright.¹⁶² The court rejected this argument, reasoning that her “voice is not copyrightable. The sounds are not ‘fixed.’”¹⁶³

However, the sound recording where the voice is fixed is copyrightable and unauthorized reproduction, *inter alia*, of the sound recording would fall within the subject matter of copyright infringement.¹⁶⁴ In *Laws v. Sony Music Entertainment*, the plaintiff singer had performed a song, and her performance was fixed in a sound recording.¹⁶⁵ The defense acquired a non-exclusive license to use the vocal track of the song.¹⁶⁶ When the defense used a portion of the sound recording in another song, the plaintiff alleged misappropriation.¹⁶⁷ The court distinguished between imitating a performance, which would not fall within the ambit of copyright so long as the imitator had the rights to the work underlying the performance, and a reproduction of the sound recording where the performance is fixed, which would.¹⁶⁸ The court ruled that “when the entirety of the

157. *Id.* at *5.

158. *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 432-33 (4th Cir. 1986).

159. 17 U.S.C. § 101 (2012).

160. *See Aalmuhammed v. Lee*, 202 F.3d 1227, 1232 (9th Cir. 2000).

161. *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988). If this controversy were governed by copyright, the issue would be violation of 17 U.S.C. 106(1) – unauthorized reproduction in copies or phonorecords.

162. *Id.*

163. *Id.*

164. *Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1135-36 (9th Cir. 2006).

165. *Id.* at 1136.

166. *Id.*

167. *Id.*

168. *Id.* at 1140-41.

allegedly misappropriated vocal performance is contained within a copyrighted medium,” it is the subject of copyright.¹⁶⁹

In *Jules Jordan Video, Inc. v. 144942 Canada Inc.*, an actor made a similar claim, alleging misappropriation of his “persona” and “dramatic performance” and the court reaffirmed its reasoning from *Laws* because, again, everything that the plaintiff alleged to have been misappropriated appeared in the motion picture – the fixed copyrightable work.¹⁷⁰

On the issue of fixation, “these cases show that, just as the *singing* of a song is not copyrightable, while the entire song recording is copyrightable, the *acting* in a movie is not copyrightable, while the movie recording is copyrightable.”¹⁷¹ Acting performances, like voices, include creative elements like inflection, intonation, pronunciation, and pitch, but these are not fixed independently of the motion picture recording (the “unitary whole”) in which they appear and therefore are not eligible to be considered independent works.¹⁷²

The Seventh Circuit recently reaffirmed this principle in *Conrad v. AM Cmty. Credit Union*, a case decided after the panel opinion in *Garcia v. Google* was published.¹⁷³ The “Banana Lady” sued the defendant for copyright infringement after they uploaded videos they had taken of her performing a singing telegram in her banana outfit.¹⁷⁴ She authorized the audience watching her performance to take photos and videos, but argued that they had exceeded the license that she had granted them (“for personal use”) by posting the photos and videos to websites like Facebook, thereby infringing her copyright.¹⁷⁵

The court ruled that her “performance itself was not copyrighted or even copyrightable, not being ‘fixed in any tangible medium of expression.’”¹⁷⁶ It ruled that “[t]o comply with the requirement of fixity she would had either to have recorded her performance or to have created a written ‘dance notation’ of it.”¹⁷⁷ It is important to note that even though the plaintiff authorized the recording of her performance in videos and photographs, the court found that it was nonetheless not fixed.¹⁷⁸

Conrad is the contrapositive to the *Lindsay* and *Andrien* cases. In *Lindsay* and *Andrien*, the putative authors exercised control over the fixation of the works and were granted copyright protection, whereas in *Conrad*, the performer exercised no control over

169. *Id.* at 1141.

170. *Jules Jordan Video, Inc. v. 144942 Canada Inc.*, 617 F.3d 1146, 1153 (9th Cir. 2010).

171. *Garcia v. Google, Inc.*, 743 F.3d 1258, 1274 (9th Cir. 2014) (Smith, J., dissenting).

172. Although this is fatal for a performer’s claim that each performance is an independent work, it is not such a death knell when considering the relaxed standards for characters to be protected by copyright, as argued *infra* Section II.A.

173. *Conrad v. AM Cmty. Credit Union*, 750 F. 3d 634, 635-36 (7th Cir. 2014).

174. *Id.*

175. *Id.*

176. *Id.* at 636 (citing *Kelley v. Chicago Park District*, 635 F.3d 290, 303–04 (7th Cir. 2011); *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 675 (7th Cir. 1986); *United States v. Moghadam*, 175 F.3d 1269, 1280–81 (11th Cir. 1999); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.03[B], p. 2–32 (2004)).

177. *Conrad*, 750 F. 3d at 636 (citing *Martha Graham School & Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.*, 380 F.3d 624, 632 and n. 13 (2d Cir. 2004); *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 160 and n. 3 (2d Cir. 1986)).

178. *See id.*

the fixation of the performance and therefore was not eligible for copyright.¹⁷⁹ Actors in motion pictures suffer the same fate as the Banana Lady – although they consent to their performances being recorded in a tangible medium of expression, they do not control the fixation, so the only copyrightable work of authorship that is fixed is the motion picture, of which the performance is merely an element and the master mind is the author.¹⁸⁰

4. JACK OF ALL TRADES, MASTER (MIND) OF NONE: JOINT AUTHORSHIP REQUIREMENTS AND CONSIDERATIONS

Joint works are works “prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”¹⁸¹ Two tests for joint authorship predominate in the courts: the *Childress* test of the Second Circuit and the more stringent *Aalmuhammed* test of the Ninth Circuit.¹⁸² When a contributor to a work is found to be a joint author, he or she shares equally in the rights to a work with all the other authors – no matter how much each person contributed to the work – and can grant nonexclusive licenses to the work, so long as he or she remits an accounting to all the other authors.¹⁸³

In *Childress v. Taylor*, the court reasoned that the definition of a joint work “is really the definition of a work of joint authorship.”¹⁸⁴ It held that the Copyright Act required all putative joint authors to: (1) have the intent that their contributions be merged into a unitary whole at the time of the work’s creation; and (2) contribute something to the work that is independently copyrightable.¹⁸⁵ The court explained that intent can be inferred from objective factors:

Though joint authorship does not require an understanding by the co-authors of the legal consequences of their relationship, obviously some distinguishing characteristic of the relationship must be understood in order for it to be the subject of their intent. In many instances, a useful test will be whether, in the absence of contractual agreements concerning listed authorship, each participant intended that all would be identified as co-authors. Though “billing” or “credit” is not decisive in all cases and

179. See generally *Lindsay v. Wrecked & Abandoned Vessel R.M.S. TITANIC*, 97 CIV. 9248 (HB), 1999 WL 816163, at *2 (S.D.N.Y. Oct. 13, 1999); *Andrieu v. Southern Ocean County Chamber of Commerce*, 927 F.2d 132 (3d Cir. 1991); *Conrad*, 750 F.3d at 634-636.

180. Moreover, there are persuasive reasons of public policy for refusing to recognize a performer’s right of protection against imitators. Policing a performance or the creation of a performer in playing a role would present very difficult, if not impossible, problems of supervision for a court of equity. In addition, the recognition of a performer’s right in a copyrighted work would impose undue restraints on the potential market of the copyright proprietor since a prospective licensee would have to gain permission from each of possibly many performers who might have rights in the underlying work before he could safely use it. Such a right could also conflict with the Constitutional policy of permitting exclusive use of patented and copyrighted works for only a limited period of time. Finally, the vesting of a monopoly in the performer and the prevention of others from imitating his postures, gestures, voices, sounds, or mannerisms may impede, rather than “promote the Progress of . . . useful Arts.” *Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343, 347 (S.D.N.Y. 1973).

181. 17 U.S.C. § 101 (2012).

182. See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232 (9th Cir. 2000); *Childress v. Taylor*, 945 F.2d 500, 505 (2nd Cir. 1981).

183. 17 U.S.C. § 201(a) (2012); *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C. Cir. 1988), *aff’d without consideration of this point*, 490 U.S. 730 (1989).

184. *Childress*, 945 F.2d at 505 (citing 1 NIMMER ON COPYRIGHT § 6.01 (1991)).

185. See *id.* at 505-06.

joint authorship can exist without any explicit discussion of this topic by the parties, consideration of the topic helpfully serves to focus the fact-finder's attention on how the parties implicitly regarded their undertaking.¹⁸⁶

The court then examined the agreements the parties had made.¹⁸⁷ Childress went about writing a play based on a person's life.¹⁸⁸ Taylor was expected to play the leading role, and helped Childress by performing and delivering research on the subject of the play and making suggestions about the presentation of the play's subject "and possibly some minor bits of expression."¹⁸⁹ Childress rejected Taylor's attempt to negotiate a co-ownership agreement.¹⁹⁰ These factors indicated to the court that the parties were not co-authors, since the "dominant author of the work" did not have the requisite intent to share authorship at the time of the work's creation.¹⁹¹

This standard all but forecloses even lead actors' eligibility for joint-authorship status in a motion picture absent contractual agreements.¹⁹² However, as Section II.B. will argue, when the "work" considered is not a motion picture or play with several highly creative moving parts that are beyond the actor's domain, but instead the character that the actor portrays in the motion picture, this standard is not fatal to a claim of joint authorship.

The Ninth Circuit adopted its own interpretation of the standard in *Aalmuhammed v. Lee*.¹⁹³ The "Islamic Technical Consultant" on Spike Lee's motion picture "Malcolm X" argued that he was a "co-creator, co-writer, and co-director" and thus a joint author.¹⁹⁴ The court considered the "substantial and valuable contributions" he made to *Malcolm X*, some uncopyrightable,¹⁹⁵ others independently copyrightable.¹⁹⁶ The court reasoned that there were three criteria for joint authorship.¹⁹⁷ In order to be considered an author (the first factor), it is not enough for someone merely to contribute copyrightable material to the work; instead, an author is "the person to whom the work owes its origin and who superintended the whole work, the 'master mind,'" who "superintend[s] the work by exercising control."¹⁹⁸ On the second factor, shared intent, the Ninth Circuit reasoned that courts should examine the "objective manifestations" that imply shared intent, such as billing.¹⁹⁹ "Third, the audience appeal of the work turns on both contributions and 'the share

186. *Id.* at 508 (internal citation omitted).

187. *Id.* at 505.

188. *Id.* at 509.

189. *Id.*

190. *Id.*

191. *Id.* at 508. For further discussion of the *Childress* standard, see Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 *Emory L.J.* 193 (2001)

192. *Childress*, 945 F.2d at 508.

193. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231 (9th Cir. 2000).

194. *Id.* at 1230.

195. "[S]uch as speaking Arabic to the persons in charge of the mosque in Egypt, scholarly and creative help, such as teaching the actors how to pray properly as Muslims, and script changes to add verisimilitude to the religious aspects of the movie." *Id.* at 1231.

196. "[H]e rewrote several specific passages of dialogue that appeared in *Malcolm X*, and that he wrote scenes relating to *Malcolm X*'s Hajj pilgrimage that were enacted in the movie." *Id.*

197. *Id.* at 1234.

198. *Id.* at 1233 (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884) (quoting *Nottage v. Jackson*, 11 Q.B.D. 627 (1883)) (internal quotations omitted)).

199. *Id.* at 1234.

of each in its success cannot be appraised.”²⁰⁰ Ultimately, “[c]ontrol in many cases will be the most important factor.”²⁰¹

On that issue, the court reasoned that:

Aalmuhammed . . . could make extremely helpful recommendations, but Spike Lee was not bound to accept any of them, and the work would not benefit in the slightest unless Spike Lee chose to accept them. Aalmuhammed lacked control over the work, and absence of control is strong evidence of the absence of co-authorship.²⁰²

Since “[n]o one, including Aalmuhammed, made any indication to anyone prior to litigation that Aalmuhammed was intended to be a co-author and co-owner,” the court concluded that he was not eligible.²⁰³ This standard, even more so than the *Childress* standard, threatens an actor’s eligibility for joint authorship in a motion picture. However, if a court finds that an actor has control over the way in which he or she chooses to portray a character, a finding of joint authorship in the character as depicted in a motion picture is not foreclosed.

B. GARCIA V. GOOGLE SETS THE STAGE
 . . . FOR CONFUSION

The facts of this case are “as squirrely as you could imagine.”²⁰⁴ The plaintiff was told that she would appear in an adventure film called *Desert Warrior*.²⁰⁵ The writer/producer, Mark Basseley Youssef, cast her, gave her four pages of the script and hired her to act for three and a half days.²⁰⁶ According to the script, she was to play a concerned mother and deliver the following lines: “Are you crazy? Is your George crazy? Your daughter has not reached her 13th year yet. George must be fifty-five years old by now!”²⁰⁷ On set, she instead improvised, delivering the line, “Our daughter is but a child, and he is fifty-five years old!”²⁰⁸

But *Desert Warrior* never materialized and Garcia’s performance was used instead in an anti-Islamic propaganda “trailer” for a motion picture called *Innocence of Muslims*.²⁰⁹ The first time she saw it was on YouTube.²¹⁰ A line was added in editing, making Garcia appear to ask, “Is your Muhammad a child molester?”²¹¹ She received thousands of death

200. *Id.* (citing *Edward B. Marks Music Corp. v. Jerry Vogel Music Co., Inc.*, 140 F.2d 266, 267 (2nd Cir.1944) (Hand, J.) modified by, 140 F.2d 268 (1944)).

201. *Id.*

202. *Id.* at 1235.

203. *Id.*

204. Jonathan Handel, *Hollywood Experts Divided on Implications of ‘Muslims’ Ruling*, HOLLYWOOD, ESQ. (Feb. 28, 2014), <http://www.hollywoodreporter.com/thr-esq/hollywood-experts-divided-implications-muslims-684607> (quoting David Nimmer).

205. *Garcia v. Google, Inc.*, 743 F.3d 1258, 1261 (9th Cir. 2014).

206. *Id.*

207. Appellant Cindy Lee Garcia’s Brief in Response to *Sua Sponte* Briefing Order Re: Stay at 22, *Garcia v. Google, Inc.*, 743 F.3d 1258 (9th Cir. 2014) (No. 12-57302).

208. *Id.*

209. Ed Silverstein, *Legal Concerns Continue over ‘Innocence of Muslims’*, INSIDE COUNSEL MAGAZINE, (April 16, 2014), <http://www.insidecounsel.com/2014/04/16/legal-concerns-continue-over-innocence-of-muslims>.

210. *Garcia*, 743 F.3d at 1261.

211. *Id.*

threats due to her connection to the motion picture.²¹² She issued several takedown notices to YouTube that YouTube did not heed, and then applied for a temporary restraining order seeking removal of the film from YouTube, claiming that the posting of the video infringed her copyright in her performance.²¹³ The district court treated the application as a motion for a preliminary injunction, which it denied in part because Garcia was not likely to succeed on the merits because she had granted the producer an implied license to use her performance in the film, and because the nature of her copyright interest was unclear.²¹⁴

Over an eighteen-page dissent, the Ninth Circuit panel ruled in Garcia's favor, reasoning that she can "assert a copyright interest . . . in the portion of 'Innocence of Muslims' that represents her individual creativity,"²¹⁵ and ordered that Google take down all copies of *Innocence of Muslims* from YouTube.²¹⁶ The court modified this order nine days later, specifying that the order "does not preclude the posting of or display of any version of 'Innocence of Muslims' that does not include Cindy Lee Garcia's performance."²¹⁷ A judge on the Ninth Circuit *sua sponte* requested a vote on whether to rehear *en banc* the order denying a stay of the panel's order directing Google to remove copies of the film.²¹⁸ However, this request did not get enough votes.²¹⁹ Garcia sought copyright registration for her performance, but the Copyright Office denied her registration because it views a motion picture as a single integrated work so none of the individual performances can be considered independently copyrightable.²²⁰ Google petitioned for rehearing *en banc*,²²¹ and garnered nine amicus briefs in support.²²² Both parties argued the merits in their rehearing briefs.²²³ This Section will only address the copyrightability of a performance in a motion picture, not the issues raised regarding the work-for-hire doctrine or implied licensure.

1. GARCIA'S ARGUMENT

In the rehearing brief, Garcia addressed the authorship issue by marshaling the legislative history of the Copyright Act and the United States' position in accordance with the 2012 WIPO Audiovisual Performances Treaty, as well as two cases holding that actors can be considered authors.²²⁴ Garcia analogized to the Committee's reasoning on the authorship status of the creators of sound recordings, which states:

212. Appellant Cindy Lee Garcia's Brief in Response to Sua Sponte Briefing Order Re: Stay, *supra* note 205.

213. *Garcia*, 743 F.3d at 1262.

214. *Id.*

215. *Id.* at 1265.

216. *Id.* at 1275 n.9.

217. Order of Feb. 28, 2014, *Garcia v. Google*, 743 F.3d 1258 (9th Cir. 2014).

218. *Id.*

219. *Id.*

220. Letter from Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy and Practices, U.S. Copyright Office, to M. Cris Armenta, (Mar. 6, 2014), <http://www.artlawreport.com/files/2014/03/Google-Judicial-Notice.pdf>.

221. Google Inc. and YouTube, LLC's Petition for Rehearing En Banc at 1, *Garcia v. Google, Inc.*, 743 F.3d 1258 (9th Cir. 2014) (No. 12-57302).

222. United States Courts for the Ninth Circuit, *supra* note 8. The briefs are from the Electronic Frontier Foundation, News Organizations, California Broadcasters, Floor64 & Organization for Transformative Works, International Documentary Ass'n, Netflix, Inc., Adobe Systems, Professors of Intellectual Property Law and Internet Law Professors.

223. Appellant Cindy Lee Garcia's Brief in Response to Sua Sponte Briefing Order Re: Stay, *supra* note 205.

224. Appellant Cindy Lee Garcia's Brief in Response to Sua Sponte Briefing Order Re: Stay, *supra* note 205,

The copyrightable elements in a sound recording will usually, though not always, involve ‘authorship’ both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may, however, be cases where the record producer’s contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer’s contribution is copyrightable.²²⁵

Garcia pointed to this as an indication that “Congress *specifically* contemplated that both the performer and the producer would be authors under the [Copyright] Act.”²²⁶ It is important to note, however, that this section of the legislative history refers to authorship of a sound recording, which is a “work of authorship,” and calls the performance a copyrightable “element” in that work.²²⁷ It does not contemplate that the performance is a separate work from the sound recording, or that the performer is an author of two works upon recording a performance in a sound recording.²²⁸ Additionally, Garcia’s argument ignores the glaringly obvious possibility that the performance as fixed on film or in digital video could have another author – the person “responsible for setting up the recording session, capturing and electronically processing the [performance footage], and compiling and editing” it.²²⁹

Garcia also pointed to the U.S. Patent and Trademark Office’s position on the compatibility of the Beijing Audiovisual Performances Treaty with U.S. copyright law. The USPTO stated that “[u]nder U.S. law, actors and musicians are considered to be ‘authors’ of their performances providing them with copyright rights” and although “U.S. law is already generally compatible with the AVP provisions . . . implementation of the AVP may require some technical amendments of the Copyright Act.”²³⁰ The text of the AVP Treaty grants performers moral rights and the rights of broadcasting and fixation of unfixed performances, as well as the rights of authorizing reproduction of, distribution of, rental of, making available of, and broadcasting and communicating to the public their fixed performances.²³¹

There are a number of reasons why the obligations imposed by the AVP treaty do not dictate a decision in Garcia’s favor. As of the time of the decision, the treaty has not entered into force—only two of the needed thirty countries have ratified it.²³² Even if it were in force, the United States has not yet ratified it.²³³ Additionally, the treaty is not self-

at 23.

225. H.R. REP. 94-1476, at 56, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5669 (1976).

226. Appellant Cindy Lee Garcia’s Brief in Response to Sua Sponte Briefing Order Re: Stay, *supra* note 205, at 23.

227. H.R. REP. 94-1476, *supra* note 223, at 56.

228. H.R. REP. 94-1476, *supra* note 223, at 56.

229. Appellant Cindy Lee Garcia’s Brief in Response to Sua Sponte Briefing Order Re: Stay *supra* note 205, at 23.

230. United States Patent and Trademark Office, WIPO AVP TREATY – BACKGROUND AND SUMMARY 2 (2012), http://www.uspto.gov/news/WIPO_AVP_treaty_fact_sheet.pdf.

231. *Beijing Treaty on Audiovisual Performances*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, available at http://www.wipo.int/edocs/mdocs/copyright/en/avp_dc/avp_dc_20.pdf.

232. *WIPO-Administered Treaties*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=841.

233. *Id.*

executing in the United States, so its provisions do not become law through ratification alone.²³⁴ Even if and when the treaty is adopted and enacted by the United States, Article 12 provides that:

(1) A Contracting Party may provide in its national law that once a performer has consented to fixation of his or her performance in an audiovisual fixation, the exclusive rights of authorization provided for in Articles 7 to 11 of this Treaty shall be owned or exercised by or transferred to the producer of such audiovisual fixation subject to any contract to the contrary between the performer and the producer of the audiovisual fixation as determined by the national law.

(2) A Contracting Party may require with respect to audiovisual fixations produced under its national law that such consent or contract be in writing and signed by both parties to the contract or by their duly authorized representatives.²³⁵

This means that it would not be in conflict with the United States' treaty obligations for a court to hold that when a performer consents to the recording of his or her performance for a motion picture, whatever rights the performer might have regarding the further reproduction, distribution, and public communication of the performance are automatically owned by or transferred to the author of the motion picture.²³⁶

Additionally, Garcia cited to two Ninth Circuit cases to support the contention that performers have copyright interests in their contributions "contained within a copyrightable medium"²³⁷: *Jules Jordan Video, Inc. v. 11494 Canada, Inc.*²³⁸ and *Lesley v. Spike TV.*²³⁹ *Jules Jordan* does not support the argument that performances are copyrightable works of authorship independent from the motion pictures or audiovisual works in which they appear,²⁴⁰ and *Lesley* is an unpublished case finding that the plaintiff-actor's appearance on a television program was not protected by copyright for lack of creativity.²⁴¹

Garcia emphasized the creativity in her performance, harkening back to the panel opinion's reflection on the creative process an actor goes through to embody the role and reminding the court that she transformed the role played by changing her lines.²⁴²

234. *The Beijing Treaty on Audiovisual Performances – and EIFL Briefing for Libraries*, ELECTRONIC INFORMATION FOR LIBRARIES, <http://www.eifl.net/beijing-treaty-audiovisual-performances-eifl-brief#provisions>.

235. *Beijing Treaty on Audiovisual Performances*, *supra* note 229.

236. *Beijing Treaty on Audiovisual Performances*, *supra* note 229.

237. *Appellant Cindy Lee Garcia's Brief in Response to Sua Sponte Briefing Order Re: Stay*, *supra* note 205, at 21.

238. *Jules Jordan Video, Inc. v. 11494 Canada, Inc.*, 617 F.3d 1146, 1153 (9th Cir. 2010).

239. *Lesley v. Spike TV*, 241 F.Appx 357, 358 (9th Cir. 2007).

240. As addressed *supra* Section I.A.3, the court ruled that the plaintiff could not pursue a state claim for misappropriation because the allegedly misappropriated "persona" and "dramatic performance" were contained in a work of authorship – a DVD. *Jules Jordan Video*, 617 F.3d at 1153. Garcia's citation to *Jules Jordan* appears to be a quote from *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1141 (9th Cir. 2006). Similarly in that case, the plaintiff's right of publicity claim was preempted not because her performance was copyrightable on its own, but because it was contained in the master sound recording that was sampled. *See id; supra* Section I.A.3.

241. *Lesley*, 241 F. App'x at 358 ("Lesley has not adduced sufficient evidence to show a genuine issue on whether his performance was sufficiently creative. His expressions were naturally associated with the theme of the show and, therefore, were "commonplace." Likewise, Lesley's non-verbal acts naturally flowed from the show's structure and atmosphere as contemplated by the producers.").

242. *Id.* at 21-22, 25; *Appellant Cindy Lee Garcia's Brief in Response to Sua Sponte Briefing Order Re: Stay*, *supra* note 205 at 23.

2. GOOGLE'S ARGUMENT

Google carefully explained why Garcia is ineligible for copyright in her performance under the work and authorship requirements of the Copyright Act.²⁴³

In demonstrating that Garcia's performance is not a work separately copyrightable from the motion picture in which it appeared, Google cited the illustrative categories of works in Section 102 of the Copyright Act.²⁴⁴ It pointed out that the provision defines "[w]orks of authorship" to "include" "motion pictures" and other audiovisual works."²⁴⁵ It argued that the eight "listed categories share certain characteristics, and those shared characteristics illuminate the meaning of the general term 'works of authorship.' . . . An acting performance such as Garcia's is not remotely similar to anything in Section 102's illustrative list."²⁴⁶ It went on to argue that the existence of the concept of "joint works" confirms that *Innocence of Muslims* is a single work with many copyrightable elements.²⁴⁷ Motion pictures are examples of joint works according to Congress, which are works "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."²⁴⁸ To hold that each individual copyrightable contribution was a work in and of itself would eviscerate the concept of the joint work. It presented the panel with the bizarre consequences of holding that each performance is a separate work: the motion picture would be left in tatters and, in the absence of contracts, the owner of the copyright in the motion picture would own very little, if any of it.²⁴⁹

Additionally, Google attacked Garcia's status as an "author."²⁵⁰ It cited *Aalmuhammed v. Lee* (quoting *Burrow-Giles*) for the proposition that the author of a work is the "person to whom the work owes its origin and who superintended the whole work, the 'master mind,'"²⁵¹ which requires creative control of the work.²⁵² Google picked up language from Judge Smith's dissenting opinion, arguing that "Garcia cannot satisfy the creative control standard for authorship because she 'had no creative control over the script or her performance'" and was "not the originator over the ideas or concepts. She simply acted out others' idea or script."²⁵³ The director controlled the performance, and at most Garcia created the work at his direction.²⁵⁴ Without "contributing intellectual modification," such a creator "is not an author."²⁵⁵

243. *Id.* at 23-32.

244. *Id.*

245. Google Inc. and YouTube, LLC's Brief in Response to Suggestion of Rehearing *En Banc* at 24, Garcia v. Google, Inc., 743 F.3d 1258 (9th Cir. 2014) (No. 12-57302).

246. *Id.* at 24-25 (citing *Microsoft v. Commissioner*, 311 F.3d 1178, 1184 (9th Cir. 2002) (stating that words in a list must be judged by the company they keep)).

247. *Id.* at 25.

248. *Id.* at 25 (citing 17 U.S.C. 101 (2010)).

249. *Id.* at 35-38.

250. *Id.* at 28.

251. *Id.* at 28 (citing *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000) (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1883))).

252. *Id.*

253. *Id.* at 29 (quoting *Garcia v. Google*, 743 F.3d 1258, 1272) (Smith, J., dissenting)).

254. *Id.* at 29-30.

255. *Id.* at 29-30 (quoting *Kyjen Co., Inc. v. Vo-Toys, Inc.*, 223 F. Supp. 2d 1065, 1068 (C.D. Cal. 2002)).

3. THE PANEL OPINION

The court decided against Google, ruling that Garcia likely has an independent copyright interest in her performance.²⁵⁶ It framed the test as follows: “An actor’s performance, when fixed, is copyrightable if it evinces “some minimal degree of creativity . . . ‘no matter how crude, humble or obvious’ it might be.”²⁵⁷ But that is not strictly true – recall that authorship “requires more than a minimal creative or original contribution to the work.”²⁵⁸ The panel’s formulation overlooks two crucial points of discussion: the test for control of fixation of a work and the possibility that if the performance is an independent work, the party that actually fixed it could be a joint author with Garcia.²⁵⁹ First, recall that a work must be fixed “by or under the authority of the author” in order to be eligible for copyright.²⁶⁰ Garcia did not allege like the authors in *Lindsay* or *Andrien* that she controlled the creative vision of the scene that was ultimately fixed.²⁶¹ Such control would require that Garcia be in charge of “posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved.”²⁶² Instead she alleged control over nothing more than her acting performance,²⁶³ making her more analogous to the plaintiff in *Conrad*. In fact, the defense alleged that the producer’s control extended “all the way down” to directing the emotions she was to portray and that even deviations from the script were directed by the producer himself.²⁶⁴

Additionally, this line of reasoning presupposes that if Garcia is the author of her performance, she is the sole author.²⁶⁵ However, this is a suspect conclusion in light of the majority’s (and the plaintiff’s) reliance on analogy to sound recordings. When it comes to sound recordings, recall that the legislative history indicates that they “involve ‘authorship’ both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording.”²⁶⁶ Creativity went into the recording and editing of the performance, and so it is not clear that Garcia, who contributed only part of the creative energy, is its sole author of the performance as fixed.²⁶⁷

Additionally, the performance, if a work, would likely be considered derivative of the preexisting script.²⁶⁸ Recall that the *Batlin* test for derivative works “requires more than a

256. *Garcia*, 743 F.3d at 1262.

257. *Id.* at 1263.

258. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000) (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)).

259. See generally *Garcia*, 743 F.3d 1258.

260. 17 U.S.C. § 101 (2012).

261. See *Appellant Cindy Lee Garcia’s Brief in Response to Sua Sponte Briefing Order Re: Stay*, *supra* note 205 at 23.

262. *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992).

263. *Appellant Cindy Lee Garcia’s Brief in Response to Sua Sponte Briefing Order Re: Stay*, *supra* note 205 at 5.

264. *Google Inc. and YouTube, LLC’s Brief in Response to Suggestion of Rehearing En Banc*, *supra* note 243, at 5.

265. *Id.*

266. 1971 U.S.C.C.A.N. 1566, 1570.

267. *Infra* Section I.A.4. discusses the standards for joint authorship.

268. The opinion acknowledges this to be the case. *Garcia v. Google, Inc.*, 743 F.3d 1258, 1264 (9th Cir.

modicum of originality”²⁶⁹ – specifically, “to support a copyright there must be at least some substantial variation, not merely a trivial variation such as might occur in the translation to a different medium.”²⁷⁰ It is not clear that in Garcia’s five-second performance she was able to contribute some substantial creative variation over and above the translation of a script to an audiovisual medium. The elements of originality that the majority points to – “body language, facial expression, and reactions to other actors and elements of a scene”²⁷¹ – are, in such a brief scene, largely dictated by the words on the page. Recall that under *Meshwerks*, “in assessing the originality of a work for which copyright protection is sought, we look only at the final *product*, not the process, and the fact that intensive, skillful, and even creative labor is invested in the process of creating a product does not guarantee its copyrightability,”²⁷² so it is immaterial that a performer “live[s] his part inwardly, and then . . . give[s] to his experience an external embodiment.”²⁷³ The only thing that matters is the end product as it appears in the video. No matter whether the court considers the creative process or not, such a brief performance is likely precluded from copyrightability by the *scène-à-faire* doctrine because acting techniques as simple as what Garcia did in her performance, like making concerned facial expressions, are necessary to act out a scene where the character is concerned. Such a straightforward representation, even though it involves “internally living the role” and acting it out, cannot be considered protectable since such simple expressions are necessary to translate the direction on the page into the audiovisual medium. Additionally, Garcia did not allege that she contributed anything other than her performance,²⁷⁴ so creative elements such as lighting and camera choice cannot be considered for the court’s originality analysis. Without alleging something substantially original and acknowledging the aspects that are likely uncopyrightable, this performance likely falls short of the *Feist* standard and almost certainly falls short of the higher bar set by *Batlin* for derivative works.

The opinion leaves open the question of what exactly the “author” of a motion picture owns under copyright, absent proof of work-for-hire or copyright-transfer agreements. The author could not own any of the scenes with actors in them, since each of those scenes would belong to the performers.²⁷⁵ The author likewise could not own any scenes without actors in them, since the cinematographer would own the footage as if it were a photograph.²⁷⁶ The author could not own the sound that accompanies the motion picture since that sound recording would belong to whomever was responsible for fixing it.²⁷⁷

The opinion also disregards the likelihood that the performance was a joint work. Although Garcia disclaims intent to be a joint author with Youseff of the motion picture

2014) (“Where, as here, an actor’s performance is based on a script, the performance is likewise derivative of the script.”).

269. *Waldman Publ’g Corp. v. Landoll, Inc.*, 43 F.3d 775, 782 (2d Cir.1994) (citing *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976) (en banc), *cert. denied*, 429 U.S. 857 (1976)).

270. *Snyder*, 536 F.2d at 491.

271. *Garcia*, 743 F.3d at 1263.

272. *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1266 (10th Cir. 2008). (emphasis in original).

273. *Garcia*, 743 F.3d at 1263 (quoting CONSTANTIN STANISLAVSKI, AN ACTOR PREPARES 15, 219 (Elizabeth Reynolds Haggood trans., 1936)).

274. *See id.*

275. *Id.* at 1272–73 (Smith, J., dissenting).

276. *Id.*

277. *Id.* at 1274–75.

Innocence of Muslims,²⁷⁸ clearly she intended to be at least a joint author of her performance on set.

4. THE DISSENT

The dissent attacks the majority's reasoning on all of the work, authorship, and fixation requirements.²⁷⁹ First, it evokes the doctrine of *noscitur a sociis*, which "counsels that words should be understood by the company they keep,"²⁸⁰ arguing that the illustrative list of "work" categories in Section 102 the Copyright Act "is significantly different from an actress's individual performance in a film, casting doubt on the conclusion that the latter can constitute a work."²⁸¹ It also points to Section 101, which distinguishes a work from the performance of the work, taking this distinction to mean that Congress did not intend for copyright, which protects works, to protect the performances of those works.²⁸² Rather than resembling a work, the dissent reasoned, Garcia's acting performance resembled the "procedure" or "process" by which the script was performed and "[i]n no case does copyright protection for an original work of authorship extend to any . . . procedure [or] process . . . regardless of the form in which it is . . . embodied in such work."²⁸³ It concludes that motion pictures are works, but the Copyright Act does not clearly place acting performances that appear in motion pictures in the category of works.²⁸⁴

On the issue of authorship, the dissent relied heavily on the analysis in *Aalmuhammed v. Lee*.²⁸⁵ It reasoned that the author of a work is the person who superintends it by exercising control, and translates an idea into a fixed, tangible expression.²⁸⁶ Applying the authorship analysis of *Aalmuhammed*, the dissent reasoned that Garcia, just like *Aalmuhammed*:

(1) "did not at any time have superintendence of the work," (2) "was not the person 'who . . . actually formed the picture by putting the persons in position, and arranging the place,'" (3) could not "benefit" the work "in the slightest unless [the director] chose to accept [his recommendations],"

278. *Id.* at 1263.

279. *See id.*

280. *Id.* at 1270 (Smith, J., dissenting) (quoting *Microsoft Corp. v. C.I.R.*, 311 F.3d 1178, 1184–85 (9th Cir.2002)).

281. *Id.*

282. *Id.*

283. *Id.* at 1271 (citing 17 U.S.C. § 102(b)).

284. *Id.*

285. The dissent first noted that *Aalmuhammed* did not only apply to a joint authorship analysis; rather, the "opinion makes clear that copyright protection is premised on authorship, whether the work is joint or otherwise:

We hold that authorship is required under the statutory definition of a joint work, and that authorship is not the same thing as making a valuable and copyrightable contribution. We recognize that a contributor of an expression may be deemed to be the "author" of that expression for purposes of determining whether it is independently copyrightable.

Id. at 1272 (quoting *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232 (9th Cir. 2000)).

286. *Garcia*, 743 F.3d at 1271 (citing *Aalmuhammed*, 202 F.3d at 1234 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884)); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989)).

and (4) made “valuable contributions to the movie,” but that alone was “not enough for co-authorship of a joint work.”²⁸⁷

Garcia could not be considered the “master mind” of the performance, since she did not originate the idea or concepts, and did not translate them into the fixed, tangible expression.

Turning its attention to the fixation requirement, the dissent focused on preemption cases, relying on *Midler*, *Laws*, and *Jules Jordan* for the proposition that while a recording or motion picture is a fixed copyrightable work, the “moving parts” that go into it – including the performances – are not.²⁸⁸ It argued that just as there are creative contributions in a vocalist’s voice when he or she sings a song but a voice is “too personal” to be copyrightable, so too is an acting performance “too personal” to be copyrightable.²⁸⁹ It concludes that Garcia could not demonstrate that the law clearly favored a claim of a copyrightable interest in her performance.²⁹⁰

5. THE COPYRIGHT OFFICE WEIGHS IN

The Copyright Office denied Garcia’s application for copyright registration.²⁹¹ It wrote:

While a novelist, playwright, or screenwriter may create distinct works that are later adapted or incorporated into a motion picture . . . an actor or actress’ performance in the making of a motion picture is an integrated part of the resulting work, the motion picture as a whole. An actor’s or actress’ performance is either joint authorship or is a contribution under a work made for hire agreement.²⁹²

The Office found no question that Garcia intended for “her contribution or performance to be merged into inseparable or interdependent parts of a unitary whole,” and so “[i]f her contribution was neither a work made for hire nor the requisite authorship to warrant a claim in a joint work, [she] has no separable claim to copyrightable authorship in her performance.”²⁹³ It rejected her claim, and its rejection is significant because the Copyright Office’s refusal to register a copyright is entitled to judicial deference if reasonable.²⁹⁴

287. *Id.* at 1272.

288. *Id.* at 1274 (citing *Midler v Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988); *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir.1970); *Laws*, 448 F.3d at 1141; *Jules Jordan Video*, 617 F.3d at 1153).

289. *Id.* at 1274-75.

290. *Id.* at 1275.

291. *Masnick*, *supra* note 14.

292. Letter from Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy and Practices, U.S. Copyright Office, to M. Cris Armenta, Mar. 6, 2014, available at <http://www.artlawreport.com/files/2014/03/Google-Judicial-Notice.pdf>.

293. *Id.*

294. *Batjac Prods. Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223, 1230 (9th Cir. 1998) (citing *Marascalco v. Fantasy, Inc.*, 953 F.2d 469, 473 (9th Cir. 1991)).

II. BUILDING CHARACTER: THE NAME OF THE GAME (AND THE ARTICLE)

Copyright protection for characters seems to be an exception to the “works” requirement of the Copyright Act, since some characters like James Bond and the characters in the *Rocky* series are protected, independently from the works in which they actually appear.²⁹⁵ In cases where an unauthorized work that incorporates characters from preexisting works could not meet the standard of “substantial similarity” to the preexisting works for the purpose of infringement analysis, courts nonetheless can find infringement based on the copyright in the characters, which is independent of the copyright in the works themselves.²⁹⁶ Two different standards for character copyrightability are prevalent in the courts.²⁹⁷ This Article will not advocate for one standard over the other, but instead will demonstrate how each of the tests for character protection would be applied to performances in motion pictures and other audiovisual works and potentially make performers eligible for limited copyright protection for their performances *infra* Section II.B.

A. CHARACTER JURISPRUDENCE SETS STAGE AGAIN ... THIS TIME, ALSO FOR CONFUSION

Despite not being included in the Copyright Act as a protected category of “work,” characters nonetheless are eligible for copyright protection if they exhibit sufficient creativity.²⁹⁸ Courts have found literary, pictorial, and audiovisual characters all eligible for copyright protection,²⁹⁹ and two main tests have emerged to determine when a particular character or set of characters is protected: the “delineation” test and the “story being told” test (the former being much more popular).³⁰⁰ Importantly, stock characters and “[b]asic character types are not copyrightable.”³⁰¹ This is, in part, a limitation imposed by the idea/expression dichotomy in copyright law and the *scènes-à-faire* doctrine.³⁰²

295. See *MGM v. American Honda Motor Co.*, 900 F. Supp. 1287 (C.D. Cal. 1995) (discussing copyright in the James Bond character, and citing *Anderson v. Stallone*, 87-0592 WDKGX, 1989 WL 206431 (C.D. Cal. Apr. 25, 1989) (unpublished) (analyzing the characters from the *Rocky* series)). None of the cases discuss whether the characters are “works” themselves, but in order to avoid a Russian-nesting-doll sort of situation where every copyrightable element in a work is considered a lesser included work, it seems safer to characterize character copyright as a judicially-created exception to the works rule. And since, as discussed *supra* Section I.A. “writings” in the Copyright Clause is a larger set that subsumes “works,” looking at characters in this way does make protecting them run afoul of the Constitution.

296. See *MGM*, 900 F. Supp. at 1287.

297. Andrew J. Thomas and J.D. Weiss, *Evolving Standards in Copyright Protection for Dynamic Fictional Characters*, 29 COMM. LAW, no. 3, Feb. 2013.

298. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.12, at 2-172.33 (noting that “it is clearly the prevailing view that characters per se are entitled to copyright protection”).

299. See, e.g., *Burroughs v. MGM*, 683 F.2d 610 (2d Cir. 1982) (affording protection to the literary character Tarzan); *Detective Comics, Inc. v. Bruns Publications, Inc.*, 111 F.2d 432 (2d Cir. 1940) (affording protection to the comic book character Superman); *MGM v. American Honda Motor Co.*, 900 F. Supp. 1287 (C.D. Cal. 1995) (affording protection to James Bond film character).

300. Mark Bartholomeew, *Protecting the Performers: Setting a New Standard for Character Copyrightability*, 41 SANTA CLARA L. REV. 341, 343 (2001).

301. *Jones v. CBS*, 733 F. Supp. 748, 753 (S.D.N.Y. 1990).

302. Jaime Lund, Article, *Copyright Genericide*, 42 CREIGHTON L. REV. 131, 132 (2009).

1. JUDGE LEARNED HAND: THE DELINEATOR

Judge Learned Hand formulated and first used the delineation test in *Nichols v. Universal Pictures*.³⁰³ There, the plaintiff alleged that the defendant had copied her play "Abie's Irish Rose" in its motion picture *The Cohens and the Kellys*.³⁰⁴ The stories of both works focused on "a quarrel between a Jewish and an Irish father, the marriage of their children, the birth of grandchildren and a reconciliation."³⁰⁵ In considering the copyrightability of characters, the court wrote:

If Twelfth Night were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress.³⁰⁶

The plaintiff argued for copyright protection in her characters, and the court reasoned that "the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly."³⁰⁷ So turning to the plaintiff's characters, the court wrote:

There are but four characters common to both plays, the lovers and the fathers. The lovers are so faintly indicated as to be no more than stage properties. They are loving and fertile; that is really all that can be said of them, and anyone else is quite within his rights if he puts loving and fertile lovers in a play of his own, wherever he gets the cue. The plaintiff's Jew is quite unlike the defendant's. His obsession in his religion, on which depends such racial animosity as he has. He is affectionate, warm and patriarchal. None of these fit the defendant's Jew, who shows affection for his daughter only once, and who has none but the most superficial interest in his grandchild. He is tricky, ostentatious and vulgar, only by misfortune redeemed into honesty. Both are grotesque, extravagant and quarrelsome; both are fond of display; but these common qualities make up only a small part of their simple pictures, no more than any one might lift if he chose. The Irish fathers are even more unlike; the plaintiff's a mere symbol for religious fanaticism and patriarchal pride, scarcely a character at all. Neither quality appears in the defendant's, for while he goes to get his grandchild, it is rather out of a truculent determination not to be forbidden, than from pride in his progeny. For the rest he is only a grotesque hobbledohoy, used for low comedy of the most conventional sort, which any one might borrow, if he chanced not to know the exemplar.³⁰⁸

The court found that the characters insufficiently delineated, nothing more than "stock characters" that did not originate with the plaintiff, and therefore they were ineligible for copyright.³⁰⁹

303. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 120 (2d Cir. 1930).

304. *Id.*

305. *Id.* at 122.

306. *Id.* at 121.

307. *Id.*

308. *Id.* at 122.

309. *Id.*

Later courts relied on the delineation principle that drove the decision in *Nichols* to analyze motion picture/audiovisual characters' copyright, asking whether "the character as originally conceived and presented [was] sufficiently developed to command copyright protection."³¹⁰

When characters appear onscreen, they can pick up additional expressive elements not present in the scripts where they first appeared.³¹¹ In so doing, the characters can become a sort of "derivative work" independent of even the characters as they appeared in the script.³¹² The court in *Silverman v. CBS*. explained this principle when applying the delineation test to characters that picked up new expressive elements when they appeared in radio and television programs after the scripts where they first appeared entered the public domain.³¹³ The characters "Amos 'n' Andy" first appeared in radio show scripts in 1928, and the early scripts had entered the public domain before the plaintiff decided to develop a musical that included and focused on them.³¹⁴ However, Amos 'n' Andy continued appearing in new episodes of radio shows until 1955, and were in a television series from 1951-53.³¹⁵ So the plaintiff sought a declaratory judgment to determine the copyright status of the characters.³¹⁶ The court applied the delineation test and determined that, with respect to the Amos 'n' Andy characters, it had "no doubt that they were sufficiently delineated in the pre-1948 radio scripts to have been placed in the public domain when the scripts entered the public domain."³¹⁷ Because they had entered the public domain, the Amos 'n' Andy characters, as developed in the earliest scripts, were available for exploitation by the plaintiff or anyone else.³¹⁸ But with respect to the later depictions of Amos 'n' Andy, the court reasoned that if there were no defects in their copyright notice at the time of publication (since that was a requirement before the 1988 Berne Convention Implementation Act made formalities such as publishing with copyright notice optional³¹⁹), "[w]hat Silverman may not use . . . is any further delineation of the characters contained in the post-1948 radio scripts and the television scripts and programs."³²⁰

Specifically:

Since only the increments of expression added by the films are protectable, Silverman would infringe only if he copies these protectable increments. It is, of course, likely that the visual portrayal of the characters added something beyond the delineation contained in the public domain radio scripts, but surely not every visual aspect is

310. 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 2.12 at 2-173; see also *Zambito v. Paramount Pictures*, 613 F.Supp. 1107, 1111-12 (E.D.N.Y. 1985), aff'd, 788 F.2d 2 (2d Cir. 1985); *Warner Bros. v. American Broadcasting Cos.* 530 F.Supp. 1187, 1193 (S.D.N.Y. 1982), aff'd, 720 F.2d 231 (2d Cir. 1983) (quoting 3 Nimmer on Copyright, § 12, at 2-169 (rev. ed. 1980)); *Film Video Releasing Corp. v. Hastings*, 509 F. Supp. 60, 65 (S.D.N.Y. 1981); *Burroughs v. MGM*, 519 F. Supp. 388, 391 (S.D.N.Y. 1981); *Burroughs v. Manns Theatres*, 195 U.S.P.Q. 159, 162 (C.D. Cal. 1976).

311. 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT §§ 2.01, 3.04 (1988).

312. See *id.* Copyrights in derivative works secure protection only for the incremental additions of originality contributed by the authors of the derivative works.

313. *Silverman v. CBS Inc.*, 870 F.2d 40 (2d Cir.), cert. denied, 109 S.Ct. 3219 (1989).

314. *Id.* at 42.

315. *Id.*

316. *Id.* at 51.

317. *Id.* at 50.

318. *Id.*

319. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 285 § 7(a) (1988).

320. *Silverman*, 870 F.70 at 50.

protected. For example, the fact that the characters are visibly Black does not bar Silverman from placing Black “Amos ‘n’ Andy” characters in his musical, since the race of the characters was a feature fully delineated in the public domain scripts. Similarly, any other physical features adequately described in the pre-1948 radio scripts may be copied even though those characteristics are visually apparent in the television films or tapes.³²¹

So the plaintiff would have had to seek a license if his Amos ‘n’ Andy contained elements similar to the new delineating elements added by the later CBS radio and television programs.³²²

Similarly to the way that an author can arrange and combine words (which are not copyrightable on their own) into a screenplay (which is copyrightable), a creator’s unique arrangement of character traits can amount to protectable expression in a delineated character.³²³ Determining why certain traits are protectable is difficult, and some courts give the issue little analysis.³²⁴ For instance, when considering the character Tarzan in *Burroughs v. Metro-Goldwyn-Mayer*, the district court’s analysis was limited to the following: “Tarzan is the ape-man. He is an individual closely in tune with his jungle environment, able to communicate with animals yet able to experience human emotions. He is athletic, innocent, youthful, gentle and strong. He is Tarzan.”³²⁵

It is circular reasoning, but perhaps not viciously so. Nonetheless, the rule provides little guidance for what aspects of a character are actually protected, or when a character is protected at all.

2. NOT THE END OF THE STORY: THE STORY BEING TOLD TEST

The Ninth Circuit established a different test with a much stricter standard: the “story being told” test.³²⁶ It developed this test in the “Sam Spade” case, *Warner Bros. v. CBS*.³²⁷ Warner purchased the exclusive motion picture, television, and radio rights to a mystery novel, *The Maltese Falcon*, from its author in 1930.³²⁸ In 1946, the author used the characters from *The Maltese Falcon*, including the lead character Sam Spade, in other stories.³²⁹ He granted exclusive licenses to use Sam Spade in radio, television, and motion pictures to other parties, and under one of those licenses, CBS broadcast the radio program “Adventures of Sam Spade” from 1946-50.³³⁰ Warner argued that since it bought the exclusive rights to *The Maltese Falcon*, it had the exclusive right to use the characters from the novel.³³¹

321. *Id.*

322. *See id.*

323. *Id.*

324. *Burroughs v. MGM*, 519 F. Supp. 388, 389 (S.D.N.Y. 1981)

325. *Burroughs*, 519 F. Supp. at 392.

326. Carrie Ayn Smith, *A Character Dilemma: A Look into Trademark Protections for Characters from Creative Works* SETON HALL LAW SCHOOL STUDENT SCHOLARSHIP PAPER 579 (2014).

327. *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955).

328. *Id.* at 947.

329. *Id.*

330. *Id.* at 948.

331. *Id.* at 947.

The court acknowledged that the original grant of rights never mentioned the characters, but also analyzed whether the characters were copyrightable at all, setting a very high bar for literary characters.³³² The court wrote that:

It is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright. . . . We conclude that even if the Owners assigned their complete rights in the copyright to the Falcon, such assignment did not prevent the author from using the characters used therein, in other stories. The characters were vehicles for the story told, and the vehicles did not go with the sale of the story.³³³

Under this test, it seems that anyone is free to exploit the characters in *The Maltese Falcon* novel since none of them constitute the “story being told.”³³⁴ But beyond that, it is hard to say exactly what the case stands for, and it has been interpreted to mean that independent copyright should be denied to most characters since it “seems to envisage a ‘story’ devoid of plot wherein character study constitutes all, or substantially all, of the work;”³³⁵ or that characters may not be independently copyrightable at all;³³⁶ or that they are copyrightable.³³⁷ Courts outside the Ninth Circuit disfavor this test,³³⁸ and courts inside the Ninth Circuit consider both standards “out of an abundance of caution.”³³⁹

Walt Disney v. Air Pirates seems to have relaxed the requirements of the “story being told” test when characters are in visual media such as cartoons and therefore have “physical as well as conceptual qualities.”³⁴⁰ The court reasoned that it is difficult to delineate distinctively a literary character; however, “[w]hen the author can add a visual image . . .

332. *Id.* at 950. Some courts consider this section of the opinion *dicta*. See, e.g., *Goodis v. United Artists Television, Inc.*, 425 F.2d 397, 406 n.1 (2d Cir. 1970); *Columbia Broadcasting Sys., Inc. v. DeCosta*, 377 F.2d 315, 321 (1st Cir. 1967). However, the Ninth Circuit in *Walt Disney Prods. v. Air Pirates*, 345 F. Supp. 108, 111-12 (N.D. Cal. 1972), *modified*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979), concluded that it is “an alternative rationale” to the rationale on contract.

333. *Id.* at 950.

334. See *Goodis*, 425 F. 2d at 406 n.1 (reasoning that the conclusion that the characters from *The Maltese Falcon* are not protected and in the public domain “would be clearly untenable from the standpoint of public policy, for it would effectively permit the unrestrained pilfering of characters”).

335. 1 M. NIMMER & D. NIMMER, *NIMMER ON COPYRIGHT* § 2.12; see also *Olson v. Nat’l Broad. Co.*, 855 F.2d 1446, 1451 (9th Cir. 1988).

336. See *Hosp. for Sick Children v. Melody Fare*, 516 F. Supp. 67, 72-73 (E.D. Va. 1980) (discussing the characters in *Peter Pan*, the court said that individual characters may not be copyrightable); *Miller v. Columbia Broad. Sys.*, 1980 COPYRIGHT L. DECISIONS (CCH) p 25,242, at 16,421 (C.D. Cal. 1980) (“[I]deas, themes, locale or characters in an author’s copyrighted works are not protected by the law of copyright.”); *Columbia Pictures Corp. v. Nat’l Broadcasting Co.*, 137 F. Supp. 348, 353 (S.D. Cal. 1955) (ordinarily characters appearing in a copyrighted literary or dramatic work are not capable of ownership and may freely be taken by others without infringing the copyright); *Tralins v. Kaiser Aluminum and Chem. Corp.*, 160 F. Supp. 511, 516 D.C. (D. Md. 1958).

337. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 n.11 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979).

338. See, e.g., *Ideal Toy Corp. v. Kenner Prods.*, 443 F. Supp. 291, 301 (S.D.N.Y. 1977) (declining to follow the “story being told” test, instead using the Second Circuit’s delineation test for policy reasons).

339. *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *7 (C.D. Cal. Apr. 25, 1989); see also *MGM v. American Honda Motor Co.*, 900 F. Supp. 1287, 1297 (C.D. Cal. 1995); *Olson v. NBC*, 855 F.2d 1446, 1452 (9th Cir. 1988); *Warner Bros., Inc. v. Film Ventures Int’l*, 403 F. Supp. 522, 525 (C.D. Cal. 1975).

340. *Walt Disney Prods.*, 581 F.2d at 755.

the difficulty is reduced.”³⁴¹ As visual characters are easier to “delineate distinctively” and are “more likely to contain some unique elements of expression they tend to receive copyright protection more readily than literary characters.”³⁴² This interpretation suggests that the Sam Spade case only applies to literary characters, and that it is just the case that the clearest way to pass the “delineation” test for literary characters is to make them the story being told by the work that contains them.³⁴³

Recent decisions have yielded a couple of factors to make the “story being told” test more concrete. The first is the use of the character’s name in the title of the work in which it appears.³⁴⁴ This factor is most apparent in the “E.T.” case.³⁴⁵ There, the court found E.T. copyrightable because it “is more than a mere vehicle for telling the story and the ‘E.T.’ actually constitutes the story being told.”³⁴⁶ The name ‘E.T.’ is itself highly distinctive and is inseparable from the identity of the character.”³⁴⁷ The second factor considers the actual storyline of the work, asking whether the appeal and intrigue relies more on the plot or the character central to it.³⁴⁸ For instance, in the “James Bond” case, the court, in granting protection to the character, reasoned that “audiences do not watch Tarzan, Superman, Sherlock Holmes, or James Bond for the story, they watch these films to see their heroes at work.”³⁴⁹

3. THE SCRAPS: THE “SPECIFIC APPEARANCE” AND “ESPECIALLY DISTINCTIVE” TESTS

Aside from the delineation and “story being told” tests, there are two less-prevalent tests for character copyrightability. The test of *Gaiman v. McFarlane* applies to graphic characters and granted protection to a comic book character, Count Nicholas Cogliostro, because of his specific name and specific appearance.³⁵⁰ Cogliostro was intended to be an:

“[O]ld man, who starts talking to Spawn and then telling him all these sort of things about Spawn’s super powers that Spawn couldn’t have known. And when you first meet him [Cogliostro] in the alley you think he’s a drunken bum with the rest of them, and then we realize no, he’s not. He’s some kind of mysterious stranger who knows things.”³⁵¹

After considering the *scènes-à-faire* doctrine, the court dismissed the idea that the character was “stock,” reasoning that “[a]lthough Gaiman’s verbal description of Cogliostro

341. *Id.*

342. *Id.*; see also *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157 (9th Cir.1977) (finding costumed H.R. Pufnstuf characters from children’s television show protectable); *Warner Bros., Inc. v. American Broad. Cos., Inc.*, 720 F.2d 231 (2d Cir.1983) (finding Superman protectable).

343. See *Walt Disney Prods.*, 518 F.2d at 755 (“Because comic book characters therefore are distinguishable from literary characters, the Warner Brothers language does not preclude protection of Disney’s characters.”).

344. 1 NIMMER, NIMMER ON COPYRIGHT § 2.12, at 2-177 (“Although copying of a character’s name is not in itself decisive, it is a factor to be considered in determining whether the character as appropriated is sufficiently distinctive to constitute an infringement.”).

345. *Universal City Studios, Inc. v. Kamar Industries, Inc.*, No. H-82-2377, 1982 U.S. Dist. LEXIS 15942, at *1 (S.D. Tex. Sept. 20, 1982).

346. *Id.* at *7.

347. *Id.*

348. *Id.* at *3.

349. *MGM v. American Honda Motor Co.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995).

350. *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004).

351. *Id.* at 658.

may well have been of a stock character, once he was drawn and named and given speech he became sufficiently distinctive to be copyrightable.”³⁵² It found that the specific appearance of the character set it apart from stock characters, and “Cogliostro’s age, obviously phony title (“Count”), what he knows and says, his name, and his faintly Mosaic facial features combine to create a distinctive character. No more is required for a character copyright.”³⁵³

Characters played by actors in audiovisual works must likely meet a higher standard than purely graphic characters since their appearances are rooted in the images of the actors who portray them, and people’s images are not copyrightable.³⁵⁴ This “especially distinctive” standard appeared in *Rice v. Fox Broadcasting Co.*³⁵⁵ The *Mystery Magician*, the character at issue, “dressed in standard magician garb—black tuxedo with tails, a white tuxedo shirt, a black bow tie, and a black cape with red lining—and his role is limited to performing and revealing the magic tricks.”³⁵⁶ He was not found to be an “especially distinct” character differing from a stock magician character in a manner that warranted protection.³⁵⁷ However, the fact that an audiovisual character’s appearance can change based on the actor playing the character but still remain the same in relevant ways can in fact cut in favor of a character’s copyright eligibility because it demonstrates that the character as written is distinct enough to retain its protectable qualities even when portrayed by different people.³⁵⁸

The “especially distinctive” test appeared again in *JB Oxford & Co. v. First Tennessee Bank Nat. Ass’n*, where the court considered whether a character from a bank’s television commercials was eligible for copyright protection.³⁵⁹ Describing the character in question, the court wrote:

Bill is a balding, Caucasian male dressed in a costume that appears to represent a stack of United States one dollar bills. The dollar bill costume is worn vertically, with cut outs for the face, arms and legs. Bill is wearing a white, form-fitting garment underneath the costume and sneakers. Bill spends most of his time sitting around and “loafing” in a downtown apartment. Bill is easily entertained by watching television, eating, or playing with a slinky. Bill is “owned” by, or subordinate to, a

352. *Id.* at 661.

353. *Id.* at 660.

354. *See Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003).

355. *Rice*, 330 F.3d at 1175 (“[C]haracters that are “especially distinctive” or the “story being told” receive protection apart from the copyrighted work.”) (citing *Olson v. Nat’l Broad. Co.*, 855 F.2d 1446, 1452 (9th Cir.1988); *MGM v. American Honda Motor Co.*, 900 F. Supp. 1287, 1295-96 (C.D. Cal. 1995).

356. *Rice*, 330 F.3d at 1175.

357. *Id.* at 1176.

358. *MGM*, 900 F. Supp. at 1296 (“Contrary to Defendants’ assertions, because many actors can play Bond is a testament to the fact that Bond is a unique character whose specific qualities remain constant despite the change in actors.”).

359. *JB Oxford & Co. v. First Tennessee Bank Nat. Ass’n*, 427 F. Supp. 2d 784, 799 (M.D. Tenn. 2006) (citing *Toho Co., Ltd. v. William Morrow and Co., Inc.*, 33 F.Supp.2d 1206, 1215 (C.D.Cal.1998) (“While Godzilla may have shifted from evil to good, there remains an underlying set of attributes that remain in every film. Godzilla is always a pre-historic, fire-breathing, gigantic dinosaur alive and well in the modern world. This Court finds that Godzilla is a well-defined character with highly delineated consistent traits.”); *Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co.*, 900 F.Supp. 1287, 1295-96 (C.D.Cal.1995) (finding James Bond character was copyrightable because it had an identifiable set of traits); *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *7 (C.D.Cal. April 25, 1989) (“The Rocky characters are one of the most highly delineated group of characters in the modern American cinema.”)).

person who expects Bill to work, and is disappointed by Bill's lack of productivity. Bill does not at first glance appear to be very smart, but he has an occasional bright idea, such as contacting JB Oxford. He is innocent, somewhat childlike, and naive, as suggested by the fact that: he bursts into tears after being scolded for not being productive; he suggests finding change in the sofa as an effective tool for earning more money; he is able to maintain an undivided interest in playing with a slinky; he bounces on the couch as he plays with the slinky; and he has a perplexed expression when the slinky is tangled.³⁶⁰

The court found that “[w]hile Bill is perhaps not as distinctive as Superman, Godzilla, James Bond or Rocky, he is certainly more distinctive than the “[Mystery] Magician” in *Rice*.”³⁶¹ The court explained: “[h]e is lazy, unproductive, childlike, innocent, naive and of average intelligence. These characteristics alone would not be protectable. However, taken together with Bill's costume and his name, the Court finds that the ‘totality’ of Bill's attributes and traits create a sufficiently developed character.”³⁶² Although the court does not mention the *Gaiman* “specific name and appearance” test, it echoes the sentiment behind the reasoning.³⁶³ This Section splits the two tests up because, although a costumed audiovisual character is conceptually similar to a graphic cartoon character, the “appearance” test could not be met by characters played by different actors, as the character's appearance would change with every change in actor.³⁶⁴ Unfortunately, neither test provides more guidance than the delineation test does and they both seem merely to rephrase the difficult issue.

B. CHARACTERS AS WORKS WITHIN WORKS AND PERFORMERS AS JOINT AUTHORS³⁶⁵

“My government send me to U.S. ‘n’ A. to make a movie-film. Please, you come and see my film. If it not success, I will be execute.”

– Borat Sagdiyev, trailer for *Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan*³⁶⁶

Sacha Baron Cohen is one of the best contemporary examples of an actor who develops distinctive characters through his performances. His series *Ali G: Resurrection* revived a popular character whose series spun off characters that would star in their own motion pictures.³⁶⁷ He retired two of the characters, Borat and Bruno, when they became too widely recognized to take unsuspecting people by surprise in the “mockumentary” style

360. *Id.*

361. *Id.*

362. *Id.* at 800.

363. *See id.* at 799.

364. *See Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003).

365. *See* Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 *FORDHAM L. REV.* 575 (2005). Professor Justin Hughes persuasively argued that giving copyright protection to “microworks” within larger works – such as performances in motion pictures or even characters – threatens the smooth functioning of the copyright system.

366. *Addicting Trailers, Borati Cultural Learnings of America for Benefit Glorious Nation of Kazakhstan* (2006), YOUTUBE (Sept. 28, 2014), <https://www.youtube.com/watch?v=czkiMTAewk8>.

367. *See Ali G Has Been 'Resurrected' For New TV Series On FXX*, HUFFPOST TV (Feb. 6, 2014, 10:59 AM), http://www.huffingtonpost.com/2014/02/06/ali-g-tv-series_n_4737938.html.

where they flourished.³⁶⁸ Actors use the creativity of their performances to transform the characters as embodied on the page to what ultimately appears onscreen.³⁶⁹ For instance, Heath Ledger's Joker in *The Dark Knight* added elements to the character that had never been seen before, even though the Joker has appeared in comic books, cartoons, television series, action figures, and motion pictures frequently since 1940.³⁷⁰

When an actor performs in a motion picture, the actor does not just perform the script, but also develops the character he or she portrays.³⁷¹ This Section frames actors' performances as means of embodying the characters. It argues that there are limited situations where an actor can be a joint author with the other creative parties involved in creating a character as it appears onscreen. It considers several situations and the legal tests that would apply in each of them when a performer would claim joint authorship. Importantly, this Section assumes that there are no work-for-hire agreements or other copyright transfer instruments.

Before turning to specific situations, it is also important to note that there are a number of contributors responsible for causing the character to wind up onscreen as it does: the performer, of course, but also the writer, director, cinematographer, costume designer, and the list goes on.³⁷² Courts will have to apply the joint authorship analysis. Under *Childress*, a court will first look to see whether each putative author contributed a copyrightable element to the character.³⁷³ The character, recall, consists of physical as well as conceptual attributes.³⁷⁴ The visual depiction of the character, in the way it dresses, walks, gestures, etc., as well as the way that it appears in the frame and the way that it is lit, is attributable to the people who made the choices causing the character to appear the way that it does.³⁷⁵ Even things like posing can be considered copyrightable elements,³⁷⁶ and so the number of people who contributed copyrightable elements can be staggering.³⁷⁷

The second step will ask who the "dominant author" is and whether that person had intent to share authorship with the others.³⁷⁸ Since all works must be fixed, the "dominant author" is likely the person who actually caused the character in the motion picture to be fixed under his or her authority (the director),³⁷⁹ since without him or her, all the creativity in the world would not result in a work.³⁸⁰ The court would look at the objective factors that would indicate an understanding that the parties intended co-ownership.³⁸¹ The same circumstances that led the court to reject joint authorship in the play in *Childress* might lead

368. Caroline Graham, *The £13m House that Borat Bought. . . Sacha Baron Cohen Settles for a Hollywood Mansion*, DAILY MAIL (Jul. 10, 2010), <http://www.dailymail.co.uk/tvshowbiz/article-1299210/The-13m-house-Borat-bought—Sacha-Baron-Cohen-settles-Hollywood-mansion.html>.

369. *Actor*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Actor>.

370. *The Joker*, BATMAN WIKI, http://batman.wikia.com/wiki/The_Joker.

371. *Acting*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Acting>.

372. *Film*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Film>.

373. *Childress v. Taylor*, 945 F.2d 500, 507 (2nd Cir. 1981).

374. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 752 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979).

375. *See Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884).

376. *See id.* But of course keep in mind the threat posed to this conclusion by *scènes-à-faire*.

377. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000).

378. *Fisher v. Klein*, 86 Civ. 9522 PNL, 1990 U.S. Dist. LEXIS 19463, at *12 (S.D.N.Y. June 26, 1990).

379. *Burrow-Giles*, 111 U.S. at 60.

380. *Childress v. Taylor*, 945 F.2d 500, 508 (2nd Cir. 1981).

381. Geoffrey Macnab, *The Madness of Daniel Day-Lewis – a Unique Method that Has Led to a Deserved Third Oscar*, INDEPENDENT (Feb. 23, 2013), <http://www.independent.co.uk/arts-entertainment/films/features/the-madness-of-daniel-daylewis—a-unique-method-that-has-led-to-a-deserved-third-oscar-8510704.html>.

a court to find joint authorship of a character in a motion picture. Take, for example, a method actor like Daniel Day Lewis who puts in incredibly extensive creative work to bring a character to life.³⁸² In such a case, it would be uncontroversial that an actor and director working together would have the type of relationship that would weigh in favor of joint authorship of the character.

The Ninth Circuit's test would look very similar. It would first ask who had control of the work as its "mastermind" (similar to the "dominant author" analysis), then determine whether each author had the intent to share authorship.³⁸³ It would turn out a similar way, since unlike a claim for joint authorship of a motion picture, a performer is more likely to succeed in claiming joint authorship in a character. Performers have more control over the execution of their roles than Aalmuhammed had over *Malcolm X*, and depending on the character's importance in the motion picture, the actor may have more control than even the director has.³⁸⁴ Then the court would look to the relationship between the putative authors to determine whether they shared the intent to be joint authors.³⁸⁵

Turning to specific situations, when a character is independently copyrightable before it appears in a motion picture, its new appearance in the motion picture should be considered for derivative work status, and to the extent that it qualifies, analyzed under the *Silverman v. CBS* standard.³⁸⁶ Just as Silverman created an Amos 'n' Andy that were "derivative" of the Amos 'n' Andy that were in early scripts, performers can create audiovisual characters in motion pictures that are derivative of their predecessors when a motion picture is based on a preexisting work.³⁸⁷ Courts should look to the elements added by the performance to see whether it should use the *Batlin*, *Schrock*, or *Meshwerks* standards for originality in derivative works.³⁸⁸ Recall that under *Batlin*, the performer must add "at least some substantial variation, not merely a trivial variation such as might occur in the translation to a different medium"³⁸⁹ in order to be eligible for derivative work status. To the extent that the performer and other joint authors of the audiovisual character add new expression, they should be entitled to copyright in those original expressive details that help to delineate the character, in the same way that Silverman was entitled to the original elements of his Amos 'n' Andy. Under *Schrock*, "the key inquiry is whether there is sufficient nontrivial expressive variation in the derivative work to make it distinguishable from the underlying work in some meaningful way."³⁹⁰ The authors of the audiovisual character must contribute "enough expressive variation from . . . existing works to enable the new work to be readily distinguished from its predecessors,"³⁹¹ and just like the photographer in *Schrock*, they will likely be able to show enough variation in their audiovisual representation of the character to earn copyright for their original contributions

382. *Id.*

383. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233-35 (9th Cir. 2000).

384. *See, e.g., Dominic Patton, 'Castle' Production Shuts Down For Day As Star Nathan Fillion Feuds With ABC Studios*, DEADLINE (Jul. 16, 2013), <http://www.deadline.com/2013/07/nathan-killion-castle-dispute-no-show/>.

385. *Aalmuhammed*, 202 F.3d at 1234-35.

386. *Silverman v. CBS Inc.*, 870 F.2d 40, 49-50 (2d Cir.), *cert. denied*, 109 S.Ct. 3219 (1989).

387. *Id.*

388. Again, this assumes that the character was already independently copyrightable in its first iteration. This Article does not take a position on which of these standards is best law; instead, it will merely explain what a court would do when operating under each.

389. *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976) (en banc), *cert. denied*, 429 U.S. 857 (1976).

390. *Schrock v. Learning Curve Int'l, Inc.*, 586 F.3d 513, 521 (7th Cir.2009).

391. *Id.* at 516.

to it. Finally, under *Meshwerks*, there is no special standard for derivative works.³⁹² So long as the audiovisual authors can show a modicum of creativity original to the audiovisual character not present in the preexisting character, they will be eligible for copyright in it.

The analysis is more difficult when the character was not independently copyrightable prior to the creation of the motion picture. The first step in the analysis asks whether the character is sufficiently delineated to warrant protection.³⁹³ Out of an abundance of caution, a court may also look to see whether the character constitutes the “story being told” – relying on indicators such as whether the character’s name appears in the title of the motion picture³⁹⁴ and whether the appeal and intrigue of the story relies on the audience seeing the character at work.³⁹⁵ Elements of a character as portrayed onscreen can help to delineate the character – an excellent performance can bring a character that reads as dry and uninteresting in a script to life onscreen. One situation where a new independently-copyrightable character can come into being is a script written in conjunction with the production of a motion picture, where a character did not exist before the script. If the character possesses sufficient expressive elements to delineate it, when the movie is finished, the character will be a product of the joint authorship of the creative contributors with shared intent and control over their contributions – the writer, the performer, the director, etc.

If the script was written “on spec” (that is, with the intent to be sold and with only a hope that it will one day be bought and become a motion picture),³⁹⁶ then the shared intent analysis is more difficult. A court would have to analyze the elements of the character as it was written in the script to determine whether the character was independently copyrightable at the time.³⁹⁷ If so, it would apply the analysis laid out in the previous paragraph for preexisting independently-copyrightable characters then run through the derivative work analysis for the character as it appears in the motion picture like in *Silverman*.³⁹⁸ If the character was not independently copyrightable as written in the script, then the court would analyze the character as it appears in the motion picture. Assuming that the character is independently copyrightable, under the *Childress* test³⁹⁹ the court would check to see who the copyrightable elements that delineate the character came from. So long as all the parties vying for joint authorship contributed copyrightable elements, it would then turn its attention to who the “dominant author” was, and whether at the time of the copyrightable character’s fixation the dominant author had the intent to share authorship with the other putative authors. Under the *Aalmuhammed* test,⁴⁰⁰ the court would look to see whether the putative authors had control over their contributions to the character as delineated in the motion picture. Importantly, it is likely that the writer at this point would lose his or her claim to joint authorship unless he or she continues to be involved in the production of the motion picture. This is because a court would look to see whether the parties had control of the elements contributed at the time that the character was fixed in the

392. *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1266 (10th Cir. 2008).

393. *Burroughs v. MGM*, 683 F.2d 610, 610 (2d Cir. 1982).

394. See *Universal City Studios, Inc. v. Kamar Industries, Inc.*, No. H-82-2377, 1982 U.S. Dist. LEXIS 15942, at *7 (S.D. Tex. Sept. 20, 1982).

395. *MGM v. American Honda Motor Co.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995).

396. *Spec Definition*, THE FREE DICTIONARY, <http://www.thefreedictionary.com/on+spec> (last updated 2009).

397. *Silverman v. CBS Inc.*, 870 F.2d 40, 49-50 (2d Cir.), cert. denied, 109 S.Ct. 3219 (1989).

398. *Id.* at 49.

399. See *Childress v. Taylor*, 945 F.2d 500, 509 (2d Cir. 1981).

400. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000).

motion picture. It would also look to see whether they had the necessary shared-authorship intent at the time of the motion picture's fixation.

Ultimately, this calculus will only arise in the exceptional circumstance when a character is as independently copyrightable as it appears in a motion picture. Performance is the process by which an actor contributes expressive elements to a character copyrightable independently from the motion picture in which it appears.⁴⁰¹

CONCLUSION

Actors' performances in motion pictures are not copyrightable works independent of the motion pictures in which they appear. The control elements of the fixation and authorship requirements for copyright present insurmountable hurdles to performers' claims of authorship in performances as they appear on film or in video. However, to the extent that a performance contributes expression to an independently-copyrightable character, the performer can be eligible for joint authorship of the character as portrayed with the others who contribute copyrightable expression and also have the intent to share authorship.

401. *Garcia v. Google, Inc.*, 743 F.3d 1258, 1263 (9th Cir. 2014).

Free Speech, Football, and Freedom: Why the NFL Should Not Compel its Players to Speak to the Media

Sohil Shah*

INTRODUCTION

Four short statements. That is all Marshawn Lynch said to the media after his team, the Seattle Seahawks, won its first Super Bowl on February 2, 2014, and after the National Football League (“NFL”) forced him to talk to the media.¹ Lynch is a running back for the Seahawks, and throughout the 2013 regular season, he refused to talk to reporters, resulting in a violation of the NFL Media Relations Policy.² Lynch was fined \$50,000 in January 2014 for his silence; but after an appeal, the NFL lifted the fine in exchange for Lynch agreeing to talk to the media during the remainder of the season.³ In this paper, I argue that the NFL’s policy of requiring players to speak to the media is a due-process violation of the First Amendment right to freedom of speech. The NFL is a state actor under the entanglement and entwinement exception to the state-action doctrine and, as a result, it violates Marshawn Lynch’s due process by infringing on his constitutional right not to speak under the First Amendment’s freedom of speech protection.

First, I outline the NFL Media Relations Policy (the “Policy”) that Lynch was fined for violating. Second, I discuss the state-action doctrine under which constitutional violations of the First Amendment, and by incorporation the Fourteenth Amendment, are enforced. Third, I analyze why the NFL’s conduct constitutes state action. Fourth, having established that the NFL is a state actor, I proceed with a First Amendment free speech analysis, concluding that the NFL policy violates Lynch’s due-process right to free speech, which includes a right to refrain from speaking.

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1. Ryan van Bibber, *Marshawn Lynch Still Doesn’t Have Much to Say*, SBNATION.COM (Feb. 2, 2014, 10:51 PM), <http://www.sbnation.com/lookit/2014/2/2/5372682/marshawn-lynch-press-conference-super-bowl>.

2. Bob Condotta, *Marshawn Lynch: ‘I’m Just Here So I Won’t Get Fined, Boss’*, THE SEATTLE TIMES (Jan. 30, 2014, 6:41 AM), http://seattletimes.com/html/seahawks/2022787143_seahawksnotebook30xml.html.

3. *Id.*

I. NFL POLICY AND MARSHAWN LYNCH

The Policy states that “players must be available to the media following every game and regularly during the practice week.”⁴ League rules mandate that players be available for interviews with the press at two distinct times: 1) after a reasonable waiting period following each game and 2) during a normal practice week on Monday, Wednesday, Thursday, and Friday for a minimum of 45 minutes on each of those days.⁵ Throughout the 2013 regular season, Seattle running back Marshawn Lynch refused to talk to reporters in violation of this policy, so the NFL fined him \$50,000 in January of 2014.⁶ Lynch appealed the fine; then, the NFL said that it would repeal the fine if Lynch adhered to the Policy for the rest of the season.⁷ Lynch then began to appear at press conferences, but gave only short responses and did not stay for the required 45 minutes.⁸ Lynch has never confirmed the reasons for his reticence towards the media; he has denied ever being misquoted or that he is trying to create a public-life/personal-life barrier.⁹ In the sections below, I argue that Lynch should not be required to talk to the media because of his First Amendment right to freedom of speech, and that the NFL is infringing on this right.

II. THE FIRST AMENDMENT, THE FOURTEENTH AMENDMENT, AND STATE ACTION

For a court to enforce the First and Fourteenth Amendments in a particular situation, state action must be involved and no exceptions to the doctrine may apply.¹⁰ In this section, I outline the First and Fourteenth Amendments, discuss their enforcement under the state-action doctrine, and explain the entanglement and entwinement exception to the state-action doctrine, which allows for a private entity, such as the NFL, to fall within the purview of the doctrine.

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech . . .”¹¹ The Fourteenth Amendment mandates application of this amendment and other amendments in the Bill of Rights to the states, specifically stating that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.”¹² The Supreme Court, early in its history, restricted guarantee of these and other constitutional rights to individuals only against government interference.¹³ In the *Civil Rights Cases*, the Court held that the Fourteenth Amendment restricts only the states, not

4. 2013 NFL Media Policy, PRO FOOTBALL WRITERS OF AMERICA, <http://www.profootballwriters.org/nfl-media-policy/> (last visited Apr. 6, 2014). The 2014 NFL Media Policy kept the same requirement for the 2014 season.

5. *Id.*

6. Andrew Brining, *Marshawn Lynch Fine Should Signal Beginning of End for NFL's Free Public Ride*, BLEACHER REPORT (Jan. 14, 2014), <http://bleacherreport.com/articles/1917644-marshawn-lynch-fine-should-signal-beginning-of-end-for-nfls-free-public-ride>.

7. Condotta, *supra* note 2.

8. *Id.*

9. *Id.*

10. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721-22 (1961); see *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349-50 (1974); see *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 293-95 (2001).

11. U.S. CONST. amend. I.

12. U.S. CONST. amend. XIV, § 1.

13. See *The Civil Rights Cases*, 109 U.S. 3, 10 (1883); see also *U.S. v. Cruikshank*, 92 U.S. 542, 543 (1875).

the private invasion of individual rights.¹⁴ This has become known as the state-action doctrine, which, simply stated, means that the constitutional amendments that protect individual rights only prohibit government action, but do not extend to private conduct that abridges or violates individual rights.¹⁵

The state-action doctrine is not absolute and private actors can be held liable under certain exceptions.¹⁶ When alleging a constitutional violation by a private party, the issue is “whether the state was sufficiently involved to treat that decisive conduct as state action.”¹⁷ The entanglement exception to the state-action doctrine states that the Constitution applies if the government “affirmatively authorizes, encourages, or facilitates private conduct that violates the Constitution.”¹⁸ Government subsidies or financial support to a private entity can make the private entity a state actor and therefore liable under the state-action doctrine.¹⁹ In *Gilmore v. City of Montgomery*, the Court held that a local government’s grant of exclusive use and control of its public recreational facilities to racially segregated private schools violated the Fourteenth Amendment’s equal-protection clause.²⁰ The Court found that the city’s actions constituted state action because they “significantly enhanced the attractiveness of the segregated private schools . . . by enabling them to offer complete athletic programs.”²¹ Specifically, the city, by providing facilities for use, allowed the schools to save money and divert the savings into their own educational programs.²²

The entanglement exception was broadened in a more recent case by adding an entwinement component to entanglement.²³ In *Brentwood Academy v. Tennessee Secondary School Athletic Association*, the Court held that a private entity, the Tennessee Secondary School Athletic Association, which regulated high school activities, was a state actor because of the Tennessee State Board of Education’s entwinement with its activities.²⁴ The Court noted that a finding of state action must be evaluated on a case-by-case basis.²⁵ The association produced rules and regulated competition for both public and private schools, and public schools provided significant financial support to the association.²⁶ The Court did not use the word entwinement in its opinion, and found state action without the requisite encouragement by the government needed in earlier entanglement cases, thereby creating an entwinement component to the entanglement exception.²⁷

III. WHY THE NFL IS A STATE ACTOR

14. The Civil Rights Cases, 109 U.S. at 10.

15. Burton, 365 U.S. at 721-22; *see also* Jackson, 419 U.S. at 349.

16. *See* Nat’l Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179, 192 (1988); *see also* Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 926 (1982).

17. *Tarkanian*, 488 U.S. at 192.

18. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPALS AND POLICIES 539 (4th ed. 2011).

19. *Id.*

20. *Gilmore v. City of Montgomery*, 417 U.S. 556, 578-80 (1974).

21. *Id.* at 569.

22. *Id.*

23. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 288-90 (2001).

24. *Id.*

25. *Id.* at 295.

26. *Id.* at 300.

27. CHERMERINSKY, *supra* note 18, at 538.

The NFL can be considered a state actor under the entanglement-entwinement exception to the state-action doctrine for a variety of reasons. As stated above, the NFL is not a government entity. The NFL is a private “unincorporated association of member clubs which own and operate professional football teams.”²⁸ Its purpose is to promote, organize, and regulate professional football in the United States.²⁹ Significant government support, however, converts the NFL into a state actor for purposes of the state-action doctrine.³⁰

First, NFL member teams receive substantial government funding for their stadiums.³¹ In Minnesota, for the Vikings’ new \$975 million stadium, state and local taxpayers will provide funding for \$678 million of that cost.³² In Georgia, public bonds will contribute \$200 million to the total \$1.2 billion in costs for the Atlanta Falcons’ new stadium.³³ Taxpayers funded \$390 million of the total \$560 million construction cost for the Seattle Seahawks’ stadium, which opened in 2002.³⁴ It has been estimated that seventy percent of the cost of NFL stadiums around the country has been funded by taxpayers.³⁵ In many cities and states, the government is also funding ongoing costs for stadiums by providing generous services such as power, sewer services, infrastructure services, and stadium improvements at no charge to the team.³⁶ Taking into account construction costs and ongoing costs, the following teams have turned a profit on the government subsidies they have received by taking in more money from the public than required to build and operate their facilities: the Buffalo Bills, Cincinnati Bengals, Cleveland Browns, Houston Texans, Indianapolis Colts, Jacksonville Jaguars, Kansas City Chiefs, New Orleans Saints, San Diego Chargers, St. Louis Rams, Tampa Bay Buccaneers, and the Tennessee Titans.³⁷

Second, the NFL has benefitted from government assistance and funding in the form of tax breaks not extended to other private corporations.³⁸ Although it is presumed that individual teams pay corporate taxes since they are for-profit organizations, with the exception of the Green Bay Packers, the NFL itself is a tax-exempt, not-for-profit organization.³⁹ The NFL has been classified as a non-profit organization since 1942, and in 1966, Congress amended the tax code by adding “professional football leagues” to its definition of 501(c) not-for-profit organizations.⁴⁰ Additionally, some argue that the NFL operates as a tax shelter for its teams. The NFL sells licenses for things such as broadcasting contracts and apparel, and the individual teams receive compensation; in turn, the teams pay dues and assessments to the NFL, which are tax-deductible because of the NFL’s 501(c)

28. *Williams v. NFL*, 582 F.3d 863, 868 (8th Cir. 2009).

29. *Id.*

30. CHEMERINSKY, *supra* note 18.

31. Nick Gillespie, *Football: A Waste of Taxpayers’ Money*, TIME (Dec. 6, 2013), <http://ideas.time.com/2013/12/06/football-a-waste-of-taxpayers-money/>.

32. *Id.*

33. Tim Tucker, *Comparing Braves, Falcons stadium deals*, AJC.COM (Nov. 13, 2013), <http://www.ajc.com/news/news/comparing-braves-falcons-stadium-deals/nbsX6/>.

34. Gregg Easterbrook, *How the NFL Fleeces Taxpayers*, THE ATLANTIC (Sept. 18, 2013), <http://www.theatlantic.com/magazine/archive/2013/10/how-the-nfl-fleeces-taxpayers/309448/>.

35. *NFL’s a Nonprofit: Author Says It’s Time for Football Reform*, NPR (Sept. 24, 2013), <http://www.npr.org/2013/09/24/225775287/nfls-a-nonprofit-author-says-its-time-for-football-reform>.

36. Easterbrook, *supra* note 34.

37. Easterbrook, *supra* note 34.

38. See Dallas Steele, *How Much Public Money Does Your State Spend on NFL Football?*, POLICYMIC (Oct. 2, 2013), <http://www.policymic.com/articles/66077/how-much-public-money-does-your-state-spend-on-nfl-football-check-this-chart>.

39. Easterbrook, *supra* note 34.

40. Steele, *supra* note 38.

status.⁴¹ Because of the millions of dollars in tax obligations that the NFL has avoided, the public must make up this lost revenue in the form of higher taxes, lower public spending for essential services such as schools and hospitals, and an increase in government debt.⁴²

Third, the NFL has benefitted greatly from its antitrust protection.⁴³ In 1966, Congress enacted Public Law 89-800, which gave the NFL a monopoly regarding its broadcasting rights.⁴⁴ Today the NFL's television rights are worth billions of dollars each year.⁴⁵ The team owners reportedly receive a large portion of profits from those contracts while making a minimal contribution to the stadium costs for each respective team.⁴⁶ The NFL also profits from its exclusive copyright license for games that are broadcast from its publicly funded stadiums.⁴⁷

Each of these incentives – public funding of stadiums, the NFL's tax-exempt status, and its beneficial antitrust arrangement – are government subsidies at their heart and provide the basis for the claim that the government has entangled itself with the NFL. As a result, the NFL's actions constitute state action. Just as in *Gilmore*, local and state governments have granted the NFL, a violator of First Amendment rights (as explained below), exclusive use of stadiums that were partially publicly funded.⁴⁸ The government has gone even further in the case of the NFL. The federal government, through its antitrust protection and granting of tax-exempt status, and local and state governments, through their subsidization of NFL stadiums, have augmented the attractiveness of the NFL and its teams by enabling the NFL to operate as the dominant professional football league in the country.⁴⁹ The government's funding of professional football has allowed team owners to reap profits for themselves.

The government has also entwined itself with the NFL under the *Brentwood* entwinement expansion of the entanglement exception. Just as public schools helped fund the athletic association in *Brentwood*, numerous government entities, specifically local and state governments and the federal government, have funded the NFL through their government subsidies.⁵⁰ While the NFL is not composed of government entities in the way that the association in *Brentwood* was composed of public schools, it cannot be denied that the NFL has received significant financial assistance from the government or that the NFL provides rules and regulates competition for professional football in the United States.⁵¹ The government has entwined itself with the NFL's activities in numerous aspects, and this entwinement is sufficient enough to make the NFL a state actor.

Critics might counter that the Supreme Court has stated that government funding alone is not sufficient for finding state action.⁵² In *Rendell-Baker v. Kohn*, the Court held that because a school's actions were not compelled or influenced by any state regulation, the

41. Steele, *supra* note 38.

42. Easterbrook, *supra* note 34.

43. *See id.*

44. Easterbrook, *supra* note 34.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Gilmore v. City of Montgomery*, 417 U.S. 556, 578-80 (1974).

49. Easterbrook, *supra* note 34.

50. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 300 (2001).

51. Easterbrook, *supra* note 34.

52. *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982).

Constitution did not apply and state action was not present.⁵³ It further reasoned that government contractors' actions do not become state actions by "reason of their significant or even total engagement in performing public contracts."⁵⁴ The entwining of the NFL and the government stands in stark contrast to the government involvement in *Rendell-Baker*. Here, even though the NFL's infringement of Lynch's rights is not influenced by government regulation, the NFL is receiving much more than government funding.⁵⁵ As evidenced above, the NFL has received numerous non-financial incentives, including protection for a monopoly on game broadcasting rights, favorable tax treatments, and numerous political favors for new stadium construction. The NFL has essentially been deemed the official professional football league by the government's actions and it enjoys a level of protection that no other football organization in the country receives.⁵⁶ While the Court appears inconsistent in the highlighted cases, it is more likely than not that each of the three levels of government has entwined itself with the NFL, making the NFL a state actor and transforming its conduct into state action.

Moreover, in *Ludtke v. Kuhn*, the court held that because the city of New York had invested significant public funds to enhance the drawing power of Yankee games by modernizing and improving Yankee Stadium, state action was present.⁵⁷ Further separating the government-encouragement standard from government entwining, the court found that it bore no relevance that the city had not explicitly directed the Yankees to adopt the discriminatory policy in dispute. It stated that the failure of the city to act constitutes state action "when the municipality is under a duty to act and the inaction results in the deprivation of constitutional rights."⁵⁸ Since most NFL stadiums receive significant public funding, after applying the holding in *Ludtke*, the NFL becomes a state actor. Additionally, the failure to act on the part of the federal government to protect Lynch's free speech rights constitutes state action.⁵⁹ The court's holding in *Ludtke*, therefore, strongly supports the application of the state-action doctrine to the NFL and the government's failure to protect Lynch.⁶⁰

IV. FREE SPEECH AND LYNCH

Since the NFL is likely a state actor, an analysis of the right to free speech is necessary. In this section, I first analyze the right to freedom of speech in the context of Lynch's refusal to speak and then conclude, under intermediate scrutiny, that the Policy infringes upon his First Amendment rights. The Policy is a result of the NFL players' collective bargaining agreement, so the commissioner is afforded a great deal of authority.⁶¹ However, if Lynch were to bring a due-process claim based on this infringement, it seems that the commissioner's authority loses its deferential status.

Lynch's potential First Amendment claim finds basis in his right to refrain from speaking to the media and the Policy's infringement of that right. In *West Virginia State*

53. *Id.* at 841.

54. *Id.*

55. *Id.*

56. Easterbrook, *supra* note 34.

57. *Ludtke v. Kuhn*, 461 F. Supp. 86, 93 (S.D.N.Y. 1978).

58. *Id.* at 94 (quoting *Citizens Council on Human Relations v. Buffalo Yacht Club*, 438 F. Supp. 316, 323 (W.D.N.Y. 1977)).

59. *Id.* at 98.

60. *Id.*

61. *NFL Media Policy*, *supra* note 4.

Board of Education v. Barnette, the Court held that a state law requiring school children to salute the flag was an unconstitutional violation of the First Amendment.⁶² It stated that the right to freedom of thought includes both the right to speak and the right to refrain from speaking.⁶³ It poignantly stated that “if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”⁶⁴

The Court also affirmed the right to refrain from speaking in *Wooley v. Maynard*.⁶⁵ The Court, reiterating a previous holding, quoted its proposition that “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”⁶⁶ In doing so, the Court reiterated its opinion that the right to refrain from speaking is still a valid, independent component of the First Amendment right to freedom of speech.⁶⁷ Lynch has chosen not to speak to the media, and his right to remain silent is part of his First Amendment right to freedom of speech.

The inquiry does not end here though. Implicit with any due-process challenge to free speech, we must also analyze the restriction on speech under the correct level of scrutiny. Intermediate scrutiny is applied to a policy forcing content-neutral speech, which is the type of speech compelled by the Policy. In applying intermediate scrutiny, the Court uses the *O’Brien* test to determine whether the policy that regulates speech violates the First Amendment.⁶⁸ The principal inquiry of the test asks whether the state has a countervailing interest to sufficiently compel the speech at issue.⁶⁹ The NFL offers only one rationale in its Policy for its rules.⁷⁰ The Policy states that “reasonable cooperation with the news media is essential to the continuing popularity of our game and its players and coaches.”⁷¹ While media access to individual athletes can ensure that NFL football games remain popular,⁷² under the *O’Brien* test, ensuring popularity is not a countervailing interest.⁷³

Moreover, even if it were, the Policy is not narrowly tailored towards achieving continued popularity of the game, its players, and its coaches. Football is a sport first and foremost, and the popularity of any team and its players is based on its competitive advantage comprised of the skill of its players and the success of the team on the field. Winning drives football, and performance on the field determines players’ value and salary prospective. Having media access to individual players may help popularize them, but fans look at performance. A bad player on the field likely has many fewer fans than a player who excels and delivers winning performances. A player’s popularity derives primarily from his performance as an athlete, not his ability to talk to a reporter and answer questions. Under

62. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641–42 (1943).

63. *Id.* at 633–34.

64. *Id.* at 642.

65. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

66. *Id.* The Court went on to hold that an individual could not be punished for blocking the state motto “Live Free or Die” from showing on his license plate.

67. *Id.*

68. *See Maynard*, 430 U.S. at 716.

69. *Id.*

70. *NFL Media Policy*, *supra* note 4.

71. *NFL Media Policy*, *supra* note 4.

72. *See National Football League, NFL Teams Extend Goodell’s Contract Through 2018 Season*, NFL.COM (Jan. 25, 2012), <http://www.nfl.com/news/story/090000d5d826501f0/article/nfl-teams-extend-goodells-contract-through-2018-season>.

73. *See Maynard*, 430 U.S. at 716.

intermediate scrutiny, then, the NFL policy forcing Marshawn Lynch to speak to the media violates his First Amendment right to free speech. Lynch would likely have a strong case that he should not be required to speak with the media – his performance on the field speaks for itself.

CONCLUSION

This paper has outlined the reasons why the NFL policy of requiring its players to speak to the media is a due-process violation of Marshawn Lynch's First Amendment right to freedom of speech. The NFL is a state actor under the state-action doctrine's entanglement and entwinement exception because of the government's strong entanglement and entwinement with the NFL's operations and funding. Because the NFL is a state actor, its policy of forcing Lynch to speak violates his due-process right to freedom of speech, which includes the right not to speak. Under intermediate scrutiny analysis, the NFL's rationale for the Policy of continuing popularity of the game, its players, and its coaches is neither narrowly tailored nor supplies the countervailing interest necessary to justify the restriction on free speech.

Getting to Deuce: Professional Tennis and the Need for Expanding Coverage of Federal Antidiscrimination Laws

Collin R. Flake*

INTRODUCTION

My job in the match, and I remember this being very clear, was to change the hearts and minds of people to match the legislation . . . and what we were trying to do with the women's movement.

– Billie Jean King¹

In a pivotal moment for women in sports, Billie Jean King defeated Bobby Riggs in the “Battle of the Sexes” as part of her campaign against sex discrimination in professional tennis.² Forty years later, women in professional tennis are still experiencing discrimination.³ Like other independent contractors, tennis players are not protected from employment discrimination under federal law.⁴ Antidiscrimination statutes such as Title VII of the Civil Rights Act,⁵ the Americans with Disabilities Act,⁶ the Age Discrimination in

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1. Jaime Schultz, *The Physical Activism of Billie Jean King*, in MYTHS AND MILESTONES IN THE HISTORY OF SPORT 203, 215 (Stephen Wagg ed., 2011).

2. Nancy E. Spencer, *Reading Between the Lines: A Discursive Analysis of the Billie Jean King vs. Bobby Riggs “Battle of the Sexes,”* 17 SOC. SPORT J. 386, 386 (2000).

3. See Jane Crossman et al., *‘The Times They Are A-Changin’*: Gender Comparisons in Three National Newspapers of the 2004 Wimbledon Championships, 42 INT’L REV. SOC. SPORT 27, 38 (2007) (finding that female tennis players receive less media coverage at Wimbledon compared to male players); Collin R. Flake et al., *Advantage Men: The Sex Pay Gap in Professional Tennis*, 48 INT’L REV. SOC. SPORT 366, 373–74 (2013) (suggesting that institutional discrimination contributes to the disparity in prize money earnings between male and female tennis players; the author published *Advantage Men* previously with the help of Professor Mikaela J. Dufur and Erin L. Moore); John Harris & Ben Clayton, *Femininity, Masculinity, Physicality and the English Tabloid Press: The Case of Anna Kournikova*, 37 INT’L REV. SOC. SPORT 397, 411 (2002) (highlighting the media’s role in perpetuating a gendered hierarchy in sports like tennis).

4. See *Shah v. Deaconess Hosp.*, 355 F.3d 496, 499 (6th Cir. 2004) (“As a general rule, the federal employment discrimination statutes protect employees, but not independent contractors.”); Lewis L. Maltby & David C. Yamada, *Beyond “Economic Realities”: The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 239–40 (1997) (“[F]ederal employment discrimination statutes typically do not protect someone classified as an independent contractor.”).

5. 42 U.S.C. § 2000e et seq. (2012).

6. 42 U.S.C. §§ 12101–213 (2012).

Employment Act,⁷ and the Equal Pay Act⁸ prohibit unequal treatment on the basis of race, sex, age, religion, and disability. However, these statutes only cover “employees,” leaving independent contractors open to many forms of discrimination.⁹

The distinction between employees and independent contractors is perhaps the most litigated issue in employment law, which has been reflected in the ongoing dialogue about expanding coverage of the federal antidiscrimination laws.¹⁰ The underinclusiveness of current laws is especially problematic for highly paid independent contractors—like professional tennis players—because unequal treatment can mean the difference between hundreds of thousands of dollars in earnings.¹¹ For example, during the 2009 singles season, median prize money earnings for male tennis players were nearly \$100,000 greater than those of female players.¹² Not surprisingly, this disparity becomes even more pronounced over the course of a player’s career.¹³

The pay gap is one of the most conspicuous manifestations of gender inequality in sport and other labor markets. In the United States in 2013, median annual earnings for women were approximately 18% lower than those of men.¹⁴ Theoretical explanations for the pay gap implicate both individual and structural variables.¹⁵ Individual-level theories are grounded in socialization, personal choice, and human capital, whereas structural-level theories underscore employer discrimination, labor market positioning, and cultural devaluation.¹⁶ These theoretical lenses are important for understanding the causes of discrimination and informing myriad policy considerations surrounding antidiscrimination laws.¹⁷

Two such laws, Title VII and the Equal Pay Act, work in tandem to deter sex discrimination in the workplace.¹⁸ Nevertheless, a worker who experiences sex

7. 29 U.S.C. §§ 621–34 (2012).

8. 29 U.S.C. § 206(d) (2012).

9. See Jeff Clement, Comment, *Lerohl v. Friends of Minnesota Sinfonia: An Out of Tune Definition of “Employee” Keeps Freelance Musicians from Being Covered by Title VII*, 3 DEPAUL BUS. & COM. L.J. 489, 510–11 (2005).

10. See, e.g., Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 172–74 (2003); Karen R. Harned et al., *Creating a Workable Legal Standard for Defining an Independent Contractor*, 4 J. BUS. ENTREPRENEURSHIP & L. 93, 96 (2010); Maria O’Brien Hylton, *The Case Against Regulating the Market for Contingent Employment*, 52 WASH. & LEE L. REV. 849, 861–62 (1995); Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 284 (2006).

11. See Flake et al., *supra* note 3, at 369.

12. *Id.*

13. *Id.* In 2009, median career prize money earnings for male players ranked in the top 100 were \$2,144,600 compared to \$878,808 for female players. *Id.*

14. U.S. BUREAU OF LAB. STAT., HIGHLIGHTS OF WOMEN’S EARNINGS IN 2013 1 (2014), available at <http://www.bls.gov/opub/reports/cps/highlights-of-womens-earnings-in-2013.pdf>.

15. See Robin Stryker, *Disparate Impact and the Quota Debates: Law, Labor Market Sociology, and Equal Employment Policies*, 42 SOC. Q. 13, 15–19 (2001) (contrasting the sociological view of discrimination as a “group level phenomenon” with the legal concept of “individualistic, intent-oriented” discrimination).

16. See *infra* notes 25–54 and accompanying text.

17. See generally ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY (1996) (describing the “judicial implications” of process- and result-based theories of discrimination); see also Linda Hamilton Krieger, *The Intuitive Psychologist Behind the Bench: Models of Gender Bias in Social Psychology and Employment Discrimination Law*, 60 J. SOC. ISSUES 835, 836 (2004) (noting that American law uses social-scientific theory for “the creation of new remedial theories through the common law process” and “factual adjudication of individual cases”).

18. Congress enacted the Equal Pay Act in order to “remedy what was perceived to be a serious and endemic

discrimination must meet the threshold requirement of being an “employee” in order to sue.¹⁹ Independent contractors cannot sue their employers for sex discrimination.²⁰ Statistical evidence indicates that female tennis players are experiencing sex-based pay discrimination,²¹ but because they are independent contractors, they have no legal recourse.

Professional tennis provides an especially appropriate case study for why some independent contractors need protection under federal antidiscrimination laws. Unlike everyday work environments, occupations in sport labor markets provide detailed records of performance, making sport one of the few settings in which individual and structural mechanisms can be tested simultaneously.²² Moreover, examining non-team sports such as tennis allows for disentanglement of the effects of individual and structural variables on earnings, thereby isolating discrimination’s effect.²³ Finally, tennis is arguably the most successful women’s sport in terms of commercial appeal and global popularity.²⁴ If independent contractors in a lucrative and highly visible profession such as tennis experience pay discrimination based on sex, the implications for female independent contractors in less prominent professions are even more worrisome.

This Note uses a socio-legal framework, with tennis as a case study, to argue that some independent contractors should be protected under federal law. Part I lays out the theoretical and legal background by first describing social-scientific theories on occupational gender inequality. It then provides a brief overview of Title VII and the Equal Pay Act. Part II discusses the statistical evidence of a gender pay gap in professional tennis and explains why tennis players are independent contractors. Part III outlines several proposals for covering some independent contractors under federal law, and argues that returning to the economic realities test is the most practical and effective way to effectuate the remedial purposes of the antidiscrimination statutes. To conclude, this Note discusses the policy implications of expanding coverage of the statutes.

problem of employment discrimination . . . ‘based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.’” *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (internal citation omitted).

19. Hugh Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, 10 OXFORD J. LEGAL STUD. 353, 353 (1990) (“Employment protection rights . . . typically vest only in employees whose jobs fit into the complementary paradigm form of employment in vertically integrated production: employment which is full-time, stable, and for an indefinite duration.”).

20. *See id.* at 354 (noting that independent contractors are frequently excluded from equal protection rights because they do not qualify as employees).

21. *See infra* Part II.A.

22. Flake et al., *supra* note 3, at 367.

23. Isolating the effect of independent variables (e.g., gender) on dependent variables (e.g., earnings) is critical in Equal Pay Act claims, where an employer’s only defense is that some legitimate factor other than sex accounts for the disparity. *See* 29 U.S.C. § 206(d)(1) (2012).

24. *See* Eliana Dockterman, *Why Tennis is the Most Popular Women’s Sport*, TIME (Sept. 7, 2014), <http://time.com/3273225/why-womens-tennis-most-popular-womens-sport/> (“Women tennis players earn more money, endorsements and TV face time than any other female athletes.”). In 2014, seven of the ten highest-paid female athletes in the world were tennis players. Kurt Badenhausen, *The World’s Highest-Paid Female Athletes 2014*, FORBES (Aug. 12, 2014, 10:49 AM), <http://www.forbes.com/sites/kurtbadenhausen/2014/08/12/the-worlds-highest-paid-female-athletes-2014/> (suggesting that tennis players dominate the list of highest-paid female athletes because tennis “is the one significant money-generating sport where men and women have attained near equality when it comes to prize money and sponsorship opportunities”).

I. THEORETICAL AND LEGAL BACKGROUND

Understanding and alleviating discrimination requires consideration of the mechanisms that link gender to disparate outcomes.²⁵ No single theory encompasses all of the nuances of gender discrimination, but scholars have identified supply- and demand-side mechanisms that contribute to occupational gender inequality.²⁶ Supply-side explanations emphasize individual factors including socialization, personal choice, and human capital investment.²⁷ Demand-side explanations underscore structural factors such as employer discrimination, labor market positioning, and devaluation of traditional female occupations.²⁸ While economists emphasize the supply side and sociologists focus on the demand side,²⁹ the most accurate assessment of discrimination incorporates both perspectives.³⁰

A. SUPPLY-SIDE THEORIES

A vast body of literature argues that gender socialization heavily influences occupational outcomes such as earnings.³¹ According to socialization theory, socially constructed differences in values and thought processes guide women and men into occupations that society deems “gender appropriate.”³² Traditional socialization reinforces the importance of domestic and family responsibilities for women, which can prevent them from acquiring the skills necessary to enter and advance in male-dominated occupations.³³ Traditional female jobs typically pay below average wages, and the share of women in an

25. Barbara F. Reskin, *Including Mechanisms in Our Models of Ascriptive Inequality*, 68 AM. SOC. REV. 1, 17 (2003).

26. See Kathleen E. Hull & Robert L. Nelson, *Assimilation, Choice, or Constraint? Testing Theories of Gender Differences in the Careers of Lawyers*, 79 SOC. FORCES 229, 231–33 (2000).

27. See JERRY A. JACOBS, REVOLVING DOORS: SEX SEGREGATION AND WOMEN’S CAREERS 8–10 (1989) (socialization); Gary S. Becker, *Human Capital, Effort, and the Sexual Division of Labor*, 3 J. LAB. ECON. S33, S33 (1985) (human capital); David A. Macpherson & Barry T. Hirsch, *Wages and Gender Composition: Why Do Women’s Jobs Pay Less?*, 13 J. LAB. ECON. 426, 461 (1995) (worker skills and preferences); Ryan A. Smith, *Race, Gender, and Authority in the Workplace: Theory and Research*, 28 ANN. REV. SOC. 509, 531 (2002) (human capital).

28. See MARIA CHARLES & DAVID B. GRUSKY, OCCUPATIONAL GHETTOS: THE WORLDWIDE SEGREGATION OF WOMEN AND MEN 15 (2004) (stereotypes about female occupations); Paula England, *Gender Inequality in Labor Markets: The Role of Motherhood and Segregation*, 12 SOC. POL. 264, 271 (2005) (employer discrimination); Paula England et al., *Wages of Virtue: The Relative Pay of Care Work*, 49 SOC. PROBS. 455, 457 (2002) (cultural devaluation); Barbara Reskin, *Sex Segregation in the Workplace*, 19 ANN. REV. SOC. 241, 264–65 (1993) (labor market positioning).

29. See England, *supra* note 28, at 270–71.

30. See Reskin, *supra* note 28, at 264–65.

31. See, e.g., Michael Betz & Lenahan O’Connell, *Work Orientations of Males and Females: Exploring the Gender Socialization Approach*, 59 SOC. INQ. 318, 325 (1989) (finding support for the “gender socialization explanation to the work orientations of men and women”); Kathy Cannings, *Managerial Promotion: The Effects of Socialization, Specialization, and Gender*, 42 INDUS. & LAB. REL. REV. 77, 77 (1988) (“[C]areer-relevant factors such as childhood socialization . . . had a significant impact on the probability of promotion.”); Margaret Mooney Marini et al., *Gender and Job Values*, 69 SOC. EDUC. 49, 49 (1996) (finding “persisting gender differences in the importance of intrinsic, altruistic, and social rewards”).

32. JACOBS, *supra* note 27, at 8–10; Hull & Nelson, *supra* note 26, at 232.

33. Hull & Nelson, *supra* note 26, at 232 (“Gender-socialization processes also result in women’s failing to acquire skills and information relevant to male-dominated jobs and reinforce the appropriateness of women’s greater domestic and familial responsibilities.”).

occupation is one of the most significant determinants of the gender pay gap.³⁴ It has also been argued that women choose jobs that allow more work-life balance, paying for this flexibility by accepting lower wages.³⁵

Human capital theory has also been applied to explain disparate labor market outcomes for men and women.³⁶ Early human capital theorists suggested that women invest less time than men in acquiring education, skills, and job training, which places them into lower paying and less prestigious jobs.³⁷ However, more recent research finds that women's human capital investment rivals that of men, which is evidenced by the fact that the proportion of women in management positions has increased from one-third to almost one-half over the past twenty years.³⁸ Despite the similarity in men's and women's human capital, gender has a negative impact on salary and upward mobility for women.³⁹ For example, one study found that "investments in human capital attributes appear to enhance the authority chances of both men and women, but men receive a much higher authority return than women for possessing similar levels of human capital."⁴⁰

B. DEMAND-SIDE THEORIES

Another prevalent explanation for occupational gender inequality is employer discrimination, which assumes many forms including statistical discrimination, homosocial reproduction, and bottom-up ascription. Statistical discrimination occurs when employers screen individuals by applying assumptions about the sexes—including averages from formal and informal data—to predict ability and productivity.⁴¹ Employers discriminate statistically because individual measures of productivity are often inaccessible or are too expensive.⁴² Statistical discrimination contributes to the sex segregation of jobs, which is the most significant determinant of the gender pay gap.⁴³

34. Stephanie Boraas & William M. Rodgers III, *How Does Gender Play a Role in the Earnings Gap? An Update*, 126 MONTHLY LAB. REV. 9, 14 (2003).

35. Deborah J. Anderson et al., *The Motherhood Wage Penalty Revisited: Experience, Heterogeneity, Work Effort, and Work-Schedule Flexibility*, 56 INDUS. & LAB. REL. REV. 273, 292 (2003) (finding that work-schedule flexibility contributes to the motherhood wage penalty); John R. Hollenbeck et al., *Sex Differences in Occupational Choice, Pay, and Worth: A Supply-Side Approach to Understanding the Male-Female Wage Gap*, 40 PERSONNEL PSYCH. 715, 737 (1987) (suggesting that women value nonmonetary benefits, such as control over work schedule and ease of movement, more than men).

36. See Hull & Nelson, *supra* note 26, at 232.

37. See Becker, *supra* note 27, at S33.

38. Philip N. Cohen & Matt L. Huffman, *Working for the Woman? Female Managers and the Gender Wage Gap*, 72 AM. SOC. REV. 681, 681 (2007).

39. See David J. Maume Jr., *Occupational Segregation and the Career Mobility of White Men and Women*, 77 SOC. FORCES 1433, 1451–52 (1999) (finding that occupational segregation has more of an impact than human capital on earnings and mobility); Wendy C. Wolf & Rachel Rosenfeld, *Sex Structure of Occupations and Job Mobility*, 56 SOC. FORCES 823, 823 (1978) (arguing that human capital theory cannot explain the gender effect on occupational attainments).

40. Smith, *supra* note 27, at 531.

41. England, *supra* note 28, at 272–73; Reskin, *supra* note 28, at 254.

42. Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 209 (2001) ("The idea is that it is expensive to measure individual productivity before hiring, so employers use averages based on informal or formal data gathering to predict how individuals will perform.")

43. BARBARA F. RESKIN, *SEX SEGREGATION IN THE WORKPLACE: TRENDS, EXPLANATIONS, REMEDIES* vii (1984).

Employers likewise discriminate by developing management enclaves composed of individuals who share common demographic characteristics.⁴⁴ This phenomenon, known as “homosocial reproduction,” leads to “bottom-up ascription”⁴⁵ when employers match subordinate groups on the basis of similar characteristics as a way to reduce perceptions of discrimination.⁴⁶ Despite external safeguards that suppress the effects of discriminatory practices by employers, such as government policy and transparency about reward structures, discrimination remains difficult to mitigate.⁴⁷

An additional structural factor affecting women is labor market positioning. Typically, men occupy the best positions in manual and non-manual sectors while women are concentrated in marginalized ones.⁴⁸ Female-dominated occupations offer lower wages because they are culturally devalued,⁴⁹ less likely to offer positions of authority,⁵⁰ located in lower-paying sectors,⁵¹ and provide less job training.⁵² The marginalized positioning of women within the labor market contributes to negative outcomes such as the motherhood penalty⁵³ and the gender gap in pay.⁵⁴

C. STATUTORY REMEDIES FOR SEX DISCRIMINATION

During the Civil Rights Movement, Congress recognized the need to enact legislation addressing the issue of sex discrimination.⁵⁵ Title VII of the Civil Rights Act of 1964 is a

44. ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 18–20 (1977).

45. Bottom-up ascription is the phenomenon where “opportunities for minority authority attainment increase toward the bottom of organizational hierarchies because the uncertainty attached to respective supervisory positions declines, thereby relieving pressures for homosocial reproduction from above.” James R. Elliott & Ryan A. Smith, *Ethnic Matching of Supervisors to Subordinate Work Groups: Findings on “Bottom-Up” Ascription and Social Closure*, 48 SOC. PROBS. 258, 261 (2001).

46. James R. Elliott & Ryan A. Smith, *Race, Gender, and Workplace Power*, 69 AM. SOC. REV. 365, 379–81 (2004).

47. See Betz & O’Connell, *supra* note 31, at 326 (“Cultural barricades interact with discriminatory intent to produce forms of discrimination that law enforcement officials cannot easily eliminate.”).

48. CHARLES & GRUSKY, *supra* note 28, at 15. Anker’s seminal study describes the nature of women’s economic marginalization in this way:

[N]urses and teachers are virtually the only two important professional occupations for women in the world. Yet, nurses have lower prestige and pay as compared to the allied medical profession of doctor which tends to be a male occupation. Further, women teachers are much more likely to be primary and pre-primary school teachers as compared to male teachers who tend to be concentrated in secondary and higher education. Among production occupations, another set of generally higher paid occupations, women are concentrated in the textile industry, a sector known for fierce international competition and the seeking out of low labour-cost [sic] sites. In clerical and sales occupations, the percentage female is generally much lower for sales supervisors and buyers as compared to salespersons and shop assistants as well as for clerical supervisors as compared to typists/secretaries/receptionists or bookkeepers/cashiers. RICHARD ANKER, *GENDER AND JOBS: SEX SEGREGATION OF OCCUPATIONS IN THE WORLD* 285 (1998).

49. England et al., *supra* note 28, at 466.

50. Smith, *supra* note 27, at 531.

51. DONALD TOMASKOVIC-DEVEY, *GENDER AND RACIAL INEQUALITY AT WORK: THE SOURCES AND CONSEQUENCE OF JOB SEGREGATION* 20 (1993).

52. Tony Tam, *Sex Segregation and Occupational Gender Inequality in the United States: Devaluation or Specialized Training?*, 102 AM. J. SOC. 1652, 1654 (1997).

53. The motherhood penalty is the phenomenon where women with children earn less than their male and female coworkers who do not have children. See Budig & England, *supra* note 42, at 219–20.

54. *Id.* at 208.

55. Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 467 (1981). “The conventional view is that

broad measure that prohibits employers from discriminating against workers on the basis of protected characteristics, including sex.⁵⁶ Congress also enacted the Equal Pay Act to ensure women are paid fairly compared to men for performing similar work at similar jobs.⁵⁷ These statutes have played an important role in narrowing the gender pay gap over the past half-century,⁵⁸ but they only protect those who come within their ambit—employees. This Part discusses the scope of Title VII and explains how courts have interpreted the term “employee.” It then considers the Equal Pay Act and describes how courts have differentiated employees from independent contractors under the statute.

1. TITLE VII OF THE CIVIL RIGHTS ACT

Title VII makes it unlawful for employers “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”⁵⁹ The term “individual” refers to an employee, which the statute circularly (and unhelpfully) defines as someone “employed by an employer.”⁶⁰ Despite considerable evolution in the concept of employees over time, independent contractors remain uncovered by Title VII.⁶¹

Commentators have observed that “by classifying their workers as independent contractors rather than as employees, employers may be able to evade the requirements of various federal labor and employment laws.”⁶² Yet whether a worker is legally an employee turns less on the employer’s classification⁶³ and more on the issue of employer “control.”⁶⁴ The Supreme Court has adopted the common law agency test for determining whether an

sex was added as a protected class to the employment discrimination title of the Civil Rights Act of 1964 for the purpose of defeating it by making it unacceptable to some of its supporters or by laughing it to death. . . . [This view] is wrong.” *Id.* at 453–54.

56. See 42 U.S.C. § 2000e et seq. (2012).

57. See 29 U.S.C. § 206(d) (2012).

58. See Marlene Kim, *Policies to End the Gender Wage Gap in the United States*, 45 REV. RADICAL POL. ECON. 278, 281–82 (2013); Jennifer Perry & David E. Gundersen, *American Women and the Gender Pay Gap: A Changing Demographic or the Same Old Song*, 31 ADVANCING WOMEN IN LEADERSHIP J. 153, 155 (2011).

59. 42 U.S.C. § 2000e-2(a)(1) (2012).

60. *Id.* The term “employee” has also been defined as a “person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.” BLACK’S LAW DICTIONARY 602 (9th ed. 2009).

61. MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 275–312 (8th ed. 2013); see, e.g., *Spirides v. Reinhardt*, 613 F.2d 826, 829 (D.C. Cir. 1979). The key distinction between employees and independent contractors lies in the notion of control. Unlike employees, independent contractors are “left free to do the assigned work and to choose the method for accomplishing it.” BLACK’S LAW DICTIONARY 839 (9th ed. 2009).

62. Maltby & Yamada, *supra* note 4, at 240.

63. The employer’s classification of the worker is not dispositive. State and federal courts will overlook the formal classification if the worker was effectively being treated as an employee. See, e.g., *Castillo v. Givens*, 704 F.2d 181, 188 (5th Cir. 1983) (“In determining an individual’s status as ‘employee’ within the meaning of the FLSA, [] defendant’s intent or the label that he attaches to the relationship is meaningless unless it mirrors the ‘economic realities’ of the relationship.”); *S.G. Borello & Sons, Inc. v. Dep’t of Indust. Relations*, 769 P.2d 399, 403 (Cal. 1989) (“The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.”).

64. Patricia Davidson, Comment, *The Definition of “Employee” Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203, 207 (1984).

employer's control over a worker is sufficient to constitute an employment relationship under the relevant antidiscrimination statute.⁶⁵ The agency test takes into account these factors:

the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.⁶⁶

Courts use this test whenever a statute is unhelpful in defining the term "employee."⁶⁷ Given the lack of clarity in the statutory definition, the distinction between employees and independent contractors has generated a considerable body of litigation.⁶⁸ In one notable case, the Eighth Circuit held that the plaintiff-musicians were independent contractors as a matter of law—and therefore not protected from discrimination under Title VII—because they retained discretion to perform at other concert series besides the defendant's, and because the defendant withheld no taxes and provided no employment benefits.⁶⁹

If a worker qualifies as an employee under the agency test, there are three theories under which the worker may bring a Title VII claim: individual disparate treatment, systemic disparate treatment, or disparate impact.⁷⁰

65. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989).

66. *Id.*

67. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324–26 (1992).

68. Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 615 (2012).

69. *Lerohl v. Friends of Minn. Sinfonia*, 322 F.3d 486, 492 (8th Cir. 2003).

70. *See ZIMMER ET AL.*, *supra* note 61, at 275–312. An individual disparate treatment violation is made out when a member of a protected group shows they were treated less favorably than other similarly situated employees on the basis of an impermissible criterion such as race or sex. Plaintiffs using individual disparate treatment theory must establish that the employer had the requisite intent to discriminate against them. *See Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1188 (2011). Plaintiffs must also show a causal connection between the employer's intent and the adverse action. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 268 (1989) (explaining that the standard of causation is whether discriminatory purpose was a "motivating factor" in the employer's decision). A prima facie case for individual disparate treatment is established when the plaintiff belongs to a protected class, applied for an open position for which she was qualified, was rejected for that position, and the position subsequently remained open. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Finally, plaintiffs must establish that an adverse employment action occurred. Adverse actions not only include ultimate employment decisions such as hiring and termination, but also involve the terms, conditions, or privileges of employment. *See Hishon v. King & Spalding*, 467 U.S. 69, 74–78 (1984).

With systemic disparate treatment claims, a worker can challenge employment policies or practices that sweep more broadly against a protected group (e.g., a policy to hire only men or to separate employees by race). There are two methods for proving systemic disparate treatment: formal policy and pattern or practice. In formal policy cases, plaintiffs must show the employer has an announced, formal policy of discrimination. *See City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716 (1978) (holding that the employer's practices facially discriminated against every female employee). These claims have become increasingly uncommon since the enactment of antidiscrimination laws during the Civil Rights movement. In pattern or practice cases, systemic disparate treatment is established by proving that the challenged discrimination is the employer's "standard operating procedure" instead of an isolated incident. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

A third theory of discrimination under Title VII is disparate impact. Employer intent is immaterial under this theory. *See Ricci v. DeStefano*, 557 U.S. 557, 583 (2009) ("Congress has imposed liability on employers for

2. THE EQUAL PAY ACT

The Equal Pay Act, which is an amendment to the Fair Labor Standards Act of 1938 (FLSA),⁷¹ makes it unlawful for an employer to discriminate by paying employees of one gender less “for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”⁷² But the statute allows employers to pay women less than men (or vice versa) pursuant to a seniority system, a system where earnings are determined by quality or quantity of production, or where differential pay is based on “any other factor other than sex.”⁷³

The protections of the Equal Pay Act do not extend to independent contractors.⁷⁴ The factors courts consider when determining employment status under Title VII also apply to Equal Pay Act claims. Although “[n]o precise standard governs whether a worker is an ‘employee’ under the [FLSA],” among the factors to be considered are:

remuneration for services, permanency of the relationship, and the *nature and degree of control* by the employer over the employee. Thus, an independent contractor who is not an “employee” as defined by the [FLSA] probably will not be an “employee” with standing to sue under the Equal Pay Act.⁷⁵

Courts have used an “economic realities” test to determine employment status for purposes of the Equal Pay Act.⁷⁶ Under this test, the court looks to the balance of power in the employment relationship and whether the worker is in a position to experience discrimination.⁷⁷ The economic realities test allows courts to weigh the totality of circumstances surrounding the employment relationship.⁷⁸

Title VII and the Equal Pay Act are not coextensive. Although both statutes “must be construed in harmony, particularly where claims made under the two statutes arise out of the same discriminatory pay policies,” an employer violates only Title VII by intentionally lowering pay because of sex, regardless of whether employees of the opposite sex are performing equal work for greater pay.⁷⁹ Plaintiffs must prove intentional discrimination for

unintentional discrimination in order to rid the workplace of ‘practices that are fair in form, but discriminatory in operation.’”) (emphasis added) (internal citation omitted). Disparate impact discrimination exists when facially neutral employment policies adversely affect one group more than another and cannot be adequately justified by the employer. *See* *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–32 (1971). Under Title VII, plaintiffs may choose any or all three theories outlined above depending on the facts and circumstances of the case, but they must be considered employees to be protected from employer discrimination in the first instance.

71. 29 U.S.C. §§ 201–19 (2012).

72. 29 U.S.C. § 206(d)(1) (2012).

73. *Id.*

74. *See* 29 U.S.C. § 203(e)(1) (2012).

75. 26 AM. JUR. PROOF OF FACTS 3D *Proof of Violation of Equal Pay Act* § 8 (1994) (emphasis added).

76. *See, e.g.*, *Tamayo v. Blagojevich*, 526 F.3d 1074, 1088 (7th Cir. 2008); *Frasier v. Gen. Elec. Co.*, 930 F.2d 1004, 1008 (2d Cir. 1991). The first federal case to directly apply the economic realities test was *Mathis v. Standard Brands Chemical Industries, Inc.*, No. 2525, 1975 WL 206 (N.D. Ga. Feb. 20, 1975), in which the court denied the employer’s motion for summary judgment based on its application of the economic realities test. Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 107 (1984).

77. Dowd, *supra* note 76, at 102.

78. *See* *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947) (explaining that employee status under the FLSA does not depend on “isolated factors but rather upon the circumstances of the whole activity”).

79. AM. JUR. PROOF OF FACTS, *supra* note 75, at § 2.5; *see, e.g.*, *Cnty. of Washington v. Gunther*, 452 U.S.

Title VII claims, whereas there is no such burden for Equal Pay Act claims.⁸⁰ But the Equal Pay Act does require that plaintiffs meet the substantial-equality-of-jobs burden.⁸¹ A job that is “substantially equal” in responsibilities and duties, regardless of the “artificially created job classification” given it by employers, falls under the purview of the Equal Pay Act.⁸² The concept of equal pay for equal work requires plaintiffs to show that they put forth equal effort, had equal responsibilities, and worked in similar conditions as their opposite sex counterparts.⁸³

II. DISCRIMINATION IN PROFESSIONAL TENNIS

The inequitable treatment of women in sports has a long and well-documented history.⁸⁴ With respect to women’s employment in sport labor markets, researchers have examined everything from conceptualizations of masculinity and femininity to differences in compensation and career paths among collegiate coaches.⁸⁵ This Part discusses a recent empirical study exposing the gender pay gap in professional tennis, a sport where popularity, revenue, and sponsorship of the men’s and women’s associations are virtually identical. It then explains why tennis players are independent contractors, and consequently why female players have no legal recourse under Title VII or the Equal Pay Act for the discrimination they are experiencing.

A. EVIDENCE OF A PAY GAP

In a recent study, researchers used multiple regression analysis,⁸⁶ a statistical technique commonly applied to data in employment discrimination cases,⁸⁷ to expose the

161, 177–80 (1981).

80. AM. JUR. PROOF OF FACTS, *supra* note 75, at § 2.5.

81. *Id.*

82. *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir. 1970); *see also* *Thompson v. Sawyer*, 678 F.2d 257, 271 (D.C. Cir. 1982) (“In applying the term ‘equal work,’ courts have been led by the legislative history toward a ‘substantially equal’ test, a middle course between a requirement that the jobs in question be ‘exactly alike’ and a requirement that they be merely ‘comparable.’”).

83. *Corning Glass Works v. Brennan*, 417 U.S. 188, 200 (1974).

84. *See generally* JENNIFER HARGREAVES, *SPORTING FEMALES: CRITICAL ISSUES IN THE HISTORY AND SOCIOLOGY OF WOMEN’S SPORTS* (1994) (providing a critique of the contemporary situation of women in sports); Mikaela J. Dufur, *Gender and Sport*, in *HANDBOOK OF THE SOCIOLOGY OF GENDER* 583 (Janet Saltzman Chafetz ed., 2006) (discussing the “discrimination against and limited opportunities for women” in sports); James H. Frey & D. Stanley Eitzen, *Sport and Society*, 17 ANN. REV. SOC. 503 (1991) (maintaining that the “inequality that characterizes society’s relations of gender and race is found in sport as well”); Lawrence M. Kahn, *Discrimination in Professional Sports: A Survey of the Literature*, 44 INDUS. & LAB. REL. REV. 395 (1991) (discussing the gender pay gap in professional tennis).

85. *See, e.g.*, Harris & Clayton, *supra* note 3, at 408–10 (conceptualizations of masculinity and femininity); Brad R. Humphreys, *Equal Pay on the Hardwood: The Earnings Gap Between Male and Female NCAA Division I Basketball Coaches*, 1 J. SPORTS ECON. 299, 304–05 (2000) (compensation and career paths for coaches).

86. For a helpful explanation of regression analysis, *see* ROBERT M. LAWLESS ET AL., *EMPIRICAL METHODS IN LAW* 300–30 (2010).

87. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555 (2011). In *Wal-Mart*, the plaintiffs used regression analysis in their attempt to show a pattern or practice of discrimination, but the Supreme Court held that the statistical evidence was insufficient to prove discrimination on a classwide basis. *Id.*; *see also* *McCleskey v. Kemp*, 481 U.S. 279, 294 (1987) (noting that the Supreme Court “has accepted statistics in the form of multiple regression analysis to prove statutory violations under Title VII”).

gender pay gap in professional tennis.⁸⁸ Researchers looked at the prize money earnings of the top 100 male and top 100 female tennis players at the conclusion of the 2009 season, as ranked by the Association of Tennis Professionals (ATP) and Women's Tennis Association (WTA) respectively.⁸⁹ The study controlled for numerous variables that could affect earnings, including the number of matches played and the players' final rankings.⁹⁰

The findings related to earnings both in 2009 and over a player's career are noteworthy. For the 2009 singles season, median prize money earnings for women were nearly \$100,000 lower than those of men, and there was less variation in earnings among women than men.⁹¹ Median career prize money earnings for men in the sample were about two-and-a-half times greater than those of women, and the disparity was reflected throughout the earnings distribution.⁹² The results of the multiple regression analysis were also telling: the average female player earned statistically significantly less than her male counterpart, even after controlling for differences in tournaments and individual productivity.⁹³

To further investigate the disparity in pay, researchers conducted a sub-analysis on prize money payouts for sex-exclusive tournaments and tournaments in which both sexes competed simultaneously.⁹⁴ The analysis revealed that in 2009, prize money payouts were equal in only seven of the twenty-one tournaments where both sexes competed, including the Australian Open, French Open, Wimbledon, and U.S. Open.⁹⁵ Furthermore, women's payouts lagged behind men's in eleven of the tournaments they shared, with the largest disparity being \$1.2 million.⁹⁶ Thus, although pay was equal at the most visible and prestigious tournaments, women were paid considerably less than men at middle- and low-tier tournaments, producing a significant overall pay gap.⁹⁷ Researchers concluded that "although personal productivity plays some role in the distribution of rewards, institutional discrimination contributes to earnings differences between male and female tennis players."⁹⁸

B. WHY PLAYERS CANNOT SUE

Even if female tennis players could make out a *prima facie* case for sex discrimination with statistical evidence of a pay gap, that evidence would avail them nothing if they lack standing to sue under the relevant antidiscrimination statute. To bring a sex discrimination claim under federal law, the plaintiff must first show that an employment relationship

88. Flake et al., *supra* note 3, at 370.

89. *Id.*

90. *Id.* at 368. The study focused on earnings as it relates to primary employment; therefore, researchers did not control for supplementary sources of income such as endorsements or side trades. *Id.*

91. *Id.* at 369.

92. *Id.* at 370. Career prize money for the top earning male (about \$47 million) was more than double that of the top earning female (about \$22 million), while career prize money for the bottom earning male (about \$110,000) was more than triple that of the bottom earning female (about \$32,000). *Id.*

93. *Id.* at 372.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 373.

98. *Id.* at 373-74.

existed.⁹⁹ In other words, the plaintiff must establish that she satisfies the definition of employee in Title VII or the Equal Pay Act.¹⁰⁰

Tennis players do not have standing to bring a sex discrimination claim under federal law because they are independent contractors.¹⁰¹ In team sports such as football, basketball, and baseball, professional athletes are generally classified as employees because they sign contracts for an agreed upon salary and their team exercises control over their work.¹⁰² Conversely, athletes in individual sports such as boxing, golf, and tennis are typically considered independent contractors whose “compensation is based on their respective individual performances in competitions.”¹⁰³ Despite these traditional classifications, the U.S. Department of Labor has stated that employment status for professional athletes should be determined “on a case-by-case basis after considering all of the circumstances affecting the relationship between the teams and their players and applying the common law factors.”¹⁰⁴

Although few courts have addressed the classification of professional tennis players vis-à-vis employment discrimination, precedent supports the proposition that tennis players are independent contractors.¹⁰⁵ In the only case to directly address the issue, an African American tennis player brought a claim for race discrimination under Title VII against the United States Tennis Association (USTA).¹⁰⁶ The district court granted the USTA’s motion for summary judgment on the grounds that the player lacked standing because there was no employment relationship.¹⁰⁷ The court reached this conclusion by applying the agency test.¹⁰⁸ It held that the player was not an employee because he did not receive a salary or benefits, could decide which events to participate in, paid for his own equipment and

99. See *Wheeler v. Hurdman*, 825 F.2d 257, 277 (10th Cir. 1987) (holding that the plaintiff lacked standing under Title VII and the Equal Pay Act because she was not an employee); *Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 883 (9th Cir. 1980) (“[T]here must be some connection with an employment relationship for Title VII protection to apply.”); *but see Gomez v. Alexian Bros. Hosp.*, 698 F.2d 1019, 1021 (9th Cir. 1983) (holding that “the connection with employment need not necessarily be direct” for Title VII to apply).

100. See 42 U.S.C. § 2000e et seq. (2012); 29 U.S.C. § 206(d) (2012).

101. See Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Issues*, in HANDBOOK ON INTERNATIONAL SPORTS LAW 223, 243 (James A.R. Nafziger & Stephen F. Ross eds., 2011).

102. See *Caldwell v. Am. Basketball Ass’n*, 66 F.3d 523, 531 (2d Cir. 1995); see also *Total and Partial Unemployment TPU 415.4: Professional Athlete*, STATE OF CAL. EMP’T DEV. DEP’T, http://www.edd.ca.gov/uibdg/Total_and_Partial_Unemployment_TPU_4154.htm (last visited Feb. 9, 2015) (“In team sports, such as football and baseball, where the player competes under the direction and control of a coach or manager, he/she is an employee. . . . [I]n individual sports competition, such as golf or tennis, where the athlete is normally free to determine his/her own style and manner of performing, he/she is an independent contractor.”).

103. Mitten & Davis, *supra* note 101, at 243; see also ROGER D. BLAIR, *SPORTS ECONOMICS* 191 (2012); DEBORAH HEALEY, *SPORT AND LAW* 83–84 (4th ed. 2012); Bobbi N. Roquemore, Comment, *Creating a Level Playing Field: The Case for Bringing Workers’ Compensation for Professional Athletes into a Single Federal System by Extending the Longshore Act*, 57 LOY. L. REV. 793, 804 (2011).

104. Letter from Richard E. Fairfax, Dir., Directorate of Enforcement Programs, Occupational Health and Safety Admin., to Robert Van Laanen (Sept. 12, 2008), available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=27301.

105. See *Washington v. U.S. Tennis Ass’n*, No. 99-CV-5148JG, 2002 WL 1732801, at *3 (E.D.N.Y. July 22, 2002); *Indep. Entm’t Grp., Inc. v. Nat’l Basketball Ass’n*, 853 F. Supp. 333, 338 (C.D. Cal. 1994).

106. *Washington*, 2002 WL 1732801 at *1. Despite concluding the plaintiff lacked standing because he was an independent contractor as a matter of law, the district court went on to hold that the USTA’s failure to grant him wild card entry into a tournament did not establish a prima facie case of disparate treatment discrimination. *Id.* at *4. The court further held that the plaintiff’s claim for disparate impact discrimination failed because he had “presented no evidence of a causal connection between the method of awarding wild cards and a disproportionate racial impact.” *Id.* at *5.

107. *Id.* at *3.

108. *Id.*

selected his own coach, and was not supervised in his training or given set hours.¹⁰⁹ Similarly, another district court deemed it a conclusion of law that “athletes of a professional sports league are employees rather than independent contractors such as professional tennis players.”¹¹⁰

If the protections of Title VII and the Equal Pay Act were extended to independent contractors, female tennis players would have a compelling claim for sex discrimination under both statutes. The players would almost certainly have a colorable claim under the Equal Pay Act because they are being paid less than men for doing the same work at many of the same tournaments.¹¹¹ If female players brought a claim under Title VII, they would need to determine which theory or theories of discrimination are appropriate depending on the nature of the anecdotal evidence in addition to the bare statistical evidence.¹¹² Regardless of which claims female players brought, their employers undoubtedly would defend by asserting that unequal pay was justified by some legitimate factor other than sex.

One such justification is that male players perform more work by playing in a best-of-five-sets format, whereas female players only play best-of-three.¹¹³ While this is true in Grand Slam events,¹¹⁴ men play best-of-three sets at most other tournaments on the professional tour.¹¹⁵ Another justification for the disparity is that men bring in more revenue because their tournaments command higher attendance and television ratings.¹¹⁶ But no empirical evidence exists to support this argument.¹¹⁷ In fact, more viewers watched the 2013 U.S. Open women’s final than the men’s.¹¹⁸ Given the statistical evidence that female players are being paid less based on sex, and the absence of a valid justification for the disparity, female players would have a convincing claim under Title VII or the Equal Pay Act—if these statutes covered them.

109. *Id.*

110. *Indep. Entm’t Grp., Inc. v. Nat’l Basketball Ass’n*, 853 F. Supp. 333, 338 (C.D. Cal. 1994). This case involved a sports marketing and managing company that brought suit against the National Basketball Association under the Sherman Antitrust Act. The district court mentioned that professional tennis players are independent contractors when it distinguished one of the cases cited by the plaintiff as irrelevant. *Id.*

111. *See* 29 U.S.C. § 206(d) (2012).

112. Statistical evidence—such as that in *Flake et al.*, *supra* note 3—has been used by plaintiffs bringing Title VII discrimination claims under the systemic disparate treatment theory. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555 (2011); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 315–19 (1977); *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 280 (5th Cir. 2008).

113. Miguel Morales, *Tennis’ Gender Pay Gap Problem Looms on the Sidelines*, FORBES (Feb. 21, 2014, 10:59 AM), <http://www.forbes.com/sites/miguelmorales/2014/02/21/tennis-gender-pay-gap-problem-looms-on-the-sidelines/> (“The complaints that men play best-of-five sets while women play best of three are well-worn and ultimately irrelevant since men and women play the same amount of sets outside the Slams.”).

114. *Id.*

115. *Flake et al.*, *supra* note 3, at 374.

116. *Id.*

117. In fact, anecdotal evidence from periodicals and online ticket price listings refutes the claim that men’s tennis garners more revenue than women’s. When spectators purchase a ticket to a Grand Slam event, the ticket grants them access to matches for both sexes that day. Accordingly, apart from counting spectators in seats, it is impossible to determine which of the sexes has higher match attendance by analyzing ticket sales at tournaments where both sexes competed simultaneously. With regard to television and Internet viewership, the ratings are essentially equal, and in some cases higher for women. *Id.*

118. Matt Cronin, *U.S. Open Women’s Final Scores Higher TV Ratings than Men’s Final*, TENNIS.COM (Sept. 11, 2013), <http://www.tennis.com/pro-game/2013/09/us-open-womens-final-scores-better-tv-ratings-men/49130/>.

III. THE CASE FOR EXPANDING THE COVERAGE OF FEDERAL LAWS

The presence of a gender pay gap in professional tennis indicates that Billie Jean King's goal of "chang[ing] the hearts and minds of people to match the legislation"¹¹⁹ has not yet been realized. Although expanding the coverage of federal antidiscrimination law has been the topic of much discussion among commentators,¹²⁰ Congress has yet to act. This Part outlines four proposals for how Congress and the courts could settle the coverage issue, and contends that the economic realities test is the optimal approach. It then presents the arguments for and against expanding the statutory definition of employee. This Part concludes by discussing how theory should inform policy considerations surrounding employment discrimination laws.

A. PROPOSALS FOR EXPANSION

One approach for covering some independent contractors is the "economic realities" test, which courts used before the Supreme Court adopted the agency test.¹²¹ The Dunlop Commission recommended that Congress apply the economic realities test to all employment discrimination statutes: "Workers should be treated as independent contractors if they are truly independent entrepreneurs performing service for clients—i.e., if they present themselves to the general public as an established business presence, have a number of clients, bear the economic risk of loss from their work, and the like."¹²² Tennis players are not independent entrepreneurs and do not establish a business presence or have clients.¹²³ Accordingly, under the economic realities test, tennis players look more like employees than independent contractors.

Another approach is the "hybrid test," which combines elements of the economic realities and agency tests.¹²⁴ Under the hybrid test, the employer's control over the worker is the most important factor.¹²⁵ In *Spirides v. Reinhardt*, the district court dismissed the worker's Title VII sex discrimination claim for lack of standing, relying on the fact that the employment contract classified the worker as an independent contractor.¹²⁶ The D.C. Circuit reversed, holding that the determination of employment status should be based on the economic realities of the relationship in addition to various control factors, including whether the work is performed under supervision and whether the employer provides the

119. Schultz, *supra* note 1, at 215.

120. See sources cited *supra* note 10.

121. See, e.g., *Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983); *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 341 (11th Cir. 1982); *but see Maltby & Yamada, supra* note 4, at 260–62 (criticizing the economic realities approach for excluding a large number of independent contractors, making it more difficult for some independent contractors to have standing, and not reducing the number of lawsuits regarding employment status).

122. U.S. DEP'T OF LABOR, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS: FINAL REPORT 66 (1994), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace.

123. Although it could be argued that tennis players are independent entrepreneurs who sell their brand or image through endorsement deals, such opportunities are simply a function of players' primary employment (the professional tour) in the first instance.

124. See *Alexander v. Avera St. Luke's Hosp.*, 768 F.3d 756, 764 (8th Cir. 2014). Davidson argues that "the economic realities test as articulated by the Supreme Court is not in substance significantly different from the hybrid test," and that the latter is preferable. Davidson, *supra* note 64, at 225.

125. Davidson, *supra* note 64, at 225.

126. *Spirides v. Reinhardt*, 613 F.2d 826, 828 (D.C. Cir. 1979).

equipment and workplace.¹²⁷ Because employers exercise control over tennis players by organizing the tournament system and fixing prize money payouts, the hybrid test may favor employee classification.

A third approach is simply for antidiscrimination statutes to “define employee so as to include any independent contractor that does not have employees of its own.”¹²⁸ Although this approach would benefit workers with no employees and little bargaining power, it may not cover highly paid independent contractors who would be included under the economic realities or hybrid tests.¹²⁹ If courts consider personal trainers and coaches to be employees of tennis players, then this approach would not extend coverage to players, but if they are not employees then players would be protected.

A final approach is “express coverage.”¹³⁰ Maltby and Yamada argue that the most effective way to protect independent contractors from unlawful discrimination is to amend statutes such as Title VII and the Equal Pay Act to expressly cover them.¹³¹ This approach protects the largest possible number of workers, leaves intact the traditional distinction between employees and independent contractors, and gives employers no incentive to circumvent discrimination laws by misclassifying employees as independent contractors.¹³² The express coverage proposal would categorically cover highly paid independent contractors like tennis players.

Congress should target discrimination against independent contractors where the stakes are the highest: when independent contractors are highly paid, have less bargaining power than their employers, and are being treated like employees. The most practical and effective way to ameliorate this discrimination is by returning to the economic realities test.¹³³ Courts took this approach before the Supreme Court adopted the agency test.¹³⁴ For instance, in *Mednick v. Albert Enterprises, Inc.*, the Fifth Circuit reversed the district court’s ruling that the plaintiff lacked standing under the FLSA because he was an independent contractor.¹³⁵ The Fifth Circuit applied the economic realities test and concluded that:

127. *Id.* at 833.

128. Henry H. Perritt, Jr., *Should Some Independent Contractors be Redefined as “Employees” Under Labor Law?*, 33 VILL. L. REV. 989, 1039 (1988); *but see* Maltby & Yamada, *supra* note 4, at 262–63 (arguing that Perritt’s approach is too narrow and that “we should avoid recasting terms that consistently have been defined another way”).

129. Perritt, Jr., *supra* note 128, at 1039.

130. Maltby & Yamada, *supra* note 4, at 266–74.

131. *Id.* at 270.

132. *Id.* at 266.

133. *See* U.S. DEP’T OF LABOR, *supra* note 122, at 38; *see also* Craig J. Ortner, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613, 2630 (1998) (“The ‘economic realities’ analysis offers the advantages of ‘avoid[ing] the rigidity of the common law test and . . . accomodat[ing] the present range of employment relationships and the new patterns that may evolve in the future.’”) (internal citation omitted).

The venerable Judge Learned Hand endorsed the economic realities approach and opined that it is “absurd” to consider someone an independent contractor when “[h]e has no capital, no financial responsibility. He is himself as dependent upon the conditions of his employment as the company fixes them as are his helpers. By him alone is carried on the company’s only business; he is their ‘hand,’ if any one is.” *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552–53 (2d Cir. 1914).

134. *See* *Dole v. Snell*, 875 F.2d 802, 804–05 (10th Cir. 1989); *Castillo v. Givens*, 704 F.2d 181, 188 (5th Cir. 1983).

135. *Mednick v. Albert Enters., Inc.*, 508 F.2d 297, 297 (5th Cir. 1975).

[a]n employer cannot saddle a worker with the status of independent contractor, thereby relieving itself of its duties under the FLSA, by granting him some legal powers where the *economic reality* is that the worker is not and never has been independently in the business which the employer would have him operate.¹³⁶

Likewise, in *Armbruster v. Quinn*, the Sixth Circuit reversed the district court's ruling that the plaintiffs were independent contractors and thus could not sue for sexual harassment and discrimination under Title VII.¹³⁷ The Sixth Circuit held that the proper test "must examine the *economic realities* underlying the relationship between the individual and the so-called principal in an effort to determine whether that individual is likely to be susceptible to the discriminatory practices which the act was designed to eliminate."¹³⁸

As these cases demonstrate, courts have had no trouble applying the economic realities test to determine employment status.¹³⁹ If Congress wrote an economic realities test into the definition of "employee" under the antidiscrimination statutes, the statutes would then cover independent contractors who have no employees, have little bargaining power, and exercise relatively little control over the manner in which they perform their work. This approach would solve the issue of female tennis players having no standing to bring a claim under current antidiscrimination law.

B. ARGUMENTS FOR AND AGAINST EXPANSION

The reasons for expanding the statutory definition of "employee" are compelling. First, allowing employers to discriminate against independent contractors is patently unfair and antithetical to the goals of antidiscrimination law.¹⁴⁰ The purpose of enacting statutes like Title VII and the Equal Pay Act is to end discrimination.¹⁴¹ Given this broad remedial goal, it makes little sense to exclude independent contractors as a category of workers that employers may freely discriminate against.¹⁴² Yet employers sometimes circumvent federal

136. *Id.* at 303 (emphasis added).

137. *Armbruster v. Quinn*, 711 F.2d 1332, 1341-42 (6th Cir. 1983).

138. *Id.* at 1340 (emphasis added). Nine years after its decision in *Armbruster*, the Sixth Circuit explained that the economic realities test "looks to whether the putative employee is economically dependent upon the principal or is instead in business for himself. . . . [It] is a loose formulation, leaving the determination of employment status to case-by-case resolution based on the totality of the circumstances." *Lilley v. BTM Corp.*, 958 F.2d 746, 750 (6th Cir. 1992).

139. Along with the circuit courts of appeals, the Supreme Court at one time applied the economic realities test in a variety of circumstances. *See, e.g., Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) ("[I]n the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service."); *United States v. Silk*, 331 U.S. 704, 713 (1947) (holding that the term employee includes "workers who were such as a matter of economic reality"); *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 129 (1944) (noting that the term employee "must be understood with reference to the purpose of the [National Labor Relations] Act and the facts involved in the economic relationship").

140. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

141. *Id.* ("The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."); *see Vamer v. Ill. State Univ.*, 226 F.3d 927, 931 n.2 (7th Cir. 2000) ("The purpose of the Equal Pay Act is to prevent arbitrary gender based wage disparities, while prohibiting 'arbitrary, discriminatory government conduct'" (internal citation omitted)).

142. Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL'Y J. 187, 223 (1999) ("By what possible rationale should laws designed to prevent work-related discrimination against those who are other than healthy, young white men prohibit a plumbing contractor from refusing to hire a plumber merely because he or she is black, female, disabled, or old, while permitting a textile manufacturer to refuse services from a solo

law by claiming their workers are independent contractors rather than employees¹⁴³—as in the case of tennis.

Second, independent contractors often have less bargaining power and are economically dependent on their employers, so they have just as much need for statutory protection as employees.¹⁴⁴ Commentators have noted that, “in substance [independent contractors] frequently appear to be in an equivalent position of social subordination and economic dependence to that of ordinary employees, and so in need of those employment protection rights from which they are often excluded by virtue of having ceased to qualify as employees.”¹⁴⁵

Third, in the context of employment discrimination, it makes more sense to consider the economic realities of today’s marketplace than to rely on principles of agency law. While the common law agency test is effective for adjudicating tort liability, applying those same principles to employment discrimination is irrational¹⁴⁶ and has been unfavorable to independent contractors.¹⁴⁷ Simply put, “[t]he failure to go beyond the formal structure of employment relationships, combined with the limited factors examined by many courts, . . . ignores the range of employment relationships subsumed under the heading of independent contractor.”¹⁴⁸

The arguments against expanding the coverage of antidiscrimination laws are misguided. One such argument is that protecting independent contractors is unnecessary because they have enough bargaining power to contract for their pay.¹⁴⁹ In reality though, as in the case of professional tennis, this argument does not hold up. Independent contractors fall along a broad spectrum ranging from equal bargaining power to very little.¹⁵⁰ For example, tennis players must amass a certain number of “points” for each victory at events sanctioned by the men’s (ATP) and women’s (WTA) associations to qualify to play in

plumbing contractor on the basis of the same prejudices?”); Danielle Tarantolo, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 180 (2006).

143. For instance, in *Ansoumana v. Gristede’s Operating Corp.*, two employers circumvented the minimum wage and overtime requirements of the FLSA for years by classifying delivery workers as independent contractors, until the workers eventually brought suit and a court determined they were employees. 255 F. Supp. 2d 184, 192 (S.D.N.Y. 2003).

144. See *Wheeler v. Hurdman*, 825 F.2d 257, 273–74 (10th Cir. 1987) (“[I]nequality of bargaining power, the dominant ability to perpetuate or terminate a business relationship and otherwise to dictate terms, probably characterizes most dealings between large corporations and independent contractors.”).

145. Collins, *supra* note 19, at 354.

146. Perritt, Jr., *supra* note 129, at 1034. Every proposal for extending the coverage of antidiscrimination statutes to include independent contractors “recognize[s] that it is irrational to use tort-law concepts to define the boundaries of labor law.” *Id.*

147. See Dowd, *supra* note 76, at 102 (“Using the common law test of employee status under Title VII is simply inappropriate. At its worst, the practice erects yet another barrier to equal employment opportunity. The rigid . . . common law test unduly denies the protection of Title VII to workers who are dependent on employers by virtue of the employer’s control of the employment marketplace or of the terms and conditions of employment.”); see also Anthony P. Carnevale et al., *Contingent Workers and Employment Law*, in *CONTINGENT WORK: AMERICAN EMPLOYMENT RELATIONS IN TRANSITION* 281, 291 (Kathleen Barker & Kathleen Christensen eds., 1998).

148. Dowd, *supra* note 76, at 102.

149. See Tarantolo, *supra* note 143, at 202; see also Eileen Silverstein & Peter Goselin, *Intentionally Impermanent Employment and the Paradox of Productivity*, 26 STETSON L. REV. 1, 23 (1996).

150. Julia S. Van de Walle, Recent Cases, *Doe v. Wal-Mart: Revisiting the Scope of Joint Employment*, 30 BERKELEY J. EMP. & LAB. L. 589, 599 (2009).

major tournaments with the most lucrative payouts.¹⁵¹ Neither this system, nor the amount of prize money at tournaments on the professional tour, is negotiable for individual players.¹⁵²

Another argument against expansion of coverage is that the labor market will naturally purge itself of irrational discrimination because it is unprofitable for employers.¹⁵³ But this is unlikely given the expenses associated with providing independent contractors the same benefits as employees, to say nothing of the substantial increase to employers' liability.¹⁵⁴ In fact, current labor laws actually incentivize employers to hire independent contractors.¹⁵⁵ The case of professional tennis demonstrates that discrimination has not been naturally purged, even though paying women less than men serves no economically rational purpose.¹⁵⁶

C. HOW THEORY SHOULD INFORM ANTIDISCRIMINATION POLICY

Social-scientific theories, both on the supply and demand sides, are useful for understanding the causes of discrimination and informing myriad policy considerations surrounding federal law.¹⁵⁷ Supply-side paradigms include socialization and human capital theory.¹⁵⁸ It can be argued that antidiscrimination laws play an important role in the socialization process.¹⁵⁹ If these laws do not protect independent contractors such as tennis players, women could be discouraged from pursuing certain professions and consequently be guided into occupations that are protected under the traditional employer-employee relationship.¹⁶⁰ This effectively limits opportunities available to women and may contribute to the segregation of women into sex-stereotyped jobs.

Additionally, human-capital theory posits that employers should compensate workers in proportion to their education, skills, and experience.¹⁶¹ Under this view, female

151. See *ATP Rankings Explained*, ATP TENNIS NOW, <http://atptennisnow.wordpress.com/2008/03/12/atp-rankings-explained/> (last visited Feb. 9, 2015); *2014 WTA Ranking System*, WTATENNIS.COM, http://www.wtatennis.com/SEWTA/Tour-Archive/Rankings_Stats/howrankingswork.pdf (last visited Feb. 9, 2015).

152. But see *U.S. Open to Double Prize Money, Alter Schedule in Coming Years*, TENNIS.COM (Mar. 20, 2013), <http://www.tennis.com/pro-game/2013/03/us-open-double-prize-money-alter-schedule-coming-years/46838/#.VCRCjE04dU/> (showing how players do have some collective bargaining power).

153. GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 13–18 (1957) (explaining that competitive labor markets will naturally rid themselves of employers with a “taste for discrimination” because they sustain high labor costs); RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 445 (1992) (“Irrational or invidious discrimination on the basis of race or sex will not last in a regime of freedom of contract, since the prospect for new entry will discipline the behavior of all players in the market.”).

154. See Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 *BERKELEY J. EMP. & LAB. L.* 296, 337 (2001).

155. See Tarantolo, *supra* note 143, at 182.

156. *Pay Equity & Discrimination*, INST. FOR WOMEN'S POLICY RESEARCH, <http://www.iwpr.org/initiatives/pay-equity-and-discrimination> (last visited Feb. 9, 2015).

157. See Krieger, *supra* note 17, at 836; Stryker, *supra* note 15, at 15–19.

158. See *supra* Part I.A.

159. Roderick M. Hills, Jr., *You Say You Want a Revolution? The Case Against the Transformation of Culture Through Antidiscrimination Laws*, 95 *MICH. L. REV.* 1588, 1621 (1997).

160. Laurie Dougherty, *Categorical Inequality*, in *THE POLITICAL ECONOMY OF INEQUALITY* 235, 240 (Frank Ackerman et al. eds., 2000) (noting that women “are less likely than men to be in relatively lucrative self-employment or independent contractor positions”).

161. GARY S. BECKER, *HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION* 5 (3d ed. 1993) (“The personal distribution of earnings is partly determined by the distribution of, and the returns from, human capital.”); Jacob Mincer & Solomon Polachek, *An Exchange: The*

independent contractors who bring similar levels of human capital to the table as their male counterparts should receive equal pay for performing equal work, in keeping with the aims of the Equal Pay Act.¹⁶² Congress need only look to the case of professional tennis, where both male and female players possess comparable levels of training and skill, to witness the inequitable distribution of rewards despite equal human capital investment.

Perhaps the most significant demand-side factor bearing on federal antidiscrimination policy is labor market positioning.¹⁶³ Historically, men have dominated the more prestigious and lucrative job sectors while women have been concentrated in marginalized ones.¹⁶⁴ Congress should view antidiscrimination laws as a vehicle for alleviating this problem. Some independent contractors, such as tennis players, have the potential for extraordinarily high returns on their human capital investment.¹⁶⁵ However, women may be discouraged from pursuing independent contractor career paths because employers are free to discriminate against them.¹⁶⁶ This discouragement is manifest by the fact that women are less likely than men to be employed as independent contractors.¹⁶⁷ If Congress amended current laws to include an economic realities test as part of the determination of employment status, many independent contractors—including tennis players—would be protected from sex discrimination. Expanding the coverage of antidiscrimination law would have a significant positive impact on the positioning of women within the independent contractor labor market.

CONCLUSION

In 2007, Wimbledon became the last Grand Slam tournament to equalize prize money for men and women.¹⁶⁸ But female tennis players are still earning significantly less than their male counterparts at other tournaments.¹⁶⁹ Despite their extraordinarily high earning

Theory of Human Capital and the Earnings of Women: Women's Earnings Reexamined, 13 J. HUM. RESOURCES 118, 118 (1978) ("In part, women's wages are lower than men's because their labor force attachment is shorter and often discontinuous.").

162. *Equal Pay Act of 1963*, EEOC, <http://www.eeoc.gov/laws/statutes/epa.cfm> (last visited Feb. 9, 2015).

163. RESKIN, *supra* note 43, at vii ("The segregation of the sexes into different occupations, industries, and (within firms) specific jobs is one of the most stable and striking features of the American workplace. . . . Most importantly, it promotes and sustains the wage gap between the sexes.").

164. CHARLES & GRUSKY, *supra* note 28, at 15; TOMASKOVIC-DEVVEY, *supra* note 51, at 103 ("What is clear is that women and men tend to hold different jobs and that the sex composition of these jobs is strongly associated with the observed gender gap in wages.").

165. See generally Rod Hilpert et al., *Show Me the Money! A Cross-Sport Comparative Study of Compensation for Independent Contractor Professional Athletes*, 10 SPORT J. 8 (2007) (comparing total payouts for various sports in which athletes are considered independent contractors).

166. See *Pay Inequity in Athletics*, WOMEN'S SPORTS FOUND., <http://www.womenssportsfoundation.org/en/home/research/articles-and-reports/equity-issues/pay-inequity/> (last visited Feb. 9, 2015) ("Paying men more for the same sport gives women in the sport less incentive to push themselves and discourages future female participation in the sport.").

167. Janet H. Marler & Phyllis Moen, *Alternative Employment Arrangements: A Gender Perspective*, 52 SEX ROLES 337, 347 (2005).

168. Liz Clarke, *Wimbledon Relents, Will Award Equal Pay*, WASH. POST (Feb. 23, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/22/AR2007022200271.html>. Responding to the announcement that Wimbledon had equalized prize money for male and female players, Billie Jean King commented, "This news has been a long time coming. . . . [N]ow with women and men paid on an equal scale, it demonstrates to the rest of the world that this is the right thing to do for the sport, the tournament and the world." *Wimbledon to Pay Equal Prize Money*, CNN.COM (Feb. 22, 2007, 4:11 PM), <http://edition.cnn.com/2007/SPORT/02/22/wimbledon.pay/>.

169. See *supra* Part II.A.

potential, tennis players, like other independent contractors, have no remedy for sex discrimination under federal law. If independent contractors in a lucrative and highly visible profession such as tennis are experiencing pay discrimination based on sex, the implications for female independent contractors in less prominent professions are even more troubling.

Female players can “get to deuce” with male players if Congress expands the coverage of federal antidiscrimination laws. The reasons for expanding coverage are compelling: permitting discrimination against independent contractors is patently unfair and frustrates the goals of antidiscrimination law; many independent contractors have less bargaining power than their employers; and applying principles of agency law is inappropriate in the employment discrimination context. The arguments against expanding coverage are misguided or altogether untrue: not all independent contractors have equal bargaining power as their employers, and irrational discrimination has not been naturally purged from the labor market. The need for a statutory remedy is apparent.

One implication of covering some independent contractors is that it may increase liability for employers and, as a corollary, produce a surge in the number of employment discrimination lawsuits.¹⁷⁰ Alternatively, covering some independent contractors could decrease the volume of litigation over the issue of employment status¹⁷¹ while allowing for a more nuanced approach into regulatory expansion.¹⁷² Most importantly, though, expanding coverage would effectuate the broad remedial goals of the federal antidiscrimination laws and would be a substantial step in ending the inequality Billie Jean King fought against.

170. Tarantolo, *supra* note 143, at 181. In 2013, there were 67,588 charges filed with the Equal Employment Opportunity Commission under one of the federal antidiscrimination statutes (Title VII, ADA, ADEA, and/or Equal Pay Act). The monetary benefits, excluding those obtained through litigation, reached \$255.9 million. *Title VII of the Civil Rights Act of 1964 Charges*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm> (last visited Feb. 9, 2015).

171. Maltby & Yamada, *supra* note 4, at 266.

172. Stewart J. Schwab, *The Diversity of Contingent Workers and the Need for Nuanced Policy*, 52 WASH. & LEE L. REV. 915, 916 (1995).

Calling an Audible: Time to Change the NFL's Locker Room Policy

Christopher O'Mahoney*

INTRODUCTION

I hear all these clowns talk on television about locker-room culture. First of all, we are rude, crude, sexist, racist, homophobic in a locker room. The stuff we have said (in a locker room) we can't say on your show. We can't say it in mixed company. We can't say at a dinner table. I miss that, giving each other a hard time. I do. I miss that.

-Charles Barkley on The Dan Patrick Show¹

During the 2013-2014 NFL season, Richie Incognito persistently verbally harassed fellow Miami Dolphin, Jonathan Martin, both in person and via telephone.² This comment argues that locker room hazing or bullying could have a larger ripple effect on the NFL's bylaws.

The background section of this comment examines the incident between Richie Incognito and Jonathan Martin. Next, this comment will delve into other well-known examples of player hazing and locker room harassment that are similar to the situation in Miami. The second part of the background section will introduce Title VII employment-law principles and proffer that Title VII can provide a helpful platform for developing appropriate NFL bylaw legislation.

The third section of this comment will analyze Title VII, specifically in the context of sexual harassment and racial discrimination in the workplace. Title VII provides a framework by which the NFL could adopt locker room policy that could prevent future

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1. Dave Hyde, *Hyde5: Charles Barkley and I Agree on Martin Saga*, SUNSENTINEL SPORTS (Nov. 22, 2013), http://articles.sun-sentinel.com/2013-11-22/sports/sfl-hyde5-charles-barkley-and-i-agree-on-martin-saga-20131122_1_jonathan-martin-locker-dion-jordan (reporting on Charles Barkley's opinions on the Richie Incognito-Jonathan Martin controversy in the Miami Dolphins locker room).

2. Ben Shpigel, 'A Classic Case of Bullying' on the Dolphins, *Report Finds*, N.Y. TIMES (Feb. 14, 2014), http://www.nytimes.com/2014/02/15/sports/football/investigation-finds-pattern-of-harassment-in-dolphins-locker-room.html?_r=0.

incidents of locker room harassment. This section analyzes Title VII case law to develop suggested legislation that the NFL could adopt for its own bylaws.

The fourth section of this comment will propose that the NFL can supplement the existing bylaws in an effort to avoid future instances of bullying or hazing in NFL locker rooms.

I. A LOOK AT THE SITUATION IN MIAMI, A BROADER LOOK AT HAZING IN THE NFL, AND AN INTRODUCTION TO TITLE VII

A. RICHIE INCOGNITO AND JONATHAN MARTIN

On November 2, 2013, the NFL Players Association announced it was investigating the participation of Richie Incognito, then a member of the Miami Dolphins, in the alleged harassment of teammate Jonathan Martin.³ Investigators found that Richie Incognito had sent numerous text messages and voicemails to Martin that were not only racist, but also physically threatening.⁴ In some of the more racially charged messages, Incognito referred to Martin as a “half nigger piece of shit,” “shine box,” “stinky Pakistani,” and “darkness.”⁵ Arguably, the most infamous message from Incognito to Martin reads as follows:

Hey, wassup, you half n----- piece of s---. I saw you on Twitter, you been training 10 weeks. [I want to] s--- in your f---ing mouth. [I'm going to] slap your f---ing mouth. [I'm going to] slap your real mother across the face [laughter]. F--- you, you're still a rookie. I'll kill you.⁶

Following these messages Martin left the team; then, the Dolphins suspended Incognito and requested that the NFL “conduct an objective and thorough review.”⁷ As the investigation commenced, some players and former coaches went so far as to accuse the media of misstating and assassinating Incognito’s character.⁸

3. Adam Schefter and Chris Mortensen, *Sources: NFLPA Eyes Martin Case*, ESPN NFL BLOG (Nov. 2, 2013), http://espn.go.com/nfl/story/_/id/9913324/sources-nfl-eyes-miami-dolphins-richie-incognito-jonathan-martin-case.

4. See Mike Garafolo, *Did Miami Teammate Threaten Martin?*, MSN FOX SPORTS <http://msn.foxsports.com/nfl/story/jonathan-martin-richie-incognito-racially-charged-texts-voicemails-miami-dolphins-nflpa-investigation> (June 2, 2014).

5. See Josh Katzowitz, *Ted Wells report: Jonathan Martin appalled by racist messages*, CBS SPORTS <http://www.cbssports.com/nfl/eye-on-football/24443157/ted-wells-report-jonathan-martin-appalled-by-racist-messages> (last visited Jan. 14, 2014). (reporting that Incognito also made numerous jokes to Martin about slavery).

6. See *Slurs in Incognito's Messages*, ESPN.COM (Nov. 5, 2013), http://espn.go.com/nfl/story/_/id/9926139/richie-incognito-miami-dolphins-used-slurs-messages-jonathan-martin.

7. Tom Pelissero, *Dolphins Suspend Richie Incognito Amid Investigation*, USA TODAY SPORTS (Nov. 4, 2013), <http://www.usatoday.com/story/sports/nfl/dolphins/2013/11/04/miami-dolphins-richie-incognito-jonathan-martin-player-misconduct-investigation/3429871/>.

8. See generally Gary Mihoces, *Dolphins Players Defend Incognito, Question Martin in Bullying Case*, USA TODAY SPORTS (Nov. 6, 2013), <http://www.usatoday.com/story/sports/nfl/dolphins/2013/11/06/miami-dolphins-jonathan-martin-richie-incognito-locker-room/3458891/> (explaining Miami Dolphins offensive lineman Randy Starks told reporters that Dolphins players want to clear Incognito’s name because he was “getting a bad rap”); see also, Kent Somers, *Arizona Cardinals, Richie Incognito's high school coach hope accounts of bullying isolated, extreme*, AZ CENTRAL SPORTS (Nov. 4, 2013), http://www.azcentral.com/sports/cardinals/articles/20131104arizona-cardinals-richie-incognitos-high-school-coach-hope-accounts-bullying-isolated-extreme.html?sf19111079=1&click_check=1 (quoting Karlos Dansby, a teammate for one season with Incognito in Miami, who was “surprised” by the allegations stating, “I hate all of this coming out about him[Incognito]. It’s really attacking his character”).

The NFL appointed Ted Wells⁹ to direct an independent investigation to determine whether this was an isolated incident or a reflection of a broader issue, not only in Miami's locker room, but in NFL locker rooms across the league.¹⁰ As Wells's investigation continued, former football players spoke out about the issue.¹¹

After Wells finished his interviews, he issued a report which, among other things, found that the bullying in the Miami Dolphins locker room was pervasive.¹² Wells suggested that new workplace-conduct rules and guidelines needed to be implemented to help ensure that players respect each other.¹³

B. LOCKER ROOM HAZING AS A LONGSTANDING TRADITION WITHIN THE NFL

While the Incognito-Martin situation in Miami brought widespread media coverage to the Dolphin's locker room, hazing in the NFL is by no means a new phenomenon.¹⁴ In 1998 Cam Cleeland was a rookie for the New Orleans Saints.¹⁵ During a training-camp hazing ritual Cleeland was punched in the nose, had his ankle nearly broken, and was hit in his eye with a sock full of coins.¹⁶ The hit with the sock shattered Cleeland's eye socket and left him partially blind.¹⁷

From 1995-2000, Warren Sapp bullied Chidi Ahanotu while they were teammates on the Tampa Bay Buccaneers.¹⁸ Sapp, as a team leader and veteran on the Buccaneers, took it upon himself to verbally attack and physically intimidate teammates.¹⁹ Ahanotu claimed that his coaches during that time, Tony Dungy and Jon Gruden, often overlooked Sapp's actions because Sapp was a dominant player for the Buccaneers.²⁰ According to other players on the

9. See generally *Wells, Jr., Theodore V.*, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, <http://www.paulweiss.com/professionals/partners-and-counsel/theodore-v-wells-jr.aspx> (Mar. 1, 2014).

10. See *Attorney Ted Wells Named Special Counsel for Dolphins Investigation*, NFL COMMUNICATIONS (Nov. 6, 2013), <http://nflcommunications.com/2013/11/06/attorney-ted-wells-named-special-counsel-for-dolphins-investigation/>.

11. See *Brett Favre Surprised by Fins Scandal*, ESPN NFL (Nov. 18, 2013), http://espn.go.com/nfl/story/_/id/9995029/brett-favre-joe-montana-differ-richie-incognito-scandal (presenting the views of NFL legend Brett Favre, who played most of his career with the Green Bay Packers and said, "I'm not saying it's right, and from a locker room sense or from a team sense, I'm not saying it's wrong. It's just the way it is").

12. See THEODORE V WELLS, JR. ET AL., PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP., REPORT TO THE NATIONAL FOOTBALL LEAGUE CONCERNING ISSUES OF WORKPLACE CONDUCT AT THE MIAMI DOLPHINS 140 (2014), available at <http://63bba9dfd9675bf3f10-68be460ce43dd2a60dd64ca5eca4ae1d.r37.cf1.rackcdn.com/PaulWeissReport.pdf>.

13. *Id.*

14. See Sam Farmer, *For Cam Cleeland, Hazing Incident Altered His NFL career—and Life*, L.A. TIMES (Nov. 7, 2013), <http://articles.latimes.com/2013/nov/07/sports/la-sp-farmer-cleeland-incognito-20131108> (recalling his own hazing, Cleeland described the scene as such "Guys were just rabid . . . You tried to make it though, and they literally just beat the ever-loving crap out of you as you tried to get through. Everything you can imagine, from kicking, punching, scrapping").

15. *Id.*

16. *Id.*

17. *Id.*

18. Pat Yasinskas, *Chidi Ahanotu: Warren Sapp Was a Bully*, ESPN (Nov. 6, 2013), http://espn.go.com/blog/nfcsouth/post/_/id/52149/chidi-ahanotu-warren-sapp-was-a-bully-2.

19. *Id.*

20. *Id.*

Buccaneers, Sapp's bullying completely stopped only when Ahanotu challenged Sapp to a fight in the locker room.²¹

In 2004 Hunter Hillenmeyer, who was filling in for injured superstar Brian Urlacher of the Chicago Bears, claimed that veteran offensive lineman Olin Kreutz would threaten players who did anything that damaged camaraderie in the locker room.²² When asked if he had a support system or a way to alert management about his situation, Hillenmeyer suggested that when it came to star players, coaches and management often turned a blind eye toward this type of behavior.²³

C. HAZING'S PROMINENCE WITHIN NFL

In the NFL, being considered an "alpha male" is an honor, a badge of prestige that many players proudly wear.²⁴ This notion of being the dominant figure in the locker room stems in part from the theory that players who are the most intimidating, durable, and "tough" are oftentimes the most respected.²⁵ This toughness is a source of pride for both current and former NFL players, and the testosterone-fueled mentality helps explain why many players were quick to blame Jonathan Martin for not standing up to Incognito and being a "man."²⁶

21. John Breech, *Keyshawn Johnson: Warren Sapp Bullied a Buccaneers Player*, CBS SPORTS (Nov. 6, 2013), <http://www.cbssports.com/nfl/eye-on-football/24196226/keyshawn-johnson-warren-sapp-bullied-a-buccaneers-player> (noting that once Ahanotu challenged Sapp to a fight, Sapp left Ahanotu alone); *But see*, Chidi Ahanotu, FACEBOOK, <https://www.facebook.com/chidi.ahanotu/posts/10153452753485054> (Mar. 20, 2014) (posting "Warren Sapp is my brother regardless of his ways. Seems fighting in the trenches, alongside a man tooth & nail thru guts, blood & glory for many many years can give a man a pass too").

22. *See* Tribune Report, *Hillenmeyer 'hated coming into work' because of Kreutz*, THE CHICAGO TRIBUNE (Nov. 6, 2013), <http://www.chicagotribune.com/sports/football/bears/chi-hillenmeyer-kreutz-20131106,0,899297.story>.

23. *Id.*

24. *See, e.g.*, Ross Jones, *Exclusive: Adrian Peterson Says 'People say crazier things than just the n-word' in NFL Culture*, FOX SPORTS (Nov. 21, 2013), <http://msn.foxsports.com/nfl/story/adrian-peterson-on-locker-room-culture-people-say-crazier-things-than-just-the-n-word-112113> (quoting Adrian Peterson, Minnesota Vikings running back, "You really got to understand the environment you're in. You are in the locker room with 60 alpha males. Sixty guys who are in the NFL, they are men . . . There's no other place . . . where there's so many guys in one space. Things like that happen").

25. *See* Mike Vaccaro, *The Other Side of NFL's Tough Guy Culture*, NEW YORK POST (Nov. 4, 2013), <http://nypost.com/2013/11/04/going-far-beyond-boys-will-be-boys/>.

26. *See* Dan Le Batard, *Where's Support for Jonathan Martin?*, ESPN.COM (Feb. 15, 2014), http://espn.go.com/nfl/story/_/id/10462076/why-miami-siding-richie-incognito-not-jonathan-martin-victim (noting that in the wake of Martin leaving the team, not one Dolphins' player sided with Martin); *see also* Ebenezer Samuel, *NFL Giants' Antrel Rolle Has Advice for Jonathan Martin: 'stand up for yourself'*, NEW YORK DAILY NEWS (Nov. 5, 2013), <http://www.nydailynews.com/sports/football/giants-rolle-advice-bullied-player-stand-article-1.1507155> (commenting on the controversy in Miami, Antrel Rolle, safety for the New York Giants, told reporters that Jonathan Martin was not only partially to blame for the alleged hazing incident but that he should have fought back, "You're not a little boy . . . you're a grown-ass man. You need to stand up for yourself"); Jim Trotter, *NFL Personnel Question 'coward' Martin for Not Challenging Incognito*, SPORTS ILLUSTRATED (Nov. 4, 2013), <http://si.com/nfl/news/20131104/nfl-personnel-question-jonathan-martin-richie-incognito/> (quoting one anonymous NFL personnel man, "If Incognito did offend [Martin] racially, that's something you have to handle as a man! . . . There's no other way to put it, other than [Martin] being soft!").

However, while hazing may be a part of the fabric of some NFL teams, not everyone in the NFL supports hazing.²⁷ In fact, there are opponents of hazing who are stunned that hazing rituals are afforded a wide berth by upper-level management across the league.²⁸ The trouble with hazing rituals begins when this “rite of passage” is abused.²⁹ When these rituals cross the opaque, amorphous line between “acceptable” hazing and outright bullying, a phenomenon begins to develop known as hazing creep.³⁰ Hazing creep is “hazing [which] gets progressively worse as each year’s group attempts [to] outdo the former.”³¹ If the proper authorities do not reel in hazing from the outset, the theory of hazing creep suggests that hazing will become more dangerous.³²

D. THE LACK OF LEGISLATION IN THE NFL BYLAWS

The NFL’s bylaws lack provisions that prohibit hazing and bullying.³³ However, the NFL’s personal-conduct policy prohibits “[v]iolent or threatening behavior among employees, whether in or outside the workplace.”³⁴ It also bars “conduct that imposes inherent danger to the safety and well being of another person.”³⁵ In light of the recent events in Miami, it is apparent that there is a lack of appropriate legislation in the NFL bylaws.³⁶ Therefore, the NFL should look to Title VII to develop a helpful and instructive piece of legislation.

E. EMPLOYMENT PRACTICES—TITLE VII BACKGROUND

Diversity in the workplace can be alienating; therefore, Title VII of the Civil Rights Act of 1964 was enacted to prevent discrimination on the basis of gender, religion, race, color, or national origin in the workplace.³⁷ The goal of Title VII is to ensure equal

27. Compare Phil Sheridan, *Since Reid Arrived, Eagles a No-haze Zone*, ESPN.COM (Nov. 7, 2013), http://espn.go.com/blog/nflnation/post/_id/99197/since-reid-arrived-eagles-a-no-haze-zone (reporting that Eagles center, Jason Kelce, told the media that former head coach Andy Reid “was very much against hazing and all that stuff”), with Vaughn McClure, *Smith: You Have to Respect Everyone*, ESPN.COM (Nov. 7, 2013), http://espn.go.com/blog/nflnation/post/_id/99132/smith-you-have-to-respect-everyone (noting that Atlanta Falcons head coach, Mike Smith, believes that having respect for another is key to a team’s success).

28. See, Matt Ufford, *The NFL’s Disastrous Lack of an anti-hazing policy*, SB NATION (Nov. 5, 2013), <http://www.sbnation.com/2013/11/5/5065834/jonathan-martin-richie-incognito-dolphins-rookie-hazing> (arguing that it is counter-intuitive that the NFL has not eradicated “ideals of masculinity” that “violate every H.R. department’s litmus test for ‘What Can Get Us Sued’”).

29. See Captain Andrew Wilcox, *Hazing Is Not a Rite*, PROCEEDINGS MAGAZINE, Oct. 1997, available at <http://www.usni.org/magazines/proceedings/1997-10/hazing-not-rite>.

30. *Id.*

31. *Id.*

32. *Id.*

33. NFL CONST. AND BYLAWS art. IX, § 9, available at http://static.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf.

34. *NFL Personal Conduct*, NFL COMMUNICATIONS (June 28, 2013), <http://nflcommunications.com/2013/06/28/nfl-personal-conduct/>; see also *National Football League*, NFL LABOR, <http://nflabor.files.wordpress.com/2013/06/personal-conduct-policy.pdf>.

35. *Id.*

36. See generally THEODORE V. WELLS, JR. ET AL., *supra* note 12 (suggesting, at the conclusion of the report, that the NFL create “new workplace conduct rules and guidelines”).

37. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(2) (2006).

employment opportunities by maintaining a working environment that is free from discriminatory ridicule and intimidation.³⁸ When Title VII was enacted, Congress hoped to rectify the imbalance of power between employers, existing employees, and minority employees.³⁹

F. ANTIDISCRIMINATION AND ANTI-RETALIATION PROVISIONS OF TITLE VII

Title VII provides two provisions that protect the employee against workplace harassment and a hostile work environment: the antidiscrimination and anti-retaliation provisions.⁴⁰ The antidiscrimination provisions bar all employer actions that discriminate against⁴¹ employees based upon their protected class status, which includes an individual's race, color, religion, sex, or national origin.⁴² To properly state a claim under the antidiscrimination provision, an employee must demonstrate that he or she was the target of discrimination because of his or her protected class status.⁴³ Additionally an employee-plaintiff must establish that the discrimination affected his or her compensation, conditions of employment, employment opportunities, or status as an employee.⁴⁴ Title VII's anti-retaliation provisions protects employees from retaliation for protesting an employment practice.⁴⁵ Anti-retaliation provisions protect any employee from retaliation, not only those employees who are a member of a protected class.⁴⁶

Burlington Northern & Santa Fe Railway Co. v. White demonstrates the differences between Title VII's two provisions—the broad, overarching protection provided by the anti-retaliation provision as compared to the narrower antidiscrimination clause.⁴⁷ Prior to *Burlington Northern*, courts did not apply the anti-retaliation provision uniformly across the country.⁴⁸ In *Burlington Northern*, the Supreme Court held that the anti-retaliation clause protects employees from retaliation, whether it occurred inside or outside the workplace.⁴⁹

38. See *Connecticut v. Teal*, 457 U.S. 440, 448 (1982) (stating Congress' purpose was to achieve equality in employment opportunities and removing "barriers" prohibiting such equality); accord *Goluszek v. H.P. Smith*, 697 F.Supp. 1452, 1456 (N.D.Ill. 1988) (explaining that Congress was concerned with discrimination "stemming from an imbalance of power and an abuse of that imbalance by the powerful . . ." when it enacted Title VII).

39. See Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451-52 (1984).

40. 42 U.S.C. §2000e-2(a)(1); 42 U.S.C. § 2000e-3(a).

41. See *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006) (defining "discriminate against" as "distinctions or differences in treatment that injure protected individuals").

42. 42 U.S.C. § 2000e-2(a)(1).

43. See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993).

44. 42 U.S.C. § 2000e-2(a)(1); accord *Burlington Northern*, 548 U.S. at 64-65 (confirming that Title VII's antidiscrimination provision is limited to employment-related discrimination).

45. 42 U.S.C. § 2000e-3(a).

46. *Id.*

47. See *Burlington Northern*, 548 U.S. at 53.

48. See *Burlington Northern*, 548 U.S. at 60; see also, e.g., *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005) (imposing a requirement that the plaintiff show that the "employer's challenged action would have been material to a reasonable employee"); *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001) (requiring a nexus between the retaliatory action and employment); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (restricting Title VII remedies to hiring, granting leave, discharging, promoting, and compensating).

49. See *Burlington Northern*, 548 U.S. at 62.

However, the antidiscrimination provision only protects employees from hostility that occurs within the workplace.⁵⁰

G. THE GOAL OF TITLE VII: PROMOTE A SAFE, PRODUCTIVE, AND EFFICIENT WORKING ENVIRONMENT

Rogers v. EEOC elaborated upon the intricacies of Title VII.⁵¹ In *Rogers*, a woman filed a claim of employment discrimination with the Equal Employment Opportunity Commission (“EEOC”) against her employer, an optometrist, for discriminating against her because of her surname and for segregating patients.⁵² The Fifth Circuit held that the employer had discriminated against the woman and that the EEOC should be given access to the patient applications.⁵³

In reaching this decision, the Fifth Circuit found that the relationship between an employee and her workplace should be granted statutory protection because of the “nuances and subtleties of discriminatory employment practices.”⁵⁴ The Court further established that an employee’s psychological and economic well-being were both protected under Title VII.⁵⁵ The Court noted that a “working environment heavily charged with discrimination” was illegal under Title VII.⁵⁶

In *McDonnell Douglas Corp. v. Green*, the Supreme Court further expanded upon racial discrimination in the workplace.⁵⁷ Respondent was a black civil-rights activist who protested against his employer because the employer allegedly made racially motivated hiring decisions.⁵⁸ The Court held that the evidence on record established a prima facie case of racial discrimination, and the case was remanded.⁵⁹ In the decision, the Court noted that Title VII is meant to promote an efficient workplace that is a fair and racially neutral environment.⁶⁰ The Supreme Court elaborated on the *McDonnell* decision in *Castaneda v. Partida*.⁶¹ The Court found that it would be “unwise” to presume that human beings of one racial or ethnic group would not discriminate against other people within the same group.⁶²

50. *Id.* at 62-63.

51. *See generally* *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971).

52. *Id.* at 236.

53. *Id.* at 241.

54. *Id.* at 238.

55. *Id.*

56. *Id.* at 238-39.

57. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793 (1973) (holding that a plaintiff has the burden of proving that (1) he belongs to a racial minority, (2) he applied for the job the employer was seeking to fill, (3) he was qualified for the position and was rejected, and (4) the employer continued to seek applicants from persons of complainant’s qualifications).

58. *Id.*

59. *Id.* at 807.

60. *Id.* at 801.

61. *See generally* *Castaneda v. Partida*, 430 U.S. 482 (1977) (regarding discrimination against Mexican Americans in grand jury selections in Texas).

62. *Id.* at 499.

H. INTRICACIES OF A HOSTILE WORKPLACE ENVIRONMENT CLAIM

The Equal Employment Opportunity Commission has defined sexual discrimination in two distinct ways: quid pro quo and hostile workplace environment sexual harassment.⁶³ A hostile workplace environment, predicated on sexual discrimination, is one where an employee faces constant and ongoing sexual harassment.⁶⁴ Once a discrimination-based claim has been filed, the EEOC will investigate the claim to determine if there is reasonable cause to believe discrimination exists in the workplace and whether the discrimination can be remedied through conciliation.⁶⁵

The Court in *Meritor Sav. Bank, FSB v. Vinson* recognized a hostile-work-environment cause of action based on sexual harassment.⁶⁶ The employee in *Meritor* claimed that her supervisor made repeated sexual advances both during and after business hours.⁶⁷ At trial, the parties presented conflicting evidence concerning the existence of a sexual relationship between the two parties.⁶⁸ The Court held that under Title VII, a claim of hostile-environment sexual harassment is a form of sexual discrimination that is actionable.⁶⁹

In arriving at this holding, the Court relied on the EEOC's precedent, which established that Title VII affords an employee the right to work in an environment that is free from discriminatory harassment, intimidation, ridicule, or insult.⁷⁰ To be actionable the sexual harassment must be severe or pervasive enough to alter the conditions of the victim's employment and create an abusive working environment.⁷¹ After this decision, the Court recognized that hostile-work-environment claims based on race adhere to the same standards as Title VII claims based on sexual harassment.⁷² Building off of the Court's decision in *Meritor*, courts have sought to define the parameters, factors, and requirements that go into hostile-workplace claims.⁷³

The Sixth Circuit in *Davis v. Monsanto* identified two requisite elements for a racially-hostile-work-environment claim: repeated slurs and tolerance of the situation by management.⁷⁴ To establish the existence of a racially hostile work environment, the employee must show that the alleged discriminatory actions would affect a reasonable

63. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 62 (1986); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998).

64. 29 C.F.R. § 1604.11(a)(3).

65. 42 U.S.C. § 2000e-5(f).

66. See *Meritor*, 477 U.S. at 65.

67. *Id.* at 60.

68. *Id.* at 60-61.

69. *Id.* at 78.

70. *Id.* at 65-66.

71. *Id.* at 67.

72. See *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002) (citing *Meritor*, 477 U.S. at 66-67 for the proposition that Title VII claims based on race follow the same analytical framework as claims based upon sexual harassment).

73. See, e.g., *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 17 (1993) (holding that in order for conduct to be actionable under Title VII's purview, it must be objectively hostile and the victim has to objectively perceive the environment to be abusive); *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451 (5th Cir. 1994) (reasoning that in order to extend Title VII to an individual, the action has to be done within an individual's employment capacity); *Goluszek v. H.P. Smith*, 697 F.Supp. 1452, 1455 (N.D.Ill. 1988) (explaining that in order for an employee to prove a sexual harassment claim under Title VII a plaintiff must demonstrate that but for the plaintiff's sex, the plaintiff would not have been the object of harassment).

74. See *Davis v. Monsanto Chemical Co.*, 858 F.2d 345, 349 (6th Cir. 1988).

employee's ability to perform his or her job.⁷⁵ However, an employee need not show that the racial harassment affected his or her work product, but rather that the harassment made work more difficult.⁷⁶

I. SAME-SEX WORKPLACE SEXUAL HARASSMENT UNDER TITLE VII

In *Oncale v. Sundowner Offshore Services Inc.*, the Supreme Court held that same-sex sexual harassment is actionable under Title VII.⁷⁷ Joseph Oncale claimed that he was subjected to sex-related and humiliating actions in the presence of other employees.⁷⁸ Oncale subsequently complained to his supervisor, who took no remedial action.⁷⁹ As a result, Oncale quit⁸⁰ and filed a complaint against his employer, Sundowner Offshore Services, Inc., alleging his co-workers discriminated against him because of his sex.⁸¹ The Fifth Circuit, affirming the decision of the District Court for the Eastern District of Louisiana, held that a male has no cause of action under Title VII for harassment by a male co-worker.⁸² The Supreme Court disagreed and overturned the Fifth Circuit, finding that discrimination consisting of same-sex sexual harassment is actionable under Title VII.⁸³

To arrive at this holding, the Supreme Court analyzed Title VII's anti-discrimination clause and concluded that nothing in the language of the statute suggests an intent to eliminate discrimination across "the entire spectrum of disparate treatment of men and women in employment."⁸⁴

The respondents were concerned that if the Court recognized same-sex harassment, Title VII would be diluted into a general workplace-civility code.⁸⁵ Respondents feared that if the Court allowed same-sex workplace-harassment claims, Title VII would be used to sue an employer any time there was "simple teasing or roughhousing among members of the same sex."⁸⁶

In order to combat this concern, the Court laid out objective parameters by which a claim should be made for members of the same-sex.⁸⁷ The Court noted that a claim could only be made in those instances in which a reasonable person believes the workplace environment is hostile and abusive.⁸⁸ The plaintiff must then show that he or she was discriminated against because of his or her sex.⁸⁹ In order to prohibit Title VII from transforming into a "general civility code for the American workplace," the Court noted that

75. *Id.*

76. *Id.*

77. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

78. *Id.* at 77.

79. *Id.*

80. *Id.* at 79.

81. *Id.* at 71.

82. *Oncale v. Sundowner Offshore Services, Inc.*, 83 F.3d 118 (5th Cir. 1996).

83. *Oncale*, 523 U.S. at 79.

84. *Id.* at 78 (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986); *accord Castaneda v. Partida*, 430 U.S. 482, 499 (1977) (commenting that it would be "unwise" to presume human beings of one ethnic or gender group would not discriminate against other members of their group).

85. *Oncale*, 523 U.S. at 80.

86. *Oncale*, 523 U.S. at 80.

87. *Id.*; *accord Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993).

88. *Oncale*, 523 U.S. at 81.

89. *Id.*

workplace harassment is not “automatically discrimination because of sex merely because the words used have sexual content or connotation.”⁹⁰ One of the many factors that the Court emphasized in the context of same-sex harassment claims was the environment or location in which the alleged action occurred.⁹¹

II. APPLICATION OF TITLE VII CASE LAW TO NFL LOCKER ROOMS

As courts have held in Title VII case law, an employer retains an affirmative duty to maintain a working environment free from sexual, gender, or racially related harassment, intimidation, or insult.⁹² However, in order to hold the employer liable, the employee must establish that the employer had knowledge of the harassment by either proving that he complained to upper-level management or by demonstrating that the harassment was so clear and obvious that the employer had constructive knowledge that the harassment was ongoing.⁹³ The Supreme Court has looked to see what methods of established procedures the employee used for filing and reporting harassment, such as a documented complaint, in order to prove the employer had constructive knowledge or notice of a hostile work environment.⁹⁴

Rather than placing the entire monitoring function entirely in the hands of the players, the NFL would benefit from placing an affirmative duty squarely on the shoulders of management and coaches. Placing an affirmative duty on both upper-level management and NFL coaches would likely remedy future situations, such as the Incognito-Martin dispute in Miami, because it will place the onus on the organization to police the locker room, and an NFL front office has broader disciplinary and enforcement capabilities than a player or coach.⁹⁵

A. RACIAL AND SEXUAL DISCRIMINATION PROVISIONS OF TITLE VII

As the court in *Rogers v. EEOC* stated, Title VII protects the relationship between an employee and his or her workplace.⁹⁶ The NFL should adopt a similar policy that protects the locker room for players. The harassment in Miami serves as an example of how such a policy would be applied. In Miami, there was a pattern of discriminatory and pervasive language directed towards Jonathan Martin by his teammates within the locker room.⁹⁷ Martin’s teammates verbally berated Martin with racist and sexually abusive language, which included obscene, sexually charged comments about Martin’s sister and his mother.⁹⁸ Not only did Martin’s teammates make insensitive and wildly inappropriate comments in

90. *Id.* at 80.

91. *Id.* (stating that while the severity of a harassment claim is viewed objectively, the Court noted that the behavior’s impact is dependent upon a “constellation” of factors, circumstances, expectations, relationships, sensitivity, and common sense).

92. *See Blue Circle, Inc.*, 324 F.3d at 1257.

93. *See Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988).

94. *See, e.g., Faragher*, 524 U.S. at 806-07.

95. *See Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 647 (11th Cir. 1997) (requiring employers, not other employees, to take “prompt remedial actions” in response to harassment claims).

96. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971).

97. THEODORE V. WELLS, JR. ET AL., *supra* note 12, at 5.

98. *Id.*

the locker room, but Incognito, Mike Pouncey, and John Jerry verbally harassed Martin and Andrew McDonald, a young offensive lineman.⁹⁹ Martin and McDonald were subjected to “homophobic name-calling” and McDonald was given a male blow-up doll as a Christmas gift.¹⁰⁰ Martin’s teammates made similarly crude comments about Martin, who is African American, for not being “black” enough.¹⁰¹

The above-mentioned racist and sexually pervasive language exemplifies the type of verbal harassment that Title VII sought to prohibit from the workplace.¹⁰² Even though Incognito claimed it was not his intention to verbally harass, intimidate, or ridicule Martin,¹⁰³ Title VII still bars such language from the workplace, regardless of the speaker’s intent.¹⁰⁴

Some would argue that language like Incognito’s is commonplace in the NFL locker room, and to some extent, this is not an incorrect statement.¹⁰⁵ However, implementing Title VII-like legislation would allow the NFL to dictate the type of language and jocular banter that would be appropriate and inappropriate in the professional setting of the NFL locker room.¹⁰⁶ Under Title VII, the goal is to prevent abusive workplace harassment, not to remove all “Archie Bunkers” from the workplace—appropriate teasing and jokes would still be acceptable.¹⁰⁷ Reluctant to morph Title VII into an unwieldy “general civility code,” the Supreme Court specified that banter or conduct which “creates an objectively hostile or abusive workplace” is prohibited.¹⁰⁸ Taking this analytical framework and applying it to the controversy in Miami, one can easily conclude that Incognito’s words and actions were objectively hostile.¹⁰⁹ Therefore, the NFL could implement a league-wide referendum, which would provide notice to the players that the use of objectively abusive language is strictly prohibited within an NFL locker room or workplace.¹¹⁰ Specifically, if the NFL used Incognito’s language and actions as a guidepost of sorts, the NFL would achieve the balance that the Court sought in *Oncale*.¹¹¹ Implementing such a policy could also protect the NFL from liability while moving closer to eliminating verbal and physical abuse from the locker room.¹¹²

99. See *Andrew McDonald is Unnamed ‘Player A’ in Miami Dolphins’ Report*, SUN SENTINEL SPORTS, (Feb. 16, 2014), http://articles.sun-sentinel.com/2014-02-16/sports/sfl-20140216_1_former-miami-dolphins-ted-wells-practice-squad.

100. *Id.*

101. THEODORE V. WELLS, JR. ET AL., *supra* note 12, at 11.

102. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971).

103. THEODORE V. WELLS, JR. ET AL., *supra* note 12, at 4.

104. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

105. See THEODORE V. WELLS, JR. ET AL., *supra* note 12, at 7 (finding that the communication between NFL players is, generally speaking, vulgar, aggressive, and not intended to be made in a public setting).

106. See, e.g., *Faragher*, 524 U.S. at 788 (1998).

107. *Davis v. Monsanto*, 858 F.2d 345, 350 (6th Cir. 1988) (stating that “In essence, while Title VII does not require an employer to fire all “Archie Bunkers” in its employ, the law does require that an employer take prompt action to prevent such bigots from expressing their opinions in a way that abuses or offends their co-workers”).

108. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998).

109. See THEODORE V. WELLS, JR. ET AL., *supra* note 12, at 7.

110. See *Monsanto*, 858 F.2d at 350.

111. See *Oncale*, 523 U.S. at 81.

112. VENABLE LLP, *Takeaways from the Miami Dolphins’ Locker Room: The Legal Risks of Workplace Bullying*, LABOR & EMPLOYMENT NEWS ALERT (Nov. 2013), <http://www.venable.com/employers-should-minimize-legal-risks-of-workplace-bullying-11-08-2013/> (explaining that the first step an employer could take to protect his or herself from liability, in a workplace bullying scenario, would be to implement a policy that clearly defines bullying and prohibits it).

B. HOSTILE WORKPLACE ENVIRONMENT

In order for an employee to bring a claim under Title VII based upon a hostile working environment, the harassment has to be “sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.”¹¹³ Upon review of such a claim, a court will view the language and abuse from an objective and subjective vantage point.¹¹⁴ In determining whether a work environment is indeed hostile, courts turn to subjective factors and circumstances such as: the frequency and severity of the discriminatory conduct; whether the conduct was threatening or humiliating; whether the harassment interfered with employee’s work performance; and the effect the language had on the employee’s psychological well-being.¹¹⁵

Using this analytical framework, Title VII-based legislation may have prevented the controversy in Miami. The content of the text messages between Incognito and Jonathan Martin was highly offensive, racist, and derogatory in nature.¹¹⁶ A reasonable employee would likely feel threatened or, at the very least, concerned about what Incognito was going to do next based on his previous interactions with Martin.¹¹⁷ Additionally, Martin subjectively felt that the abuse made the locker room a hostile and abusive place to work.¹¹⁸

Furthermore, looking at the factors the Court laid out in *Harris*, Incognito’s actions were frequent,¹¹⁹ severe,¹²⁰ humiliating,¹²¹ and affected Martin’s job performance.¹²² Therefore, if the NFL implemented proper antidiscrimination policies, controversies like the one in Miami would be addressed earlier. Had Title VII legislation been in place at the time, Martin could have built a claim for a hostile workplace environment¹²³ based on either race or sex to the proper NFL governing body, as opposed to leaving his team and his livelihood.¹²⁴ Even though some members of the Miami Dolphins coaching staff were aware of what was happening to Martin, they failed to act.¹²⁵

Admittedly, veterans desire to motivate and “light a fire” under a younger player could be difficult to eradicate from the sport because of the competitive nature of the “alpha male” in the locker room.¹²⁶ When an NFL player does not fit this alpha-male mold, he is viewed as weak or “soft.”¹²⁷ Similar to the victim in *Oncale*, Martin was routinely harassed because

113. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

114. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993).

115. *Id.*

116. THEODORE V. WELLS, JR. ET AL., *supra* note 12, at 10.

117. *Id.*, at 2-11.

118. *Id.* at 16-17.

119. *Id.* at 68.

120. *Id.* at 32.

121. *Id.* at 5.

122. *See id.*, at 16-17 (hypothesizing that the actions of Martin’s teammates could have triggered causes of Martin’s depression and suicidal thoughts).

123. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

124. *See* THEODORE V. WELLS, JR. ET AL., *supra* note 12, at 1 (noting that Martin left the Dolphins because “some of his teammates subjected him to persistent bullying, harassment, and ridicule”).

125. *Id.* at 44-45.

126. *See Trotter*, *supra* note 26 (noting that the NFL is a physical, testosterone driven sport that prides itself on men handling things “man against man”).

127. *See* Larry Brown, *Report: Dolphins Players Repeatedly Fined Jonathan Martin for Being Soft*, LARRY BROWN SPORTS (Nov. 12, 2013), <http://larrybrownsports.com/football/dolphins-players-fined-jonathan-martin>

of his sex, in the sense that Martin was not “man” enough as a football player.¹²⁸ As a result of Martin being viewed as “different,” he was ostracized within the Miami locker room.¹²⁹ This stigma unnerved Martin and as a result, he left his job.¹³⁰ The failure of the Dolphin’s coaching staff to remedy the situation created a hostile work environment for Martin, so he felt as if he had no viable options or alternatives besides leaving the team.¹³¹ Had the NFL implemented Title VII-like legislation that provided players in Martin’s position an avenue to voice their concerns, similar controversies could likely be avoided.

C. EMPLOYER AND SUPERVISOR LIABILITY

In a Title VII harassment case, the law imposes a negligence standard upon employers, meaning an employer is liable if it knew or should have known of an employee’s conduct and failed to take proper remedial action.¹³² Essentially, an employer will be found liable where a plaintiff, who is alleging that he was sexually harassed by a supervisor, can establish that the supervisor had authority over the employee.¹³³

In Miami, one of Martin’s “supervisors” was offensive line coach Jim Turner.¹³⁴ As his offensive line coach, Turner had the power to decide if Martin played in games,¹³⁵ and he often criticized Martin’s performance.¹³⁶ Additionally, the Ted Wells Report made it clear that Turner was not only aware of the locker room harassment, but took part in it.¹³⁷ Furthermore, Turner’s assistant offensive line coach Chris Mosley overheard sexually charged comments repeatedly made by Incognito and others about Martin’s sister; however, Mosley did nothing to prevent their recurrence and actually participated in such insults.¹³⁸

Turner was responsible for instilling a “Judas” concept amongst the Miami Dolphins linemen.¹³⁹ This “Judas” system was meant to discourage the other linemen from confronting one another.¹⁴⁰ Turner believed the “Judas” concept would build camaraderie along the offensive linemen.¹⁴¹ When Martin left the team to seek professional treatment,

soft/210426 (detailing how Dolphins’ players routinely levied a “sensitivity fine” on Jonathan Martin, because it was deemed his performance on the field was “soft”).

128. See Kate Fagan, *So, What Defines a ‘Real Man’ In Sports?*, ESPN (Nov. 6, 2013), <http://espn.go.com/espnw/news-commentary/article/9937514/espnw-jonathan-martin-richie-incognito-incident-raises-questions-means-real-man-sports>.

129. Omar Kelly, *Sources: Dolphins Coaches Asked Incognito to Toughen Up Martin*, SUN SENTINEL SPORTS (Nov. 5, 2013), http://articles.sun-sentinel.com/2013-11-05/sports/fl-miami-dolphins-hazing-1106-20131105_1_richie-incognito-jonathan-martin-safe-and-professional-workplace.

130. Brown, *supra* note 127.

131. Gregg Rosenthal, *Ted Wells Releases Miami Dolphins Misconduct Report*, AROUND THE NFL (Feb. 14, 2014), <http://www.nfl.com/news/story/0ap2000000325827/article/ted-wells-releases-miami-dolphins-misconduct-report>.

132. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 799-800 (1998).

133. See *id.*, 524 U.S. at 745.

134. See THEODORE V. WELLS, JR. ET AL., *supra* note 12, at 67.

135. See *Ellerth*, 524 U.S. at 762.

136. See THEODORE V. WELLS, JR. ET AL., *supra* note 12, at 94.

137. *Id.* at 44-45.

138. *Id.*

139. *Id.* at 38.

140. *Id.*

141. *Id.* (stating that Turner believed Judas betrayed Jesus Christ because Judas was a ‘snitch’ and Turner did not want the other lineman to snitch on one another).

Turner, predicated upon this “Judas” system, pushed Martin to speak publicly about the incident in order to defend Incognito.¹⁴²

If Title VII applied, the Miami Dolphins franchise could be liable for the actions of Turner. An illustrative and similar case is *Burlington Industries v. Ellerth*,¹⁴³ where the Supreme Court held that an employer was subject to liability where a supervisory employee created a hostile work environment for a non-supervisory employee.¹⁴⁴ In that case, Ted Slowik was a midlevel manager who had authority to hire and promote employees, and he sexually harassed Kimberly Ellerth, a salesperson.¹⁴⁵ Ellerth chose to ignore Slowik and attempted to deal with the situation on her own, not talking to management about Slowik’s actions.¹⁴⁶

The Supreme Court further explored employer liability for supervisors in *Faragher v. Boca Raton*.¹⁴⁷ In that case a former lifeguard sued the city under Title VII based on the conduct of the supervisors, who had allegedly created a “sexually hostile atmosphere” at work.¹⁴⁸ The Court held that an employer may be found vicariously liable for a hostile working environment that was created by a supervisor with immediate authority.¹⁴⁹ However, an employer can raise an affirmative defense comprised of two elements: “(a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee reasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”¹⁵⁰ Under these parameters an employee must comply with employer procedures which are designed to remedy or, better yet, avoid the discriminatory harm altogether.¹⁵¹

Applying the analysis from Title VII case law, specifically *Ellerth* and *Faragher*, it becomes clear that the Dolphins could be held liable for the actions of their employee, Jim Turner, in his supervisory role. Therefore in order for the NFL to avoid future controversies such as this, the NFL should implement Title VII-like legislation that would require teams to adopt anti-harassment policies that prohibit the boorish behavior that took place in Miami. This legislation would also provide teams with an affirmative defense that they can raise if they are faced with a similar predicament.

E. ANTIHARASSMENT POLICY AS A PREVENTIVE MEASURE

While Dolphins Coach Joe Philbin was quick to remedy the situation after the Incognito-Martin incident, having a policy in place could help prevent a similar dispute before it ever happens. The Court stated in *Faragher v. Boca Raton* that an employer may raise an affirmative defense against an employee making a Title VII claim by having an

142. Barry Jackson, *Tidbits, observations, salacious details from Ted Wells' Dolphins report; Heat, UM, Marlins*, MIAMI HERALD, <http://miamiherald.typepad.com/sports-buzz/2014/02/tidbits-observations-salacious-details-from-ted-wells-dolphins-report.html> (last visited Jan. 11, 2015).

143. See generally *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 742 (1998).

144. *Id.* at 745.

145. *Id.* at 747.

146. *Id.* 748.

147. See *Faragher v. Boca Raton*, 524 U.S. 775, 780 (1998).

148. *Id.*

149. *Id.* at 807.

150. *Id.*

151. *Id.*

anti-harassment policy.¹⁵² If an employer has an anti-harassment policy in place, it must meet two elements: (1) the employer exercised reasonable care to prevent and correct the harassment, and (2) the plaintiff employee unreasonably failed to take advantage of any preventive opportunities provided by the employer to avoid the harm.¹⁵³ Therefore, in a hypothetical situation where Martin sued the Dolphins, if the Dolphins had a preventive anti-harassment policy in place before this dispute occurred, they could have entirely avoided the situation and insulated themselves from any potential liability.¹⁵⁴

Complicating the issue is the idea of “snitching” within the NFL.¹⁵⁵ Martin stated he never felt comfortable going to anyone in the Miami Dolphins organization because he did not want to “snitch” on his teammates, whom he had desperately tried to befriend.¹⁵⁶ Understandably, Martin was a victim of intense bullying and, for someone in his situation, choosing to not go to the proper authorities is consistent with being bullied and victimized.¹⁵⁷ However, it is reasonable to assume that had Martin had proper guidance and a proper channel to vet his concerns, perhaps the tensions with Incognito could have been more promptly addressed.¹⁵⁸

III. WHAT THE NFL SHOULD DO NOW

While the NFL locker room might be a unique workplace that, as some argue, should be governed by the players, it is still a workplace and is viewed as such by the law.¹⁵⁹ The NFL provides a universe where players can come together and unite to achieve an ultimate goal: winning a Super Bowl.¹⁶⁰ Given how unique each player in the NFL is in terms of background, there will inevitably be diverse locker rooms. Each race, nationality, and socioeconomic upbringing has its own unique set of experiences that will both shape someone’s perspective on life and dictate a person’s behavior and personality.¹⁶¹ However, these differences can be put aside on the football field because every player is dependent on one another to achieve a common goal.¹⁶² For that reason, the NFL is a unique and unusual workplace where players can become a large family and remain brothers long past their playing days.¹⁶³

152. *See id.* at 807.

153. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 767 (1998).

154. *See id.*, at 770.

155. THEODORE V. WELLS, JR. ET AL., *supra* note 12, at 37.

156. *Id.*

157. *Id.* at 17.

158. *See Uma Chandrasekaran, Tackling Workplace Bullying: Lessons from the Miami Dolphin’s Locker Room*, SEYFARTH SHAW LLP (Nov. 14, 2013), <http://www.laborandemploymentlawcounsel.com/2013/11/tackling-workplace-bullying-lessons-from-the-miami-dolphins-locker-room/>.

159. Ashley Fox, *The Locker Room Is Still a Workplace*, ESPN.COM, (Sept. 24, 2014), http://espn.go.com/nfl/story/_id/9948373/the-richie-incognito-jonathan-martin-incident-workplace-issue-not-just-locker-room-spat-gone-wrong.

160. *NFLN Survey/Super Bowl Player: Chargers*, ESPN.COM, (Sept. 24, 2014), http://espn.go.com/blog/nflnation/post/_id/113911/nfln-surveysuper-bowl-player-chargers.

161. Peter Adler, *Beyond Cultural Identity: Reflections on Multiculturalism*, MEDIATE.COM, (Sept. 24, 2014), <http://www.mediate.com/articles/adler3.cfm#>.

162. *Id.*

163. Fox, *supra* note 159.

However, such diversity can lead to hostile interactions between teammates.¹⁶⁴ Therefore, and especially in light of the situation in Miami, the NFL should implement a framework similar to Title VII that allows similar incidents to be handled by the proper authority. One option is to implement legislation within the NFL's bylaws that places more responsibility on players, coaches, and upper-level management to take proactive measures to prevent workplace harassment from escalating. The NFL bylaws as currently constructed do not have a means to resolve such issues.¹⁶⁵ If there were such a system, problems such as this could be remedied sooner rather than later.

Having a system where the players can notify management of problems within the locker room will allow teams to monitor players more effectively. Just as an employer needs to monitor his or her employees,¹⁶⁶ so must the NFL monitor its athletes. In a workplace that is currently governed by players, and likely will always be governed by players to some extent,¹⁶⁷ there needs to be a system that allows players who are being hazed to go to a higher authority in an effective manner. This is not to suggest that the NFL needs to sterilize the locker room and remove any amount of player leadership from the equation; rather, this comment recommends the NFL establish an acceptable level of locker room conduct and provide players who feel as if they are being unfairly harassed the ability to voice their concerns to their employer.

The NFL should implement similar legislation in their bylaws in an effort to avoid future instances of bullying or hazing in the locker room. If an NFL player feels he is getting harassed, he should report this to management in an effort to put management "on notice." However, if a coach or someone in management reasonably should have known that this level of harassment was going on, they should have an affirmative duty to step in and remedy the situation.

Furthermore, if the player can either prove that he put the team on constructive notice of the harassment or that management should have known what was going on, that player could potentially file a civil suit against the team. Hopefully, implementing such legislation would deter any future litigation of this nature. The goal of such legislation would be to require coaches and management to be more proactive and aware of what is going on in the NFL locker room. This increased attention would result in a more professional work environment for the players.

CONCLUSION

The alleged harassment and subsequent investigation into the Miami Dolphins could have a ripple effect on the NFL and its bylaws, and perhaps other major sports leagues. NFL teams can shield themselves from potential liability by taking preventive measures to stop hazing and bullying in the locker room, and implementing policies consistent with the requirements of Title VII.

164. Brianne J. Gorod, *Rejecting "Reasonableness": A New Look at Title VII's Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469, 1475-1476 (2007).

165. Fox, *supra* note 159

166. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2453 (2013) (recognizing that an employee could prevail in a workplace harassment claim through evidence that employer did not monitor the workplace).

167. Fox, *supra* note 159.

