

## NOTES

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# LIGHTS, CAMERA, LEGAL ACTION: ASSESSING THE QUESTION OF ACTING PERFORMANCE COPYRIGHTS THROUGH THE LENS OF COMPARATIVE LAW

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### INTRODUCTION

In a controversial opinion released in May 2015, the United States Court of Appeals for the Ninth Circuit addressed an unusual, and highly publicized, copyright question: Can an actor claim a copyright in his or her individual dramatic performance, distinct from the film at large?<sup>1</sup> In *Garcia v. Google, Inc.*, the court initially held that an actor, like the plaintiff, Garcia, could possibly claim a copyright interest for her individual performance in a film, so long as that contribution met the threshold requirements of copyrightability laid out in the Copyright Act.<sup>2</sup> After an uproar from third-

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

2 *Garcia v. Google, Inc.* (*Garcia Amended Opinion*), 766 F.3d 929 (9th Cir. 2014), *rev'd en banc*, 786 F.3d 733 (9th Cir. 2015). When referencing the initial *Garcia* decision, I cite to the Amended Opinion of the Ninth Circuit, as the substantive legal analysis is consistent with its initial opinion. The change was only in the relief granted. Additionally, it is worth noting that the case reached the court as an appeal of a denial of a preliminary injunction. *Id.* at 932–33. As such, the court was not squarely answering the question of whether or not Garcia had a copyright in her performance, but only whether she had shown a likelihood of success on the merits. *See id.* at 935 (“We need not and do not decide whether every actor has a copyright in his performance within a movie. It suffices for now to hold that, while the matter is fairly debatable, Garcia is likely to prevail based on the record and arguments before us.”). Perhaps due to the limited nature of its review—or perhaps fearful of the implications of stating its holding more broadly—the court is careful with its terminology in this opinion. Judge Kozinski, writing for the majority, repeatedly refers to Garcia’s performance as a “creative contribution to a work” rather than a work itself, *see id.* at 934, and does not outright state that Garcia has a copyright, only that “she’s shown that she is likely to succeed on her copyright claim.” *Id.* at 940. Thus, even if the case had not been reheard en banc, the availability of copyrights for acting performances would have still been up for debate.

party content distributors, film industry players, and a variety of others, the court revisited the case en banc.<sup>3</sup> In an amended opinion, the court did a full one-eighty, holding instead that Ms. Garcia had no copyright claim in her performance and suggesting that actors may never obtain a copyright of this sort.<sup>4</sup>

The *Garcia* litigation has ignited extensive debate in both professional and academic communities regarding the possibility of granting copyrights in actors' individual performances.<sup>5</sup> On one side, commentators argue that recognizing such rights will lead to a "splintering" problem in the film industry, as anyone who contributes something minimally creative to a film could claim a copyright interest, leading to a title searching problem for downstream users,<sup>6</sup> imposing practical burdens on producers of creative works,<sup>7</sup> and violating the Constitutional mandate that copyright law "promote . . . [p]rogress."<sup>8</sup> On the other side, however, parties assert that these fears are exaggerated, and so long as an acting performance meets the minimal requirements for copyrightability set forth in the Copyright Act,<sup>9</sup> it should receive protection.<sup>10</sup> The fact that the Ninth Circuit, arguably most equipped to evaluate claims relating to motion pictures,<sup>11</sup> came out on each

3 See *infra* note 69 and accompanying text.

4 *Garcia*, 786 F.3d at 740.

5 See, e.g., Paul M. Azzi, Note, *Two Wrongs Don't Make a Copyright: The Dangerous Implication of Granting a Copyright in Performance Per Se*, 83 U. CIN. L. REV. 529, 530, 556 (2014) (rejecting the Ninth Circuit's initial *Garcia* decision for its potential detrimental effects on the entertainment industry and application of copyright law to film); see also generally Jacob M. Victor, *Garcia v. Google and a "Related Rights" Alternative to Copyright in Acting Performances*, 124 YALE L.J.F. 80 (2014) (identifying the holes in American intellectual property law revealed during the *Garcia* litigation and suggesting the adoption of a European-style related rights regime).

6 *Garcia*, 786 F.3d at 742; see, e.g., Rebecca Tushnet, *Garcia v. Google Reversed; Many Sigh in Relief*, REBECCA TUSHNET'S 43(B)LOG (May 19, 2015, 11:18 AM), <http://tushnet.blogspot.co.uk/2015/05/garcia-v-google-reversed-many-sigh-in.html> (suggesting that the "risk of making every five seconds [of film] into its own work" outweighs the arguments for giving *Garcia* a copyright in her performance).

7 See, e.g., Brief of Amici Curiae Professors of Intellectual Property Law in Support of Google, Inc. and YouTube, LLC's Petition for Rehearing En Banc at 1, *Garcia v. Google Inc.*, 786 F.3d 733 (9th Cir. 2015) (No. 12-57302) ("Amici anticipate that this Court's decision, unless corrected, will create significant practical difficulties for firms and individuals producing the creative works that copyright is intended to incentivize.").

8 U.S. CONST. art. 1, § 8, cl. 8.

9 See 17 U.S.C. § 102(a) (2012) (setting out requirements of originality, fixation, and authorship for copyright protection).

10 See, e.g., Marc Sketchler, Note, *I Didn't Say That: The Ninth Circuit's Novel and Important Extension of Copyright Protection in Garcia v. Google, Inc.*, 17 TUL. J. TECH. & INTELL. PROP. 353, 360-63 (2014) (supporting the recognition of *Garcia*'s copyright because she met copyright minimums).

11 The Ninth Circuit has been coined the "Hollywood Circuit" due to the prominence of issues pertaining to the entertainment industry in its caseload. See, e.g., *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1521 (9th Cir. 1993) (Kozinski, J., dissenting) (refer-

side of this argument at some point during the *Garcia* litigation<sup>12</sup> illustrates the complicated nature of this question.

In its en banc opinion, the court noted that Garcia's claim was inconceivable under *American* copyright law, but intimated that she might have had a viable claim had her case arisen in a foreign jurisdiction.<sup>13</sup> According to the court, Garcia's claim was more attuned to a system that recognizes either moral rights<sup>14</sup> or a right to be forgotten,<sup>15</sup> which would better enable Garcia to "have her connection to the film forgotten and stripped from YouTube."<sup>16</sup> American copyright law has historically rejected any notion that authors are

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ring to the Circuit as the "Hollywood Circuit" in a right of publicity case concerning a celebrity).

12 In its initial opinion, the Ninth Circuit found that Garcia likely satisfied the minimum requirements for copyright protection, and as such, may have a copyright interest in her performance, rejecting the argument that recognition of such an interest would create complications in the film industry. *Garcia Amended Opinion*, 766 F.3d 929, 935, 940 (9th Cir. 2014), *rev'd en banc*, 786 F.3d 733 (9th Cir. 2015). In its subsequent en banc opinion, the court instead found that Garcia did not meet the Copyright Act's minimum requirements, and placed significant weight on the potential effects of recognizing such rights in the film industry. *Garcia*, 786 F.3d at 742–43.

13 *Garcia*, 786 F.3d at 745–46.

14 *Id.* at 746. The court states, "Nor is Garcia protected by the benefits found in many European countries, where authors have 'moral rights' to control the integrity of their works and to guard against distortion, manipulation, or misappropriation." *Id.* (citing *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 296 (7th Cir. 2011)). Moral rights, which are especially prominent in European countries, serve to protect the author's personhood and the integrity of his or her works beyond the proprietary interests. See, e.g., Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities Under the U.K.'s New Performances Regulations*, 24 B.U. INT'L L.J. 213, 217 (2006) (explaining that "[t]he moral rights doctrine is premised on the idea that creators of artistic works have certain personal rights that transcend the mere protection of economic or property rights" in contrast to the traditional monist approach to intellectual property rights taken in common law countries (citing Gregory M. Duhl, *Old Lyrics, Knock-Off Videos, and Copycat Comic Books: The Fourth Fair Use Factor in U.S. Copyright Law*, 54 SYRACUSE L. REV. 665, 705–06 (2004)); Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1541–42; Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 800–01 (2001); Calvin D. Peeler, *From the Providence of Kings to Copyrighted Things (and French Moral Rights)*, 9 IND. INT'L & COMP. L. REV. 423, 448 (1999); Jonathan Stuart Pink, *Moral Rights: A Copyright Conflict Between the United States and Canada*, 1 SW. J.L. & TRADE AM. 171, 192–93 (1994); Monica E. Antezana, Note, *The European Union Internet Copyright Directive as Even More than It Envisions: Toward a Supra-EU Harmonization of Copyright Policy and Theory*, 26 B.C. INT'L & COMP. L. REV. 415, 421–22 (2003); Robert J. Sherman, Note, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 379, 388–89 (1995)). However, this would still require the existence of a copyrightable work, which neither this opinion nor the court's earlier opinion characterize an actor's contribution to be. See *supra* note 2 and accompanying text.

15 *Garcia*, 786 F.3d at 745.

16 *Id.*

entitled to prevent the use of their works as a matter of natural right<sup>17</sup>—as asserted under moral rights and the right to be forgotten<sup>18</sup>—instead justifying copyright law as a tool for regulating economic efficiency so as to generate public benefits.<sup>19</sup> As the court explained, moral rights are only recognized in America in an extremely limited category of visual arts,<sup>20</sup> from which motion pictures are explicitly excluded.<sup>21</sup> According to the court, American copyright law was not the proper source of Garcia’s relief.<sup>22</sup>

Despite the United States’ apparent aversion to moral rights, the court’s allusion to foreign policies in its opinion invites a deeper look into foreign copyright policy to craft a potential solution for the problem of individual performance copyrights. Rather than analyzing the arguments in the Ninth Circuit’s en banc opinion, this Note will explore the issues raised by *Garcia* in light of international intellectual property law. As mentioned, the Ninth Circuit made clear that an actor does not have a distinct copyright interest in his or her individual performance within a film under current American copyright law.<sup>23</sup> This Note will use comparative methods to consider whether an actor *should* have such an interest based on America’s international obligations under various intellectual property treaties, the treatment of acting performances in parallel foreign jurisdictions, and the current framework of American copyright law. Despite agreeing that, on the particular facts of *Garcia*, the Ninth Circuit reached the correct conclusion, this Note asserts that *Garcia* has identified a gap in American intellectual property law. In accordance with the fundamental principles underlying intellectual property law and global trends, this Note will argue that this problem should be addressed by incorporating into the American intellectual property scheme an enumerated set of performers’ rights and limited moral rights.

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17 See, e.g., Bird & Ponte, *supra* note 14, at 247 (explaining that under the American approach to copyright, rights are not inherent or natural to the author but come from statute).

18 For example, moral rights commonly recognize a “right of integrity,” which enables an author to object to certain modifications and prejudicial uses of his works as a matter of right. See, e.g., Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407, 410–11 (2009) (“The right of integrity permits the creator to halt significant modification of the work and to prohibit presentation of a work in a derogatory manner contrary to the intentions of the creator.” (citing Lee, *supra* note 14, at 802)).

19 See, e.g., *id.* (“The U.S. observes a utilitarian approach to creative works, seeking to promote the public good through granting economic incentives for creative endeavors.” (citing Antezana, *supra* note 14, at 424, 432–33; Brandi L. Holland, Note, *Moral Rights Protection in the United States and the Effect of the Family Entertainment and Copyright Act of 2005 on U.S. International Obligations*, 39 VAND. J. TRANSNAT’L L. 217, 230 (2006); Sherman, *supra* note 14, at 389–90)).

20 *Garcia*, 786 F.3d at 746; see Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (2012).

21 17 U.S.C. § 101 (“A work of visual art does not include . . . any . . . motion picture . . .”).

22 See *supra* note 14 and accompanying text.

23 *Garcia*, 786 F.3d at 741.

Part I of this Note will provide the background of the *Garcia* case, outlining the relevant portions of the Ninth Circuit's initial opinion, as well as its subsequent en banc opinion. In particular, it will confront the court's assertion that the interest claimed by Garcia may be more readily recognized in certain foreign jurisdictions.<sup>24</sup>

Continuing from this proposition, Part II will address the availability of copyright protection for acting performances in audiovisual works abroad. For this comparison, this Note will first look at French copyright law, widely accepted as the most author-friendly of Western intellectual property regimes,<sup>25</sup> acknowledging the natural law philosophies that form the bedrock of this law.<sup>26</sup> Next, this Part will turn to copyright law in the United Kingdom—considered a middle ground between continental European and American regimes<sup>27</sup>—to investigate its treatment of performance copyrights, paying special attention to the limited, yet critical, role moral rights play in this system.<sup>28</sup> Ultimately, this Note will assert that such a limited recognition of intellectual property rights for performers and partial moral rights regime could reasonably be incorporated into American law to provide actors with legal support. Finally, this Part will turn to the United States' obligations under international law to assert that American law should be amended so as to recognize the possibility of actors obtaining copyrights in their individual performances within audiovisual works. Despite foundational differences in intellectual property philosophy between the United States and European countries, outlined in Part II, the United States' obligations under the Beijing Treaty on Audiovisual Performances (“the Beijing Treaty”) and Berne Convention for the Protection of Literary and Artistic Works (“the Berne Convention” or “Berne”) require that domestic intellectual property laws recognize rights of this sort. This Part will reference the U.K.'s efforts to comply with these same treaties as evidence that acting performance copyrights and moral rights are not discordant with the traditional common law view of copyright as an economic tool to encourage public dissemination of creative works.<sup>29</sup>

Part III of this Note will frame the issue of acting performance copyrights in light of the 1976 Copyright Act, which currently governs copyright

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24 See *supra* notes 13–18 and accompanying text.

25 See, e.g., Bird & Ponte, *supra* note 14, at 227 (“French law provides the broadest moral rights protection . . . .” (citing Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 12 (1985); Lee, *supra* note 14, at 803)).

26 See, e.g., Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 6–12 (1997) (providing the philosophical background of the French copyright in the philosophies of Kant and Hegel and the theory that one's creative works are an extension of one's person).

27 Bird & Ponte, *supra* note 14, at 227 (stating that the U.K.'s moral rights protection falls between the broad approach of French and narrow approach of the United States).

28 See, e.g., *id.* at 240, 246 (explaining the functional limitations on moral rights imposed by U.K. copyright law).

29 *Id.* at 266 (“[T]he U.K.'s regulations erode U.S. claims that the recognition of moral rights is incompatible with common law traditions . . . .”).

law in the United States. After summarizing the minimum requirements for copyright protection, this Part will elaborate on three types of works contemplated by the Act as valid recipients of copyright protection: choreographic works, pantomimes, and sound recordings. Comparing an actor's performance to these legitimate performance-related rights, this Part will assess the ability of American copyright law to absorb acting performances into its existing structure. It will also describe the various limiting doctrines of copyright law to suggest that significant safeguards already exist to prevent acting performance copyrights from turning the entertainment industry on its head.

Ultimately, this Note will conclude that by slightly modifying its current laws in a manner similar to the U.K., America could provide protection to actors like Garcia, bringing its laws into better harmony with Europe to the benefit of authors and the public at large.

### I. *GARCIA V. GOOGLE*

Cindy Lee Garcia's troubles began when she answered a casting call for an action-adventure film called *Desert Warrior* and was selected for a cameo role.<sup>30</sup> Her character only appeared in a few pages of the entire script, and she had two speaking lines.<sup>31</sup> Garcia was present for three-and-a-half days of filming, which were overseen by the film's writer and director, Mark Basseley Youssef.<sup>32</sup> In performing her lines, Garcia was instructed to "seem[ ] concerned."<sup>33</sup> She was paid a total sum of \$500 for her involvement in the film.<sup>34</sup>

Nearly a year after the initial casting call, Youssef completed a film using Garcia's performance.<sup>35</sup> However, the film was nothing like the action-adventure film for which Garcia believed she was acting.<sup>36</sup> Instead, Youssef incorporated Garcia's performance into an anti-Islamic propaganda film entitled *Innocence of Muslims*, which portrayed the Prophet Mohammed as "a murderer, pedophile, and homosexual."<sup>37</sup> Garcia's speaking performance was dubbed over, so that her character instead was attributed with the line, "Is your Mohammed a child molester?"<sup>38</sup> Garcia did not consent to her performance being used in this manner—or in any manner beyond the action-

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30 *Garcia Amended Opinion*, 766 F.3d 929, 932 (9th Cir. 2014), *rev'd en banc*, 786 F.3d 733, 737 (9th Cir. 2015).

31 *Garcia v. Google, Inc.*, 786 F.3d 733, 737 (9th Cir. 2015) (en banc). Garcia's speaking role was as follows: "Is George crazy? Our daughter is but a child?" *Id.*

32 *Garcia Amended Opinion*, 766 F.3d 929 at 932.

33 *Garcia*, 786 F.3d at 737 (alteration in original).

34 *Id.*

35 *Id.*

36 *Id.* at 736 (stating that Garcia was "bamboozled" by the film in which her performance was incorporated).

37 *Id.* at 737.

38 *Id.*

adventure film—and was unaware of Youssef’s ulterior film plans until she saw the trailer on YouTube.<sup>39</sup>

The YouTube trailer of *Innocence of Muslims* sparked outrage and was linked to “numerous violent protests” across the Middle East.<sup>40</sup> Garcia received several death threats<sup>41</sup> and promptly contacted Google, Inc., the owner of YouTube, asserting that the film was hate speech and violated her privacy and publicity rights under California law.<sup>42</sup> She also sent Google five takedown notices pursuant to the Digital Millennium Copyright Act, “claiming that YouTube’s broadcast of *Innocence of Muslims* infringed her copyright in her ‘audio-visual dramatic performance.’”<sup>43</sup>

When Garcia’s case reached the district court, she had refined her claims to include allegations of copyright infringement.<sup>44</sup> It is crucial to note that Garcia did not claim, and was never granted, a copyright in the film as a whole.<sup>45</sup> She did not claim joint authorship—which would grant her rights

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39 *Id.* at 737–38.

40 *Id.* at 738. United States Ambassador to the United Nations Susan Rice linked the dissemination of *Innocence of Muslims* with the September 11, 2012, attack on the U.S. Embassy in Benghazi, Libya. *Meet the Press* (NBC television broadcast Sept. 16, 2012), [http://www.nbcnews.com/id/49051097/ns/meet\\_the\\_press-transcripts/t/september-benjamin-netanyahu-susan-rice-keith-ellison-peter-king-bob-woodward-jeffrey-goldberg-andrea-mitchell/#.VISGwoR8vwv](http://www.nbcnews.com/id/49051097/ns/meet_the_press-transcripts/t/september-benjamin-netanyahu-susan-rice-keith-ellison-peter-king-bob-woodward-jeffrey-goldberg-andrea-mitchell/#.VISGwoR8vwv) (statement of United States Ambassador to the United Nations Susan Rice). Shortly thereafter, “an Egyptian cleric issued a fatwa against anyone associated with *Innocence of Muslims*, calling upon the ‘Muslim Youth in America[ ] and Europe’ to ‘kill the director, the producer[,] and the actors and everyone who helped and promoted this film.’” *Garcia*, 786 F.3d at 738 (alteration in original); see also Makoia Kawabata, *Building Character: How to Grant Actors Limited Copyright Protection for Performances Without Creating a New Species of Copyrighted Work*, 16 TEX. REV. ENT. & SPORTS L. 1, 1–2 (2014) (recounting the political controversy sparked by *Innocence of Muslims*).

41 *Garcia*, 786 F.3d at 738.

42 *Id.* Garcia initially filed her complaint against Google, Youssef, and other production assistants in state court, alleging a multitude of wrongs including invasion of privacy, false light, violation of her right of publicity, fraud, unfair business practices, slander, and intentional infliction of emotional distress. *Id.* However, Garcia voluntarily dismissed this state lawsuit, instead filing suit in the United States District Court for the Central District of California alleging copyright infringement against Google. *Id.* Though she revived several of her state law claims against Youssef in her initial district court complaint, those claims were eventually dismissed. Order Dismissing Action, *Garcia v. Nakoula*, No. CV-12-8315-MWF(VBKx) (C.D. Cal. June 29, 2015) (order dismissing action with prejudice following the Ninth Circuit’s en banc decision and based on the parties’ stipulation). Although, based on the available facts, some of these claims might have had merit, this Note asserts that Garcia’s problems are *intellectual property* problems at heart, and as such, should be addressed within the bounds of intellectual property law. Garcia was concerned with the unauthorized usage of her creative work product, a concern properly categorized in copyright. Plaintiffs like Garcia should not have to weave a patchwork of various tort claims to obtain relief for copyright-based problems, especially when those problems are expressly categorized as and handled within intellectual property law in many foreign jurisdictions. This will be further addressed in Part II below.

43 *Garcia*, 786 F.3d at 738.

44 *Id.*

45 *Id.* at 741.

to the film as a whole<sup>46</sup>—and did not claim any interest in the underlying screenplay.<sup>47</sup> Instead, Garcia claimed that she had an independent copyright in her individual acting performance, distinct from the copyrights in the film and screenplay.<sup>48</sup> Still, the district court denied Garcia’s request for a preliminary injunction, finding that she had not established a likelihood of success on the merits, particularly in light of the murky nature of her copyright claim.<sup>49</sup> The district court concluded that even if Garcia did have a copyright interest in her individual performance within the film, she had clearly granted Youssef “an implied license to ‘distribute her performance as a contribution incorporated into the indivisible whole of the Film.’”<sup>50</sup>

Garcia appealed to the Ninth Circuit who reversed the lower court.<sup>51</sup> Judge Kozinski, writing the majority opinion, held that Garcia did in fact show a likelihood of success in claiming a copyright interest in her individual performance in the film.<sup>52</sup> According to the opinion, Garcia had obtained this right because her performance met the Copyright Act’s copyrightability threshold, which requires an original work of authorship fixed in a tangible medium of expression.<sup>53</sup> According to Judge Kozinski, “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.’”<sup>54</sup>

In this opinion, the Ninth Circuit framed Garcia’s performance as a derivative work,<sup>55</sup> and as such, explained that Garcia only had a copyright interest in those elements of the performance that she authored.<sup>56</sup> She had no claim to her textual lines of script or the direction she received from Youssef.<sup>57</sup> Google argued that Garcia could not claim a copyright in her per-

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46 17 U.S.C. § 201(a) (2012) (“The authors of a joint work are coowners of copyright in the work.”).

47 *Garcia Amended Opinion*, 766 F.3d 929, 935 (9th Cir. 2014), *rev’d en banc*, 786 F.3d 733 (9th Cir. 2015).

48 *Garcia*, 786 F.3d at 737.

49 *Id.* at 738 (“[T]he district court found that the nature of Garcia’s copyright interest was unclear . . .”).

50 *Id.*

51 *Garcia Amended Opinion*, 766 F.3d at 940.

52 *Id.* at 935.

53 17 U.S.C. § 102(a) (2012).

54 *Garcia Amended Opinion*, 766 F.3d at 934 (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)).

55 *Id.* at 935 (explaining that an actor’s performance is derivative of the motion picture and screenplay, which are independently copyrightable); *see* 17 U.S.C. § 101 (“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.”).

56 *Id.*; *see* 17 U.S.C. § 103(b) (“The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work . . .”).

57 *Garcia Amended Opinion*, 766 F.3d at 935 (“She can claim copyright in her own contribution but not in ‘preexisting material’ such as the words or actions spelled out in the



formance because she did not author the script, received staging directions, and had no control over the production of the scene or its incorporation into the final work.<sup>58</sup> The court rejected this, though, pointing out that actors are not merely puppets. Judge Kozinski wrote:

[A]n 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. Otherwise, “every shmuck . . . is an actor because everyone . . . knows how to read.”<sup>59</sup>

The Ninth Circuit also rejected the district court’s conclusion that Garcia granted Youssef an implied license to use her performance in *Innocence of Muslims*.<sup>60</sup> The court pointed out that all licenses have limits.<sup>61</sup> Even if Garcia granted Youssef a license to use her performance in the action-adventure film for which she was cast, “[*Innocence of Muslims*] differs so radically from anything Garcia could have imagined when she was cast that it can’t possibly be authorized by any implied license she granted Youssef.”<sup>62</sup>

After backlash from a multitude of industries and interest groups,<sup>63</sup> the Ninth Circuit decided to rehear Garcia’s case en banc, and ultimately reversed its initial opinion.<sup>64</sup> Writing for the majority, Judge McKeown rejected Garcia’s copyright claim, highlighting her minimal role in the film en route to his conclusion that actors, especially Garcia, do not have individual copyright interests in their performances embedded in larger films.<sup>65</sup> In contrast to Judge Kozinski’s acknowledgment of actors’ creative contributions,<sup>66</sup> which he revived in a dissent to the en banc opinion,<sup>67</sup> Judge McKeown discounted Garcia’s “five-second acting performance”<sup>68</sup> and swiftly

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underlying script.” (quoting 17 U.S.C. § 103(b)) (citing *U.S. Auto Parts Network, Inc. v. Parts Geek, LLC*, 692 F.3d 1009, 1016 (9th Cir. 2012)).

58 *Id.* at 934.

59 *Id.* (internal citations omitted).

60 *Id.* at 937.

61 *Id.*

62 *Id.*

63 After the court published its initial opinion, Google and YouTube petitioned for en banc rehearing on the copyright issues, and were supported by a mass of amicus briefs from parties such as news organizations, the Electronic Frontier Foundation, Netflix, Adobe, Facebook, and Professors of Intellectual Property, among others. *Garcia v. Google, Inc.*, 786 F.3d 733, 735–36 (9th Cir. 2015) (en banc).

64 *Id.* at 747.

65 *Id.* at 740–41.

66 See *Garcia Amended Opinion*, 766 F.3d at 934; see also *supra* notes 53–59 and accompanying text.

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

68 *Id.* at 736 (majority opinion); see also *id.* at 741, 747 (referring to Garcia’s contribution as a “five-second performance”). This emphasis on the brief nature of Garcia’s contribution could raise *Bleistein* concerns. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (establishing that it is not the role of the courts to evaluate the artistic merit or value of works in analyzing copyright issues).

dismissed the suggestion of copyright in individual acting performances.<sup>69</sup> The court's main concern was the "splintering" effect<sup>70</sup> that recognizing such a right might have—enabling any and every individual who contributes to a film to obtain a copyright.<sup>71</sup>

Additionally, the court relied heavily on the fact that Garcia had been denied copyright registration for her acting performance by the United States Copyright Office.<sup>72</sup> In its response, the Copyright Office asserted that its "longstanding practices do not allow a copyright claim by an individual actor or actress in his or her performance contained within a motion picture."<sup>73</sup> It explained that actors' performances were integrated into motion pictures and could not be given distinct protection.<sup>74</sup> Actors could only obtain copyright as joint authors, and their performances would mostly be governed by the work-made-for-hire doctrine.<sup>75</sup> The Office's ultimate con-

69 *Id.* at 740 ("The central question is whether the law and facts clearly favor Garcia's claim to a copyright in her five-second acting performance . . . . The answer is no.")

70 *Id.* at 742. For this proposition, the court relied heavily on the circuit's seminal joint authorship case, *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000). In *Aalmuhammed*, the plaintiff was hired by a big-budget production company as a historical and religious consultant for an upcoming film about Malcolm X. *Id.* at 1229. After production was completed, the plaintiff claimed joint authorship in the film. *Id.* at 1230. The court rejected his claim, noting the Copyright Act's mandate that joint authorship only exists if all contributing authors intend it to be so. *Id.* at 1234–35; see 17 U.S.C. § 101 (2012) (defining "joint work"). Further, the court noted the dangers of relaxing the joint authorship requirement in the context of film production: "So many people might qualify as an 'author' if the question were limited to whether they made a substantial creative contribution that that test would not distinguish one from another." *Aalmuhammed*, 202 F.3d at 1233. Though the *Garcia* court relied heavily on *Aalmuhammed* language, *Aalmuhammed* is not analogous to Garcia's claim. See *Garcia*, 786 F.3d at 750 (Kozinski, J., dissenting); *Garcia Amended Opinion*, 766 F.3d at 934. Unlike the plaintiff in *Aalmuhammed*, Garcia did not seek rights to the film as a whole, only to her individual performance. Judge Kozinski's dissent further points out the majority's misuse of *Aalmuhammed*: "We went out of our way to emphasize that joint authorship of a movie is a 'different question' from whether a contribution to the movie can be a 'work' under section 102(a). And we clearly stated that a contribution to a movie *can* be copyrightable (and thus can be a 'work')." *Garcia*, 786 F.3d at 750 (Kozinski, J., dissenting) (quoting *Aalmuhammed*, 202 F.3d at 1233, 1232 (internal citation omitted)).

71 *Garcia*, 786 F.3d at 743 (majority opinion).

72 *Id.* at 741–42.

73 Letter from Robert J. Kasunic, Assoc. Register of Copyrights and Dir. of Registration Policy and Practices, U.S. Copyright Office, to M. Cris Armenta, The Armenta Law Firm 2 (Mar. 6, 2014) (on file with author) [hereinafter *Copyright Office Letter*].

74 *Id.*

75 *Id.* A work made for hire is either "a work prepared by an employee within the scope of his or her employment" or

a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

17 U.S.C. § 101. Under the work-made-for-hire doctrine, the copyright in work of authorship vests in the author's employer rather than the author himself.

clusion was the same as the Ninth Circuit's: "If her contribution was neither a work made for hire nor the requisite authorship to warrant a claim in a joint work, Ms. Garcia has no separable claim to copyrightable authorship in her performance."<sup>76</sup>

Though the court addressed a multitude of different avenues through which a person involved with a complex film could obtain a copyright interest—licensing, joint authorship, derivative work, and work made for hire—the court ultimately concluded that none of these roads led to a copyright for Garcia.<sup>77</sup> Despite the gravity of harm facing Garcia,<sup>78</sup> the Ninth Circuit rejected her claim altogether.<sup>79</sup> If Garcia were to get relief for her troubles, intellectual property law would not be the provider.<sup>80</sup>

In its opinion, the court also noted the discrepancy between American and European laws in confronting claims like Garcia's. It explained that Garcia's claim might have succeeded in Europe, where actors could seek redress through the right to be forgotten<sup>81</sup> or moral rights.<sup>82</sup> The right to be forgotten, recently recognized by the European Union, requires Google to evaluate requests from individuals to have personal information removed from the Google search engine.<sup>83</sup> Moral rights, as explained in Part II of this Note, allow authors to obtain redress for uses that disparage the integrity of their works.<sup>84</sup> The court dismissed this discrepancy between American and European law as "[u]nfortunate [ ] for Garcia."<sup>85</sup>

It is important to note that claims for copyright in an actor's individual performance like Garcia's are rarely litigated.<sup>86</sup> This is not because of the obviousness of a solution to the dilemma, but instead because most acting performances are regulated by contracts, express licenses, and the work-made-for-hire doctrine.<sup>87</sup> However, as evident from the language of the Cop-

76 *Copyright Office Letter*, *supra* note 73, at 2.

77 *Garcia*, 786 F.3d at 741–44.

78 *Id.* at 744 (noting the seriousness of the threats made to Garcia).

79 *See id.* at 747.

80 *Id.* at 740–41.

81 *Id.* at 745.

82 *Id.* at 746.

83 Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos* (May 13, 2014), [http://curia.europa.eu/juris/document/document\\_print.jsf?doclang=EN&docid=152065](http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=152065).

84 *See, e.g., Bird & Ponte*, *supra* note 14, at 221 (explaining the functions of the common moral rights).

85 *Garcia*, 786 F.3d at 745.

86 *See id.* at 743 (describing the difficulties of litigating claims for copyright in an actor's individual performance). This is also possibly attributable to a widespread assumption that such claims were not available.

87 *Id.*; *see also* Bonnie Teller, Note, *Toward Better Protection of Performers in the United States: A Comparative Look at Performers' Rights in the United States, Under the Rome Convention and in France*, 28 COLUM. J. TRANSNAT'L L. 775, 779 (1990) ("Due to the 'work for hire' doctrine . . . most performers in audiovisual works . . . are statutorily alienated from the copyright in the work they create." (citing 17 U.S.C. § 201(b) (1988))).

yright Act<sup>88</sup> and the Supreme Court's interpretation of such, no sophistication is required for one to obtain a copyright, in film or any other medium.<sup>89</sup> Therefore, any "schmuck with a videocamera" can create a film that will be protected by copyright.<sup>90</sup> In such instances, implied licenses will generally prevent the actors from suing for copyright infringement in their performances.<sup>91</sup> But, thanks to modern technology and editing programs, the ease with which performances can be spliced, altered, edited, and exploited should raise concerns.<sup>92</sup> It is not a stretch of the imagination to foresee claims like *Garcia's* arising in the future, where actors perform for one purpose, only to discover that their performances have been recycled in a new work.<sup>93</sup> Though such individuals could potentially find redress from tort or privacy laws, *Garcia* made clear that, at least in the Ninth Circuit, intellectual property law will turn a blind eye.<sup>94</sup>

## II. COPYRIGHT PROTECTION FOR ACTING PERFORMANCES IN THE INTERNATIONAL SPHERE

As the Ninth Circuit noted, had *Garcia's* case arisen in a number of foreign jurisdictions, she would not have faced such difficulty establishing an

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88 See 17 U.S.C. § 102(a) (2012) (requiring only originality, authorship, and fixation for copyright protection).

89 See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (stating that works don't need to be artistically advanced for copyright protection, so long as they "possess some creative spark, 'no matter how crude, humble or obvious' it might be" (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.08[C][1] (1990))); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951) (explaining that, unlike in patent, copyright does not require that a work is novel, highly unique, or beyond the result of "ordinary skill" (quoting *Henderson v. Tompkins*, 60 F. 758, 764 (C.C.D. Mass. 1894))).

90 *Garcia Amended Opinion*, 766 F.3d 929, 937 (9th Cir. 2014), *rev'd en banc*, 786 F.3d 733 (9th Cir. 2015); see, e.g., Richard Masur, *The Importance of Copyright Protection to Audio and Audiovisual Performers in the Digital Age: An Actor's Point of View of U.S. Copyright in the Digital World*, 38 COLUM. J.L. & ARTS 331, 333 (2015) ("High quality, affordable recording hardware, coupled with low-cost editing through easily accessible computer apps has created a nation of 'filmmakers' . . . [with the goal of] 'exposure.'").

91 *Garcia*, 786 F.3d at 743 (explaining that low-budget filmmakers are unlikely to use express contracts or licenses in making their films, and in the absence of such explicit agreements, the courts look for implied licenses).

92 Masur, *supra* note 90, at 332 ("Although some unauthorized copying was happening in the era of analog videocassettes, an explosion of audiovisual theft was triggered by digital recording because of the perfect copies made possible by the technology.").

93 *Id.* at 336 (explaining that constant advances in digital technology make it easy for actors' performances to be taken, reconfigured, and separately distributed as clips and mash-ups, or "reedited in such a way so as to create comedic, prurient or other distortions of the original intent of the filmmakers and the actors").

94 *Garcia*, 786 F.3d at 744–45 (explaining that the relief *Garcia* seeks is inconsistent with the purposes of copyright law and should instead be addressed through privacy or publicity laws).

intellectual property claim.<sup>95</sup> In addition to offering broader intellectual property rights in general, many foreign jurisdictions have specifically decided to extend copyright protection to acting performances by joining the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 1961 (“Rome Convention”).<sup>96</sup> The Rome Convention has been ratified by ninety-two nations, the United States not being one of them,<sup>97</sup> and was formed in response to concerns regarding new forms of technology that made reproduction of sounds and performances far easier and cheaper than they had been in the past.<sup>98</sup> Though the Rome Convention does not protect performances done for audiovisual works, and thus does not confer rights upon film actors like *Garcia*, it does protect a wide range of performers beyond the traditional scope of copyright law.<sup>99</sup> The Rome Convention gives these performers the right to prevent, among other things, the unauthorized reproduction of a fixation of a performance “if the reproduction is made for purposes different from those for which the performers gave their consent.”<sup>100</sup> While many consider the Convention itself outdated and too modest in its provisions,<sup>101</sup> it is relevant to this Note as evidence that a significant number of countries have explicitly recognized an individual interest in certain performances—distinct from the larger works in which they appear—since as early as 1961.

The United States has not signed the Rome Convention, and as exhibited by *Garcia*, has not implemented legislation to recognize copyrights for actors’ performances.<sup>102</sup> This position stands in contrast to copyright regimes in many countries with which the United States frequently inter-

95 See *supra* notes 81–84 and accompanying text.

96 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention].

97 WIPO-Administered Treaties: Contracting Parties, Rome Convention, WORLD INTELLECTUAL PROP. ORG., [http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=17](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=17) (last visited Apr. 12, 2016).

98 See, e.g., Teller, *supra* note 87, at 775–76 (explaining that the Rome Convention was intended to address problems with performers’ rights raised by technological development); see also generally Masur, *supra* note 90 (describing the concerns faced by actors in coping with digital technology).

99 Ted Shapiro, *The Beijing Audiovisual Performers Treaty: A Long March to Compliance?*, 25 ENT. L. REV. 291, 292–93 (2014) (performances fixed in audiovisual works are excluded from protection under treaties governing performance rights such as the Rome Convention and the WIPO Performances and Phonograms Treaty (WPPT)).

100 Rome Convention, *supra* note 96, art. 7(1)(c)(ii).

101 See, e.g., Deming Liu, *The Beijing Treaty on Audiovisual Performances and its Impact on the Future of Performers’ Rights Under English Law*, 37 EUR. INTEL. PROP. REV. 81, 81 (2015); Teller, *supra* note 87, at 789.

102 Shapiro, *supra* note 99, at 293 (explaining that the only recognition of performers’ rights in U.S. copyright law occurs in Section 1101 of the Copyright Act, but is limited to the fixation of live musical performances and therefore does not affect actors); Victor, *supra* note 5, at 80 (“[U]nder American law, acting performances must either be governed by conventional copyright law or receive no IP protection at all.”).

acts.<sup>103</sup> Though, until the recent Beijing Treaty,<sup>104</sup> performances fixed in audiovisual works have not received full international protection and many nations have implemented legislation, often called “related” or “neighboring” rights schemes, to provide actors with copyright-based rights in their performances.<sup>105</sup> In light of the international nature of the film industry,<sup>106</sup> the United States’ failure to entertain the adoption of even minimum copyright protection for performers places American actors at a significant economic disadvantage.<sup>107</sup> One commentator has explained that the United States’ failure to follow the emerging international pattern of recognizing certain intellectual property rights for actors increases transaction costs, as film producers—who, in light of the massive casts used in many films, frequently deal with actors from different nations—have to spend additional time and resources learning actors’ expectations and negotiating for the rights to exploit their works.<sup>108</sup> As noted by the *Garcia* court,<sup>109</sup> and as will be explained in the following Sections, economic reward in exchange for public dissemination has been traditionally cited as the foundational purpose of copyright law in America.<sup>110</sup> Under its current system, though, both film

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103 See, e.g., Bird & Ponte, *supra* note 14, at 213 (“Tensions have traditionally existed between civil and common law nations over the nature of the legal protections provided for creative works.” (citing Sherman, *supra* note 14, at 379–80, 388–90)).

104 See *infra* Section II.C.

105 See, e.g., Shapiro, *supra* note 99, at 293 (noting that performers are not equated with traditional authors at the international level, but instead are protected via a “related rights” approach); Victor, *supra* note 5, at 85 n.34, 86 (noting that France, Germany, and the U.K. all have implemented a related rights copyright system whereby actors receive a limited, yet effective, set of economic and moral rights in their performances).

106 See, e.g., Owen Morgan, *The Problem of the International Protection of Audiovisual Performances*, 33 INT’L REV. INTEL. PROP. & COMPETITION L. 810, 816 (2002) (“[A]udiovisual works are increasingly produced and financed across national borders which makes consistency and certainty of transfer and rights ownership rules extremely important.” (quoting United States of America, *Submission of the United States of America on Transfer*, at 2, Standing Comm. on Copyright and Related Rights, World Intellectual Prop. Org. [WIPO], Fourth Session, SCCR/4/4 (Apr. 6, 2000), [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_4/sccr\\_4\\_4.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_4/sccr_4_4.pdf))).

107 See, e.g., Masur, *supra* note 90, at 336–37 (asserting that the losses suffered by actors “flow primarily from an evolution of technology and a failure of the copyright law to adequately address these new . . . issues and protect those who may be harmed by the growing amounts of infringement made possible by digital technology”); Teller, *supra* note 84, at 775 (arguing that the problem of unauthorized reproduction and distribution of acting performances is “exacerbated because the United States has no uniform, national system of protection for performers and has not signed” the Rome Convention).

108 Morgan, *supra* note 106, at 816 (explaining transaction costs of contracting in the film industry).

109 *Garcia v. Google, Inc.*, 786 F.3d 733, 744–45 (9th Cir. 2015) (en banc) (explaining that copyright law serves as an economic incentive for authors to create and disseminate works).

110 See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”).

producers and actors are economically disadvantaged by the murky nature of actors' rights, which could impede creative production.<sup>111</sup> Thus, the United States' aversion to the actor-friendly approach of international copyright regimes—explained more in the following Sections—should not deter it from recognizing copyrights for actors, as such laws would indeed be consistent with the economic incentive theory that fuels the development of its domestic copyright law. Below, this Note will briefly examine the laws in place in France and the United Kingdom to reveal possible solutions to the disadvantage currently suffered by American actors.

### A. French Copyright Law

In France, copyright is called “*droit d’auteur*,” which translates to “author’s right.”<sup>112</sup> Copyright protection is set out in statute, the *Code de la propriété intellectuelle* (“IP Code”).<sup>113</sup> French copyright law is significantly more author-friendly than American, or even other European, regimes,<sup>114</sup> in that it “allows authors to control the reproduction and performance of their intellectual creations.”<sup>115</sup> Unlike American law, which is built on utilitarian principles,<sup>116</sup> French copyright law is rooted in natural law and adheres to the belief that copyright is a natural right, as an author’s creative works are an extension of his personality.<sup>117</sup> This notion of the moral right is central to French copyright law. Indeed, the definition of author in the IP Code

111 See Morgan, *supra* note 106, at 816.

112 Jean-Luc Piotraut, *An Authors’ Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 558 (2006).

113 CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PROP. INTELL.] [INTELLECTUAL PROPERTY CODE] art. L112-1 (Fr.), English translation available at [https://www.legifrance.gouv.fr/content/download/1959/13723/version/3/file/Code\\_35.pdf](https://www.legifrance.gouv.fr/content/download/1959/13723/version/3/file/Code_35.pdf) (“The provisions of this Code shall protect the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose.”).

114 See, e.g., Piotraut, *supra* note 112, at 550 (explaining the “remarkably broad protection conferred to authors by French copyright law, particularly when compared to the United States jurisprudence in the same area”).

115 *Id.* at 563.

116 See, e.g., *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’” (quoting U.S. CONST. art. II, § 8)); *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 24 (2d Cir. 1976) (“American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors.”); Shapiro, *supra* note 99, at 293 (stating that the lack of moral rights recognition in America “stems from the ‘utilitarian’ nature of US copyright law” (citing ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY* xiii (2010))).

117 Piotraut, *supra* note 112, at 555 (explaining that in France “[c]opyright is deemed a natural right, part of the natural law, a true extension of personality, consisting of economic and moral rights, *i.e.*, the right to forbid uses of a work which would discredit the author directly or through his work” (quoting David Ladd, *The Harm of the Concept of Harm in Copyright*, 30 J. COPYRIGHT SOC’Y U.S.A. 421, 425 (1983))).

includes “attributes of an intellectual and moral nature as well as attributes of an economic nature.”<sup>118</sup> The inclusion of “economic nature” as distinct and secondary in this clause demonstrates that moral rights are of primary importance in French intellectual property law. This is further exemplified by the fact that moral rights attach to individual authors, but not to corporations.<sup>119</sup> These elements combine to establish the “generally undisputed” notion that “France has offered the most advanced protection of moral rights.”<sup>120</sup>

French moral rights include “the rights of disclosure, retraction, attribution, integrity, and resale royalties, as well as protections against misattribution, excessive criticism, and attacks on the creator’s personality.”<sup>121</sup> These rights are available to a broad spectrum of different types of works,<sup>122</sup> rather than just a privileged few as they are in the United States.<sup>123</sup> Further, moral rights under the IP Code are generally inalienable.<sup>124</sup> This means that regardless of who possesses the copyright in a work—if it was licensed or assigned to someone other than the author—the author retains his moral rights.<sup>125</sup>

Yet even setting aside this broad availability of moral rights to French authors, performers are granted specific intellectual property rights that their American counterparts lack. France is one of the ninety-two nations that signed the Rome Convention, and it enacted legislation to specifically address actors’ rights in 1985.<sup>126</sup> This law was incorporated into Article 212-3 of the IP Code, which states, “The performer’s written authorization shall be required for fixation of his performance, its reproduction and communication to the public as also for any separate use of the sounds or images of his

118 C. PROP. INTELL. art. L111-1 (Fr.).

119 *Id.* art. L121-1 (“An author shall enjoy the right to respect for his name, his authorship and his work. This right shall attach to his *person*.” (emphasis added)).

120 Bird & Ponte, *supra* note 14, at 227.

121 *Id.* (citing Kwall, *supra* note 25, at 12).

122 C. PROP. INTELL. art. L112-1 (Fr) (“The provisions of this Code shall protect the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose.”).

123 See Visual Artists Rights Act of 1990, Pub. L. No. 101-650, § 603(a), 104 Stat. 5089, 5128 (codified at 17 U.S.C. § 106A(b) (2012)) (moral rights only recognized in visual arts).

124 C. PROP. INTELL. art. L121-1 (Fr) (“An author shall enjoy the right to respect for his name, his authorship and his work. . . . It shall be perpetual, inalienable and imprescriptible.”). *But see* Bird & Ponte, *supra* note 14, at 229 (noting that some courts have permitted “limited waivers in contracts if the courts view those waivers as reasonable and not substantive alterations or distortions of the creative work” (citing Thomas P. Heide, *The Moral Right of Integrity and the Global Information Infrastructure: Time for a New Approach?*, 2 U.C. DAVIS J. INT’L L. & POL’Y 211, 214 (1996); Kwall, *supra* note 25, at 12–13)).

125 Bird & Ponte, *supra* note 14, at 230.

126 Loi 1985-660 du 3 juillet 1985 relative aux droits d’auteur et aux droits des artistes-interprètes, des producteurs de phonogrammes et de vidéogrammes et des entreprises de communication audiovisuelle [Law No. 85-660 of July 3, 1985 on Author’s Rights and on the Rights of Performers, Producers of Phonogram and Videogram and Audiovisual Communication Enterprises], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 4, 1985, p. 7495.



performance where both the sounds and images have been fixed.”<sup>127</sup> It also imposes a compulsory licensing scheme for exploitation of actors’ performances, setting a minimum industry standard for remunerations and providing a guideline for parties contracting on their own.<sup>128</sup> As a result, performers have redress for unauthorized reproductions of their performances even when their moral rights are not infringed. France has also signed the Beijing Treaty, discussed below, which addresses performers whose works are fixed in audiovisual works.<sup>129</sup> French law accommodated this obligation by extending to such actors rights similar to copyright, though slightly restricted in scope.<sup>130</sup> Under this system, which is referred to as “related rights,” actors are not considered traditional authors, but employees.<sup>131</sup> The IP Code specifies that performers’ related rights are not to be interpreted in a way that interferes with the exercise of exclusive rights by authors.<sup>132</sup> French law also addresses the “splintering” effect of which the *Garcia* court warned,<sup>133</sup> by distinguishing between performing artists and ancillary performers, such as extras in a film.<sup>134</sup> Only performers, defined as “those persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works, variety, circus or puppet acts” receive intellectual property rights.<sup>135</sup>

In practice, performers in France receive essentially the same set of rights as authors,<sup>136</sup> though they are conditioned on certain labor law practices<sup>137</sup> and may be trumped by the author’s rights.<sup>138</sup> Performers have the exclusive rights to authorize, via writing, the fixation of their performance, reproduction of the fixed performance, communication of the fixed per-

127 C. PROP. INTELL. art. L212-3 (Fr.).

128 Teller, *supra* note 87, at 798.

129 *WIPO-Administered Treaties: Contracting Parties, Beijing Treaty on Audiovisual Performances*, WORLD INTELLECTUAL PROP. ORG., [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=841](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=841) (last visited Arp. 12, 2016).

130 See Marjut Salokannel, *Study on Audiovisual Performers’ Contracts and Remuneration Practices in France and Germany*, at 5, Ad Hoc Informal Meeting on the Protection of Audiovisual Performances, World Intellectual Prop. Org. [WIPO], AVP/IM/03/3B (Mar. 31, 2003), [http://www.wipo.int/edocs/mdocs/copyright/en/avp\\_im\\_03/avp\\_im\\_03\\_3b.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/avp_im_03/avp_im_03_3b.pdf).

131 *Id.* at 3; see CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L762-1 (Fr.).

132 C. PROP. INTELL. art. L211-1 (Fr.) (“Neighboring rights shall not prejudice authors’ rights.”).

133 See *supra* notes 70–71 and accompanying text.

134 C. PROP. INTELL. art. L212-1 (Fr.); Salokannel, *supra* note 130 (“The main principle of the French law is that *every artist performing in a central capacity enjoys protection under the law*. Artists who perform in ancillary functions from the artistic point of view are excluded from author’s rights protection.”). Under this system, if an ancillary actor wants to obtain IP rights for his performance, he bears the burden of proving that his artistic contributions meet the standard set forth in the Code. *Id.*

135 C. PROP. INTELL. art. L212-1.

136 Salokannel, *supra* note 130 (“In principle, the French law has granted the performers the whole scope of rights.”).

137 *Id.* (explaining that performers’ rights are tempered by requirements under collective labor agreements and employment agreements).

138 See *supra* note 132 and accompanying text.

formance to the public, and separate use of the sounds and images from the performance where both the sounds and images have been fixed.<sup>139</sup>

In sum, French performers and authors receive far broader protection than their American counterparts due to the existence of comprehensive moral rights and performers' related rights provisions in French intellectual property law. Though the intricacies of the French system are beyond the scope of this Note, this overview illustrates the significant gap between American and European law.<sup>140</sup> America has traditionally opposed intellectual property law rooted in moral rights,<sup>141</sup> and as such, would not likely be receptive to remodeling its laws after the French IP Code. However, it could perhaps learn from France's related rights scheme—and particularly its distinction between performers and ancillary actors—and implement a similar distinction as a means of mediating the impact of performers' rights on the film industry.

### B. *United Kingdom Copyright Law*

Copyrights were first recognized in the United Kingdom in the 1710 Statute of Anne, which gave authors a renewable fourteen-year exclusive right to print works.<sup>142</sup> The goal of the statute was to encourage authors to produce new works, while maintaining a balance between the economic interests of authors, monopolistic tradition of publishers, and the public interest.<sup>143</sup> As United States copyright law came from England, this history helps explain the economic focus woven throughout American copyright.<sup>144</sup>

The U.K. adopted Article 6bis—the moral rights provision—of the Berne Convention<sup>145</sup> in 1928,<sup>146</sup> though it did not enact positive legislation

139 Salokannel, *supra* note 130.

140 See *id.* at 3–25 for a detailed description of French law on audiovisual performances.

141 See, e.g., Bird & Ponte, *supra* note 14, at 247.

142 The Statute of Anne 1710, 8 Ann., c. 19 (Eng.).

143 See, e.g., Bird & Ponte, *supra* note 14, at 234 (explaining that printers and booksellers thrived under the Statute of Anne, which was not concerned with protecting the author's rights or the integrity of their works); Susan P. Liemer, *How We Lost Our Moral Rights and the Door Closed on Non-Economic Values in Copyright*, 5 J. MARSHALL REV. INTELL. PROP. L. 1, 9–32 (2005) (providing the background of early copyright in England to explain the rejection of moral rights and centralization of economic concerns in modern American copyright law).

144 See, e.g., Bird, *supra* note 18, at 417 (stating that the utilitarian roots of U.K. copyright explain why the U.S. also emphasizes economic interests); Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229, 230 (1995) (discussing how moral rights did not play a role in the formation of copyright laws in the common law countries).

145 The Berne Convention will be explained in Section II.C below.

146 Dworkin, *supra* note 144, at 231–32 (explaining the background of the adoption of Article 6bis).

addressing moral rights until 1988.<sup>147</sup> One committee was gathered in 1952 to examine whether the U.K.'s copyright laws were consistent with Berne,<sup>148</sup> and it decided that because contract could cover most problems similar to moral rights, no one had complained that the U.K. was in breach of Berne, and the vague nature of moral rights would make legislating on the matter very difficult, the U.K. should not modify its intellectual property laws to explicitly provide moral rights.<sup>149</sup> As such, the Copyright Act of 1956 did not address moral rights.<sup>150</sup> However, moral rights continued to grow across the international plane following the addition of Article 6bis to Berne, prompting the U.K. to reconsider its intellectual property laws.<sup>151</sup> A second committee, the Whitford Committee, was convened to review the moral rights issue in 1977,<sup>152</sup> and this time concluded that the U.K. did need to amend its laws to comply with Berne.<sup>153</sup> Though enacted reluctantly,<sup>154</sup> the Copyright, Designs and Patents Act 1988 (CDPA), which still governs U.K. copyright law, recognized moral rights independent of traditional proprietary rights.<sup>155</sup>

While its moral rights protection is not nearly as vast as the French IP Code, the CDPA recognizes two moral rights—the right of attribution and right of integrity—that subsist for the same duration as the author's economic rights.<sup>156</sup> The CDPA places several restrictions on these rights, thus arguably limiting their effectiveness.<sup>157</sup> For example, the right of attribution does not apply in situations “where it is not reasonably practical to identify”

147 *Id.* at 232 (explaining that the U.K., and other common law countries, did not enact new law following the addition of moral rights to Berne because their existing laws were thought to indirectly cover moral rights).

148 Patricia M. Leopold, *Reports of Committees*, 40 MOD. L. REV. 685, 685 (1977).

149 Dworkin, *supra* note 144, at 238.

150 Though the Copyright Act of 1956 did not explicitly provide moral rights, Section 43 of the Act conferred a misattribution right, under which artists could “prevent both false attributions of a work and false representations that a work was an adaptation of another’s creation.” Bird & Ponte, *supra* note 14, at 237 (citing Sheila J. McCartney, *Moral Rights Under the United Kingdom’s Copyright, Designs and Patents Act of 1988*, 15 COLUM.-VLA J. L. ARTS 205, 215 (1991)). This essentially creates the moral right of attribution, but it was not referred to as such until the 1988 Act. *Id.*

151 *Id.* at 238.

152 *See, e.g., id.* at 238 (explaining that the government “expressed uncertainty as to whether contemporary U.K. law . . . fully satisfied the obligations of the Berne Convention and questioned whether moral rights were actually protected in the United Kingdom” (citing Leopold, *supra* note 148, at 685; McCartney, *supra* note 150, at 219)).

153 *See, e.g.,* Dworkin, *supra* note 144, at 238 (describing the recommendations of the Whitford Committee and its conclusion that English law did not sufficiently address moral rights); Leopold, *supra* note 148, at 685–90 (same).

154 Numerous authors have noted that legislators in the U.K. were not excited about the addition of moral rights to copyright law. *See, e.g.,* Bird & Ponte, *supra* note 14, at 239–40.

155 Copyright, Designs, and Patents Act 1988, c.48, §§ 77–89 (Eng.).

156 *Id.* § 86(1).

157 *See, e.g.,* Dworkin, *supra* note 144, at 257 (asserting that the moral rights provisions were “erode[d] significantly” by waiver policies and restrictions on use).

the actor.<sup>158</sup> With the right of integrity, there is no infringement where modifications are made as part of the normal editorial process, or where a news broadcaster makes modifications to remove “anything which offends against good taste or decency or which is likely to encourage or incite crime or lead to disorder or to be offensive to public feeling.”<sup>159</sup>

In contrast with France, moral rights in the U.K. are waivable.<sup>160</sup> The inclusion of this provision caused significant debate during the drafting of the legislation, as many said that it emasculated the moral rights legislation.<sup>161</sup> Indeed, most authors would end up waiving their moral rights through contract, thus defeating the purpose of the reforms.<sup>162</sup> As one commentator has said, “The commercial reality is that there is very little in relation to moral rights which cannot be excluded, varied or limited by contractual provisions.”<sup>163</sup> Further, English courts have interpreted the moral rights provisions of the CDPA narrowly, which further limits the impact of the CDPA’s moral rights sections.<sup>164</sup>

Though the reach of the CDPA’s moral rights provisions is limited, the inclusion of moral rights in copyright law manifests the United Kingdom’s awareness of the broad moral rights protection granted in other nations, as well as its efforts to increase, albeit minimally, the protection its own authors receive.<sup>165</sup> The practice of contracting around moral rights may prevent them from having any real teeth, but unsophisticated or informal parties who operate without contact are able to claim them still.<sup>166</sup>

The CDPA was drafted so as to incorporate the Rome Convention, and thus sets the foundation for protecting certain performers.<sup>167</sup> Under the CDPA, moral rights are only extended to performers for live performances and those performances embodied in sound recordings, not performances in

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158 The Performances (Moral Rights, etc.) Regulations 2006, SI 2006/18, art. 6 (Eng.).

159 Copyright, Designs and Patents Act § 81(6)(c).

160 *Id.* § 87(2) (stating that the document executing the waiver of moral rights must be in writing and signed by the performer).

161 See Dworkin, *supra* note 144, at 256 (noting that the many qualifications and exceptions to the U.K.’s moral rights provisions “were attempts by the United Kingdom’s government to modify, some would say emasculate, moral rights in the light of business realit[ies]”).

162 See *id.* at 257 (stating that the CDPA’s broad waiver provisions “drive a coach and horses through . . . the moral rights provisions”).

163 *Id.*

164 For a detailed analysis of English courts’ treatment of moral rights, see Bird & Ponte, *supra* note 14, at 240–46.

165 See, e.g., Dworkin, *supra* note 144, at 258 (arguing that the CDPA was successful in raising awareness of moral rights matters, in that “[e]ven where authors discover that those with whom they are dealing are seeking to limit or exclude their rights by waiver, that in itself can serve as a valuable reminder in the negotiating process”).

166 *Id.* (citing W.R. Cornish, *Moral Rights Under the 1988 Act*, 12 EUR. INTELL. PROP. REV. 449, 452 (1989)).

167 Liu, *supra* note 101, at 82.

audiovisual recordings.<sup>168</sup> However, the U.K. has signed the Beijing Treaty (explained in the following Section) and will therefore need to modify its exclusion of performances in audiovisual works from moral rights protection.<sup>169</sup> Further, the CDPA does not include a definition of “performer,” so adopting the definition of the Beijing Treaty—which expressly states that a performer includes “those who perform a literary or artistic work that is created or first fixed in the course of a performance”<sup>170</sup>—is feasible. Since the CDPA already recognizes moral rights, as well, modifying its laws to comply with the Beijing Treaty should not be difficult, and will provide performers in the U.K. with protections that they do not have in the United States. Additionally, the U.K. has manifested a related rights approach similar to France, whereby performers are not protected to quite the extent of authors.<sup>171</sup>

Though the United States has tried to avoid recognizing moral rights,<sup>172</sup> the success with which the U.K., the birthplace of the common law system, has implemented them into its intellectual property law undermines the United States’ assertion that natural law theories are incongruent with common law systems.<sup>173</sup> As demonstrated by the U.K.’s approach—recognizing limited rights for actors—including moral rights would not destroy the film industry as such rights would still predominately be dealt with through contract. Still, adopting a similar rights regime would bring the U.S. into harmony with foreign nations and enable it to flourish as a generator of creative content.<sup>174</sup>

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168 The Performances (Moral Rights, etc.) Regulations 2006, SI 2006/18, art. 6 (Eng.); see Liu, *supra* note 101, at 90 (discussing performers’ rights under the CDPA).

169 See Liu, *supra* note 101, for a full explanation as to how the U.K. might modify its laws to better reflect the Beijing Treaty provisions.

170 World Intellectual Prop. Org. [WIPO], *Agreed Statements Concerning the Beijing Treaty on Audiovisual Performances*, WIPO Lex. No. TRT/BEIJING/002 (June 24, 2012), <http://www.wipo.int/wipolex/en/details.jsp?id=13105> [hereinafter *Agreed Statements*]; Liu, *supra* note 101, at 82.

171 See, e.g., Victor, *supra* note 5, at 85 n.34 (“British copyright law provides a term of life of the author plus seventy years for creative works, but when it comes to recordings and performances, provides only a flat term of fifty years from the date of the recording or performance.” (citing Paul Edward Geller, *International Copyright: The Introduction* 1, §§ 3, 4[1](c)(ii), in *INTERNATIONAL COPYRIGHT LAW AND PRACTICE* (Lionel Bently ed., 2015); 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, 305 (2001))).

172 See, e.g., Bird & Ponte, *supra* note 14, at 248–50 (explaining the United States’ historical aversion to moral rights).

173 *Id.* at 267.

174 See, e.g., *id.* at 282 (advocating for the U.S. to “recognize that the further adoption of moral rights for creative works . . . offers an opportunity for the country to once again become a dominant player in the formulation of international intellectual property rights”).

### C. *International Agreements*

As highlighted by the preceding explanations of French and U.K. copyright law, American copyright law offers inadequate protection to authors of creative works, especially performers.<sup>175</sup> Beyond the author-friendly stance evident in France's and the U.K.'s domestic copyright laws, international agreements comprehensively advocate for broader protection than America's domestic legislation reflects.<sup>176</sup> Interestingly, the U.S. is actually a signatory to several of these agreements—most notably the Beijing Treaty and Berne Convention—indicating its awareness of the rights conferred to authors abroad. Whether the U.S. has adequately conformed its domestic law to encompass these international obligations is doubtful.<sup>177</sup> Though a full analysis of that argument is beyond the scope of this Note, an explanation of the minimum requirements mandated by these two treaties will demonstrate the attitude of the international community toward authors' rights and further emphasize the United States' position as an outlier.<sup>178</sup>

The Beijing Treaty on Audiovisual Performances was adopted in 2012 and focuses specifically on intellectual property rights for performers in audiovisual productions, such as motion pictures.<sup>179</sup> The United States became a signatory on June 26, 2012.<sup>180</sup> Though the Treaty has not yet come into force, it explicitly confronts claims like Garcia's and is therefore relevant to evaluating the viability of acting performance copyrights in the future. The Treaty was prompted by, among other things, "the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments" and concern for "the profound impact of the development and con-

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175 *Id.* at 276 (asserting that the United States' refusal to evolve with international standards of copyright law "leaves the United States behind and makes the absence of significant moral rights protection glaring").

176 *Id.* at 282.

177 *See id.* at 216 (noting that the U.S. has not completely fulfilled its obligations under international copyright treaties).

178 *See, e.g.*, Aaron D. White, Note, *The Copyright Tree: Using German Moral Rights as the Roots for Enhanced Authorship Protection in the United States*, 9 LOY. L. & TECH. ANN. 30, 31 (2010) ("[T]he United States is lagging behind the rest of the world in providing strong moral rights protection for authors and is arguably not complying with its international obligations." (citing Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 2 (1997); David Nimmer, *The Moral Imperative Against Academic Plagiarism (Without a Moral Right Against Reverse Passing Off)*, 54 DEPAUL L. REV. 1, 20 (2004))).

179 *See, e.g.*, Liu, *supra* note 101, at 81 (describing the background of the Beijing Treaty as a remedy to the defects in its predecessors, the Rome Convention and WIPO Performances and Phonograms Treaty).

180 WORLD INTELLECTUAL PROP. ORG., *supra* note 129.

vergence of information and communication technologies on the production and use of audiovisual performances.”<sup>181</sup>

The Beijing Treaty secures to performers a plethora of proprietary rights,<sup>182</sup> which overlap significantly with rights granted to authors under the United States’ domestic Copyright Act,<sup>183</sup> and also grants certain moral rights.<sup>184</sup> The Treaty specifically addresses gaps left by the Rome Convention and extends to all performers, which it defines as “actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore.”<sup>185</sup> Further, the Treaty recognizes a right of attribution and right of integrity with respect to an actor’s “live performances or performances fixed in audiovisual fixations.”<sup>186</sup> Notably, these are the same two moral rights that have been adopted by the U.K.<sup>187</sup> The Treaty defines the right of attribution as the right “to claim to be identified as the performer of [one’s] performances, except where omission is dictated by the manner of the use of the performance.”<sup>188</sup> The right of integrity is the right “to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation, taking due account of the nature of audiovisual fixations.”<sup>189</sup> This caveat in the definition of the integrity right was included to make clear that modifications “made to a performance during normal exploitation, such as editing, compression, dubbing or formatting, in existing or new media or formats, in the course of a use authorised by the performer do not constitute” moral rights violations.<sup>190</sup> Additionally, parties to the Treaty agreed that an objective standard will be used in evaluating whether a use is prejudicial to the performer’s reputation, thus eliminating the performer’s ability to quash legitimate and reasonable modifications.<sup>191</sup> This addresses concerns that such rights would curb free expression and intellectual progress.<sup>192</sup>

Though the Treaty is not yet in force, its popularity indicates that claims in acting performances are viewed by many nations as proper recipients of

181 World Intellectual Prop. Org. [WIPO], Beijing Treaty on Audiovisual Performances, preamble, June 24, 2012, WIPO Lex. No. TRT/BEIJING/001, <http://www.wipo.int/wipolex/en/details.jsp?id=12213> [hereinafter Beijing Treaty].

182 *Id.* arts. 6–11 (granting performers the following exclusive rights: right to authorize the broadcast of their unfixed performances, right to authorize the fixation of performances, right of reproduction, right of distribution, right of rental, right to authorize the making available of fixed performances, right of broadcasting and communication to the public).

183 *See e.g.*, 17 U.S.C. § 106 (2012) (also granting exclusive rights of reproduction, distribution, and public display).

184 Beijing Treaty, *supra* note 181, art. 5.

185 *Id.* art. 2(a) (citing *Agreed Statements, supra* note 170).

186 *Id.* art. 5(1).

187 *See supra* notes 156–57 and accompanying text.

188 Beijing Treaty, *supra* note 181, art. 5(1)(i).

189 *Id.* art. 5(1)(ii).

190 Liu, *supra* note 101, at 87 (citing *Agreed Statements, supra* note 170).

191 *Id.*

192 *Id.* at 88.

copyright protection. Interestingly, the U.S. signed this treaty prior to *Garcia*, though the Copyright Office does not acknowledge this in its correspondence with Garcia.<sup>193</sup> As noted earlier, the Office instead asserted that it has never recognized an individual copyright in an actor's performance and does not intend to do so moving forward.<sup>194</sup> The United States has been criticized for joining international agreements without actually integrating them into domestic law.<sup>195</sup> The position of the Copyright Office, as manifested in its correspondence with Garcia, indicates that this trend may continue in relation to the Beijing Treaty.

The Berne Convention for the Protection of Literary and Artistic Works is a treaty administered by the World Intellectual Property Organization (WIPO) that governs international copyright law.<sup>196</sup> Relevant for purposes of this Note, the United States, France, and the United Kingdom are all State Parties, though the United States did not join the Convention (first established in 1886) until 1988.<sup>197</sup> Under Berne, each member state is obliged to recognize the concept of author centrality, as under Article 2, paragraph 6, which states international copyright protection is to "operate for the benefit of the author and his successors in title."<sup>198</sup>

Berne was first altered to provide moral rights protection in 1928<sup>199</sup> through Article 6bis.<sup>200</sup> Its provisions have expanded since then.<sup>201</sup> The United States' opposition to moral rights is one of the primary reasons it was so late in joining the Convention.<sup>202</sup> Commentators have noted several potential reasons for this stance. First, in its early history, the United States was not a large exporter of intellectual property and therefore did not have

193 See *Copyright Office Letter*, *supra* note 73.

194 See *supra* notes 73–76 and accompanying text.

195 See, e.g., Bird & Ponte, *supra* note 14, at 251 (noting the United States' practice of joining international agreements to reap their economic benefits without significantly impacting domestic law).

196 Berne Convention for the Protection of Literary and Artistic Works, *opened for signature* Sept. 9, 1886, S. TREATY DOC. NO. 99-27 (1986), 1161 U.N.T.S. 31 [hereinafter *Berne Convention*].

197 *WIPO-Administered Treaties: Contracting Parties, Berne Convention, United States of America*, WORLD INTELLECTUAL PROP. ORG., [http://www.wipo.int/treaties/en/remarks.jsp?cnty\\_id=1045C](http://www.wipo.int/treaties/en/remarks.jsp?cnty_id=1045C) (last visited Feb. 20, 2016).

198 *Berne Convention*, *supra* note 196, art. 2(6).

199 Bird, *supra* note 18, at 413.

200 *Berne Convention*, *supra* note 196, art. 6bis(1) ("Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.").

201 For example, in 1967, Article 6bis was expanded to protect certain moral rights after the author's death. Bird & Ponte, *supra* note 14, at 238 (citing McCartney, *supra* note 150, at 219).

202 *Id.* at 248 (citing Antezana, *supra* note 14, at 420; Holland, *supra* note 19, at 228, 230).



the need to join the Berne Convention.<sup>203</sup> Second, commentators have suggested that the United States' aversion to moral rights came from a concern that adopting such provisions "would negatively impact economic interests" and cause a "chilling effect on investment in creative works" that would "decrease investment in the arts and entertainment industries, leading to fewer creative works in the public forum."<sup>204</sup> Recognizing moral rights would equip authors with an "aesthetic veto" with which they would be able to control usage of their works; the result would hamper free expression.<sup>205</sup> Others still suggest that United States copyright law is generated in reality by lobbyists from the media and entertainment industries, eager to maximize their economic benefits at the expense of disadvantaged authors.<sup>206</sup>

Regardless of its reasons for rejecting moral rights, as a Berne party, the United States is obligated to recognize them to a certain extent. Berne was adopted into American domestic law through the Berne Convention Implementation Act (BCIA).<sup>207</sup> Despite the broad moral rights expressed in Berne, "[t]he BCIA explicitly waived off the rights of attribution and integrity and prevented artists from bringing legal actions in the U.S. to defend their moral rights under the provisions of the Convention."<sup>208</sup> Indeed, Congress proclaimed that it would take a "minimalist approach" to Berne compliance,<sup>209</sup> stating that existing federal and state law already provided authors with rights equivalent to the moral rights recognized in the Convention and it therefore did not need to enact new legislation—"a rather disingenuous claim considering the United States's rejection of the Convention for over a

203 *Id.*; see also Bird, *supra* note 18, at 418 (describing the U.S.'s early cultural identity as focused on "industry and commercialism" rather than art (citing Rikki Sapolich, Note, *When Less Isn't More: Illustrating the Appeal of a Moral Rights Model of Copyright Through a Study of Minimalist Art*, 47 IDEA 453, 455–56 (2007))).

204 Bird & Ponte, *supra* note 14, at 248 (citing Carl H. Settlemeyer III, *Between Thought and Possession: Artists' "Moral Rights" and Public Access to Creative Works*, 81 GEO. L.J. 2291, 2309–10 (1993)); see generally David Lange, Symposium Remarks, *From Berne to Beijing: A Critical Perspective*, 16 VAND. J. ENT. & TECH. L. 1, 1 (2013) (expressing concern that expansion of IP rights threatens fundamental American values, including First Amendment protections).

205 Bird & Ponte, *supra* note 14, at 249 (citing Settlemeyer, *supra* note 204, at 2309–10).

206 See, e.g., *id.* (citing Sherman, *supra* note 14, at 398, 400–01).

207 Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified at 17 U.S.C. § 101 (2012)).

208 Bird & Ponte, *supra* note 14, at 251 (citing §§ 3(b)(1)–(2)); see also *id.* (suggesting that the U.S. joined Berne to benefit economically from international agreement "while sidestepping its obligations to defend moral rights" (citing Antezana, *supra* note 14, at 426–27, Holland, *supra* note 19, at 231; Settlemeyer, *supra* note 204, at 2306; Sherman, *supra* note 14, at 405–06)). The BCIA specifically, does not "expand or reduce any right of an author of a work" to "claim authorship of the work" or "to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation." *Id.* at 251 n.299 (quoting §§ 3(b)(1)–(2)).

209 H.R. REP. NO. 100-609 (1988).

century could be traced back precisely to the need to change U.S. laws.”<sup>210</sup> In response to Congress’s inaction, several states enacted their own moral rights legislation, mirroring some of the rights granted to authors in Europe.<sup>211</sup> However, these statutes lacked nationwide uniformity, and their effects were thwarted by jurisdictional limitations, thus providing no remedy with respect to inter-state and online issues.<sup>212</sup> Further, many of the statutes were preempted when Congress passed the Visual Artists Rights Act (VARA) in 1990, which gave authors of a limited category of artworks certain moral rights.<sup>213</sup> VARA has been criticized as Congress’s empty attempt to feign compliance with Berne, due to its limited scope and restrictive approach to moral rights.<sup>214</sup>

In sum, despite the United States’ participation in these prominent international copyright agreements, Congress has taken hardly any action to expand the rights of authors. As such, the United States is in conflict with many of its European counterparts, leaving American authors vulnerable as the globalization of intellectual property charges forward.<sup>215</sup> As demonstrated, the United States has taken a firm stance opposing moral rights. Despite obligations to the contrary under the Berne Convention, the United States has shown little intention of softening its position. These inconsistencies in rights recognized could create problems for American authors, considering the globalization of many industries that deal heavily with intellectual property—such as technology, music, and film industries. As the next Part will illustrate, however, adapting domestic law to provide rights for performers is feasible under the current Copyright Act, and would better align the United States with its foreign counterparts, for the benefits of its authors and its consuming public.

### III. COPYRIGHT LAW IN AMERICA

#### A. *Basic Requirements for Eligibility*

Congress is charged with the creation of intellectual property laws in the United States Constitution, which states that the fundamental purpose of the copyright system is to “promote the Progress.”<sup>216</sup> The 1976 Copyright Act,<sup>217</sup> which currently governs copyright law in the United States, grants a limited

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210 Bird & Ponte, *supra* note 14, at 252; *see also* Bird, *supra* note 18, at 418–20 (describing Congress’s refusal to legislate for moral rights following its adoption of Berne).

211 *See, e.g.*, Bird & Ponte, *supra* note 14, at 254. For a complete list of these statutes, *see id.* at 254 n.310.

212 *Id.* at 255–56.

213 17 U.S.C. § 106A (2012) (conferring moral rights of integrity and attribution onto authors of works of visual art).

214 *See, e.g.*, Rebecca Stuart, Note, *A Work of Heart: A Proposal for a Revision of the Visual Artists Rights Act of 1990 to Bring the United States Closer to International Standards*, 47 SANTA CLARA L. REV. 645, 647 (2007) (criticizing VARA as ineffective and insufficient in light of international moral rights laws).

215 *See, e.g.*, Bird & Ponte, *supra* note 14, at 282.

216 U.S. CONST. art. 1, § 8, cl. 8.

statutory monopoly to authors as a means of incentivizing artistic production and dissemination in furtherance of the objectives of the Constitution.<sup>218</sup>

Eligibility for copyright is understood to be a low threshold,<sup>219</sup> as evident by the language of the act, which sets only four requirements—three positive and one negative—to receive copyright protection: “Copyright protection subsists . . . in *original* works of *authorship fixed* in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>220</sup> Further, “[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.”<sup>221</sup> Therefore, copyright protection automatically is granted to an author where there is originality, a work of authorship, and fixation in a tangible medium of expression, and the matter is not a system, method, or idea.<sup>222</sup> The Act sets a slightly higher bar for compilations<sup>223</sup> and derivative works<sup>224</sup> seeking protection. For such works, the Act requires that a secondary user—the user utilizing the preexisting material in her new work—make some contribution to the preexisting work.<sup>225</sup> Further, the preexisting material must have been lawfully obtained.<sup>226</sup>

To satisfy the originality requirement, a work needs to be the independent creation of the author and contain a “minimal degree of creativity.”<sup>227</sup>

217 Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. § 101).

218 See, e.g., *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[The limited grant of copyright protection] is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”); *Luck’s Music Library, Inc. v. Gonzales*, 407 F.3d 1262, 1263 (D.C. Cir. 2005) (“The [Intellectual Property] Clause authorizes the granting of a temporary monopoly over created works, in order to motivate authors and inventors while assuring the public free access at the end of the monopoly.” (citing *Sony*, 464 U.S. at 429)).

219 See, e.g., *Ets-Hokin v. Sky Spirits, Inc.*, 225 F.3d 1068, 1076 (9th Cir. 2000) (describing the threshold for copyright protection as minimal).

220 17 U.S.C. § 102(a) (emphasis added).

221 *Id.* § 102(b).

222 See *id.* § 201(a) (stating that copyright vests in the author(s) of the work).

223 “A ‘compilation’ is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” *Id.* § 101.

224 “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.” *Id.*

225 *Id.* § 103(b).

226 *Id.* § 103(a).

227 *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (citing *NIMMER & NIMMER*, *supra* note 89, §§ 2.01[A]–[B]).

As the Supreme Court has articulated, “the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”<sup>228</sup> Courts are not to consider artistic merit when analyzing originality, as their role is not to weigh in on the value of an artist’s creations, but merely to determine whether the author has made creations at all.<sup>229</sup>

To receive protection, a work must also be a work of authorship.<sup>230</sup> Despite the extensive set of definitions provided in Section 101 of the Act, “authorship” is not defined. The absence of this definition indicates Congress’s intent to leave the term flexible.<sup>231</sup> The Supreme Court has deemed an author, “he to whom anything owes its origin.”<sup>232</sup> Authorship had been defined in several different ways by the different circuits. Most pertinent to the *Garcia* case, the Ninth Circuit has held that to be an author, one must superintend or be the “master mind” of the work.<sup>233</sup> Using similar terminology, other courts also assert that an author must have some element of control over the work.<sup>234</sup>

Though “work” is not defined, the Act lists appropriate subject matter of copyright in Section 102, though this list is illustrative, not limiting.<sup>235</sup> Relevant to this Note, the 102 subject matter section includes dramatic works, pantomimes, and choreographic works, *in addition to* motion pictures, demonstrating that Congress contemplated that each of these could exist distinct from one other and yield individual copyrights.<sup>236</sup>

A work also must be fixed “by or under the authority of the author” in order to be eligible for protection.<sup>237</sup> The definitions section of the Act explains that a work is fixed when it “is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a

228 *Id.* (quoting NIMMER & NIMMER, *supra* note 89).

229 *See supra* note 68 and accompanying text (addressing the *Bleistein* standard).

230 17 U.S.C. § 102(a).

231 *See, e.g., Kawabata, supra* note 40, at 4 (explaining that the purpose of this flexible language is “to avoid exhausting the constitutional power of Congress to legislate in this field” (quoting H.R. REP. NO. 94-1476, at 51 (1976))).

232 *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 58 (1884).

233 *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232–36 (9th Cir. 2000).

234 *See, e.g., Lindsay v. Wrecked & Abandoned Vessel R.M.S. Titanic*, No. 97 Civ. 9248(HB), 1999 WL 816163, at \*5 (S.D.N.Y. Oct. 13, 1999) (holding that a film producer was the author of documentary footage because even though he did not physically shoot the copyrighted scenes, he had control over the project’s operation and the final product duplicated his visions).

235 17 U.S.C. § 102(a) (“Works of authorship *include* the following categories.” (emphasis added)).

236 *Id.* §§ 102(a)(3)–(4), (6).

237 *Id.* § 101.

period of more than transitory duration.”<sup>238</sup> Courts have concluded that fixed for copyright purposes does not mean permanent.<sup>239</sup>

### B. Performance-based Categories of Works Recognized by the Act

As mentioned, the Copyright Act provides a list of eight categories of works eligible for copyright protection to serve as a guideline.<sup>240</sup> Though “acting performance” is not included, the presence of several performance-related categories in the list implies that the works rooted in performance are not excluded per se. Most analogous to an actor’s performance are pantomime and choreographic works,<sup>241</sup> which, like an actor’s performance, derive their expressive merit from their performance.<sup>242</sup> Directions of a set of steps of dance or expressive movements for a pantomime are of far less value than the performance of those steps as *The Nutcracker*, for example, as demonstrated by the lack of a public market for the blueprints of these works. Similarly, acting performances, if described in text, would likely be quite boring, confusing, and of little use to the public, yet the same performances might be captivating when viewed on screen. In an early case, the Second Circuit equated elements of an acting performance to pantomime, stating “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.”<sup>243</sup>

The fact that pantomime and choreography, which are often encompassed within dramatic works and motion pictures, are explicitly granted their own protection as distinct works shows that the language of the Act itself is receptive to the protection of physical expression—of course, that also is fixed—distinct from any underlying instructions, scripts, or screenplays. Given the close analogy between acting performances and pantomime and choreographic works, if recognized as a valid recipient of protection, acting performances could be subjected to a heightened originality require-

<sup>238</sup> *Id.*

<sup>239</sup> See, e.g., *Williams Elecs., Inc. v. Arctic Int’l, Inc.*, 685 F.2d 870, 873–74 (3d Cir. 1982) (finding audiovisual effects in computer game sufficiently fixed because although images were constantly changing, they were sufficiently repetitive and predictable).

<sup>240</sup> See 17 U.S.C. §§ 102(a)(1)–(8).

<sup>241</sup> Neither pantomime nor choreography is defined in the Act. See *id.* § 101. The U.S. Copyright Office Compendium, however, defines pantomime as “[t]he art of imitating, presenting, or acting out situations, characters, or events through the use of physical gestures and bodily movements,” and choreography as “the composition and arrangement of a related series of dance movements and patterns organized into a coherent whole.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, glossary, at 3, 13 (3d ed. 2014), <http://copyright.gov/comp3/docs/compendium.pdf>.

<sup>242</sup> See, e.g., *Dougherty*, *supra* note 171, at 303 (“[A]cting involves movement, posture, and gesture, which are analogous to copyrightable pantomime or choreography.”).

<sup>243</sup> *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 55 (2d Cir. 1936); see also *Tiffany Prods., Inc. v. Dewing*, 50 F.2d 911, 914 (D. Md. 1931) (“Action can tell a story, display all the most vivid relations between men, and depict every kind of human emotion, without the aid of a word.”).

ment.<sup>244</sup> Though pantomime and choreography are not frequently litigated, the legislative history of these categories indicates that the originality requirement for these works is higher than the minimal standard mandated by *Feist*.<sup>245</sup> This should quiet some concerns regarding the impact of recognizing rights in acting performances, as the originality requirement would ensure that “extras” and ancillary actors could not exploit the system. The originality requirement would function like the French distinction between primary and ancillary performers,<sup>246</sup> ensuring that only substantive contributors could reach the threshold for protection.

Additionally, a limited copyright interest for acting performances could be modeled after the existing sound recording copyright. Sound recordings are defined in the Copyright Act as “works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects . . . in which they are embodied.”<sup>247</sup> Sound recordings receive protection distinct from musical compositions, and a copyright in a sound recording does not extend to the underlying song itself.<sup>248</sup> Accordingly, when, for example, a song is fixed on a cassette tape, two copyrights exist: one in the musical composition and one in the sound recording. The sound recording copyright is not infringed by indistinguishable imitations of that recording; only use or reproduction of the literal fixation itself will infringe. In a way, the sound recording is somewhat like a derivative work of the musical composition, in that it utilizes the copyrighted musical composition, but creates a new, separately copyrightable work in the recording. Owners of sound recording copyrights do not receive the full set of exclusive rights provided for most works under Section 106,<sup>249</sup> but instead receive a more limited set of rights.<sup>250</sup> Further, these rights are subject to a number of limitations, such as an exception for public radio broadcasts.<sup>251</sup> The definition of sound recordings in the Act explicitly removes sounds accompanying audiovisual works from protection, so acting performances cannot receive protection under this provision as it currently exists. However, in crafting a remedy to the problem of acting performance rights, the sound recording copyright could serve as a useful model. It also serves as evidence that the United States is capable of accommodating quasi-copyright

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244 See Kawabata, *supra* note 40, at 15–16 (explaining the originality requirements for pantomime and choreography).

245 See *id.* at 16 (noting that earlier Copyright Acts required that choreography be “sufficiently ‘dramatic’” and pantomime include a “‘significant amount’ of copyrightable matter” in order to be protectable (citing U.S. COPYRIGHT OFFICE, COMPENDIUM II: COMPENDIUM OF COPYRIGHT OFFICE PRACTICES, § 461 (1984); NIMMER & NIMMER, *supra* note 89, § 2.07[B])).

246 See *supra* notes 134–35 and accompanying text.

247 17 U.S.C. § 101 (2012).

248 *Id.* § 114.

249 *Id.* § 106.

250 See *id.* § 114(b) (sound recordings not given general public performance right).

251 See *id.* § 114(d).

interests like those granted to performers in foreign countries, and establishing a similar right for American performers would not be infeasible under existing copyright law.

### C. Eligibility for Acting Performances

As reasoned by Judge Kozinski during the *Garcia* litigation, an actor's performance, like *Garcia's*, would be categorized as a derivative work under the Act.<sup>252</sup> The performance derives from the film's script, and must be largely based on that script—which includes the creation of the individual character's personality and limits his reactions and relations to other characters—in order to be a successful performance. Because they are derivative works, acting performances could be subject to a more rigorous scrutiny when determining eligibility for copyright.<sup>253</sup> In addition to requiring fixation, originality, and an original work of authorship, the Act also requires that derivative works not be based on unlawfully taken material,<sup>254</sup> and some courts require that they contain more than a trivial contribution to receive protection distinct from the underlying work.<sup>255</sup> As such, acting performances, as derivative works, would have to make more than a trivial variation to the underlying screenplay or film to be considered for eligibility.

Many actors undeniably input their own creativity into their performances to satisfy the low standard of “minimal spark” to satisfy the originality requirement. Otherwise, as Judge Kozinski stated in his original *Garcia* opinion, anyone who can read would be an actor.<sup>256</sup> However, copyright law imposes several additional limitations on works, especially pertinent in the acting context, which could serve as additional hurdles to obtaining protection. First, ideas are not protectable, even if those ideas are original to the author (as in, the author thought of them on his own).<sup>257</sup> Basic actions and emotions that actors might utilize—such as crying, or raising one's voice—are merely ideas and thus incapable of ever gaining protection.<sup>258</sup> Second,

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252 *Garcia Amended Opinion*, 766 F.3d 929, 935 (9th Cir. 2014), *rev'd en banc*, 786 F.3d 733 (9th Cir. 2015).

253 See, e.g., *Entm't Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1219–20 (9th Cir. 1997) (explaining that originality analysis for derivative works requires a two-part test to ensure that protection is not given to the underlying works, only the subsequent contributions).

254 17 U.S.C. § 103(a).

255 See *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976) (explaining that authors must add more than a trivial contribution to receive protection). *But see* *Schrock v. Learning Curve Int'l, Inc.*, 586 F.3d 513, 521 (7th Cir. 2009) (stating that “nothing in the Copyright Act suggests that derivative works are subject to a more exacting originality requirement than other works of authorship”).

256 *Garcia Amended Opinion*, 766 F.3d at 934.

257 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea . . .”).

258 See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122–23 (2d Cir. 1930) (qualities of anger, anxiousness, love, despondency, and disgust assigned to characters in plaintiff's screenplay are ideas and not copyrightable).

common scenes utilized frequently in expressive works, called “*scènes à faire*,” are unprotectable.<sup>259</sup> The *scènes à faire* doctrine bars protection for elements of a work that are pre-ordained by the topic, such as the inclusion of a stock character,<sup>260</sup> as well as common phrases or events that audiences expect from a given theme or subject.<sup>261</sup>

These limiting doctrines could create problems for actors in satisfying the originality requirement. Assuming that the actor did not contribute to the underlying screenplay, the quantity of material in which he could assert a copyright interest could be severely limited.<sup>262</sup> Of course, a combination of unprotectable elements could rise to the level of protectable interest,<sup>263</sup> an actor who does not have a significant role in the work, and additionally relied upon a director’s instruction (and thus cannot claim to be the originator of the content), may simply not have enough elements to combine in order to establish that interest.

In addition to these problems establishing the requisite level of originality for derivative work protection, actors may find difficulty satisfying the authorship requirement. As stated above, courts agree that an author must have some control over the work.<sup>264</sup> Not every individual who makes valuable contributions to a work may claim authorship.<sup>265</sup> Many actors, particularly those with minor roles, will have difficulty demonstrating that they had sufficient control over their performance to satisfy the authorship standard. The presence of a director or acting coach would make establishing authorship even harder. Furthermore, the actor’s creative choices are strictly lim-

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259 See, e.g., *Cavalier v. Random House, Inc.*, 297 F.3d 815, 824 (9th Cir. 2002) (comparing children’s books for infringement and stating that the “general premise of a child, invited by a moon-type character, who takes a journey through the night sky and returns safely to bed to fall asleep” is a basic plot idea and is not copyrightable); *Kawabata*, *supra* note 40, at 8 (“*Scènes-à-faire* poses a particularly acute threat to short performances . . . 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.”).

260 See, e.g., *Gaiman v. McFarlane*, 360 F.3d 644, 659–60 (7th Cir. 2004) (stating that stock characters such as a “drunken old bum” are unprotectable *scènes à faire* (citing *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986))); *Nichols*, 45 F.2d at 122 (finding characters of “low comedy Jew and Irishman” in Plaintiff’s play are dramatic prototypes that were not original to the Plaintiff and thus not protectable).

261 See, e.g., *Cavalier*, 297 F.3d at 824 (noting that setting of a starry sky in children’s books “naturally and necessarily flows from the basic plot premise of a child’s journey through the night sky” and constitutes unprotectable *scènes à faire*).

262 See *Kawabata*, *supra* note 40, at 8 (noting that performances would usually be derivative of films).

263 See, e.g., *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344–51 (1991) (explaining that combinations of unprotectable facts can become protectable compilations, but the compiler only has a copyright claim in the selection and arrangement of the unprotectable elements, not the underlying elements themselves).

264 See *supra* notes 230–34 and accompanying text.

265 *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232 (9th Cir. 2000) (holding that “authorship is not the same thing as making a valuable and copyrightable contribution” to a work).



ited to actions that would be true to his or her character in the film, which most likely was dictated by a third party's screenplay, not the actor's own creativity. Because of these restrictions, many actors would likely fall short of authorship and thus not be able to claim an independent copyright in their performances, even if they were to satisfy the other statutory requirements. This would be fatal to the actor's claim of rights, as U.S. copyright law does not distinguish between authors, who receive full rights, and performers, who receive limited related rights, as other jurisdictions do.

In sum, United States copyright law as it currently stands is capable of recognizing actors' rights in the same limited manner in which it recognizes copyright in pantomimes and choreographic works. As Judge Kozinski asserted in *Garcia*, so long as an actor is able to satisfy the originality, fixation, and authorship requirements, he should be able to claim a copyright interest in his performance.<sup>266</sup> In contrast to the *Garcia* majority's concern that recognizing such rights will lead to "copyright of thousands,"<sup>267</sup> there are sufficient limiting doctrines already in place that would prevent these fears from materializing. Performances would be restricted by *scènes à faire* and merger doctrines, and would be subject to the higher originality requirement of derivative works, thus ensuring that every individual who simply contributed to a motion picture could not obtain a copyright simply by the nature of his or her job.

#### CONCLUSION

Amending the United States Copyright Act to explicitly provide for actors' rights, granting all authors moral rights, and imposing broad waiver provisions such as those in the U.K. would improve the standing of American actors and filmmakers in the international arena, as it would enhance predictability and reliability, thus reducing transaction costs of producing films, and increasing uniformity with international players. As advances in technology continue to saturate the film industry, it is increasingly important that the United States modernize its legislation in a way that will ensure the constitutional objective of promoting progress comes to fruition. As the law currently exists, actors do not have an intellectual property remedy for the unauthorized exploitation of their performances. The breadth of this gap in the law is evident from *Garcia*. Even though, based on the limiting doctrines of copyright, it is unlikely that *Garcia* ultimately would prevail in establishing copyright infringement for the reproduction of her performance in *Innocence of Muslims*, the ease with which audiovisual performances can be replicated and distorted suggests that claims similar to *Garcia*'s will arise in the future. In order to incentivize performers to disseminate their expressive creations to the public, American copyright law needs to ensure that they will be adequately protected when those creations are misused. Reforming the Copy-

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266 *Garcia Amended Opinion*, 766 F.3d 929, 934 (9th Cir. 2014), *rev'd en banc*, 786 F.3d 733 (9th Cir. 2015).

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

right Act to recognize limited rights for actors and general moral rights for authors will best protect the interests of actors, authors, filmmakers, and the viewing public.