Co-Authorship Between Photographers and Portrait Subjects

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ABSTRACT

Copyright law provides that when two or more authors create a single work with the intent of merging their contributions into inseparable or interdependent parts of a unitary whole, the authors are considered joint authors. For photographic works, judicial precedent establishes that the creative contributions necessary to support a copyright claim include the author's choices concerning elements such as lighting, pose, garments, background, facial expression, and angle. In many visual works, however, those creative elements are determined not solely by a photographer, but also by the subject, who can sulk or smile, stand with good posture or stoop, and be situated in full light or obfuscated by shadow, among many other options. A subject's rights in photographs have not been fully explored. The Supreme Court avoided deciding the issue more than a century ago. Today, paparazzi and celebrities make high-stakes legal assertions about copyright infringement and fair use through litigation.

Certain portrait photographs of an individual person may be works of joint authorship, the co-authors being the photographer and the subject. While it is established across the globe that photographs merit copyright protection, and that the rights in a photograph generally vest in the photographer, it is a mistake to allow the authorial inquiry into every photograph to end there. Copyright law is accustomed to doing the hard work of specific factual analysis; its fair use doctrine requires such scrutiny, and an apportionment of joint authorship should be no different. The construction of joint authorship is legally flexible, at least in the manner that it is codified. This Article proposes making better use

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of a framework that already exists in US copyright law. No legislative change is necessary, but courts' current interpretation of joint authorship requires recalibration to permit more flexibility. Such a stance will more accurately reflect how creative people work together and will bestow rights more fairly and on creative parties, which will sometimes include photographic subjects.

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I. INTRODUCTION: COPYRIGHT AND PHOTOGRAPHY

> For me, every photograph is a portrait. . . . You're photographing a relationship with the person you're shooting; there's an exchange, and that's what that picture is. – Peter Lindbergh[1]

Broadly speaking, copyright law bestows exclusive rights on an author of a copyrightable work.[2] In the case of photography, the

1. Lizzy Wilkinson, *Peter Lindbergh: The Era of the Supermodel Will Never Return*, THE TELEGRAPH (Sept. 12, 2013), http://fashion.telegraph.co.uk/news-features/TMG10300086/Peter-Lindbergh-The-era-of-the-Supermodel-will-never-return.html [https://perma.cc/B6UA-LDGV].

2. 17 U.S.C. § 106 ("Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and authorize any of the following . . . .").

photographer is generally considered the author, and the work is the photograph.[3] This is true whether the photographer makes his living taking photographs or if he captures casual photographs of his family on his iPhone.[4] A photograph is copyrightable whether it is a masterpiece of composition, lighting, and execution, or whether a mere modicum of creativity is demonstrated.[5]

In certain cases, however, an author may not be identifiable, or a photograph may not demonstrate the quantum of creativity required to merit copyright protection. The issue of whether the photograph is considered a pictorial work[6] or a work of visual art[7] further muddies the copyright analysis of a photograph—this determination may matter for purposes of applying the extra authorial protections available in the Visual Artists Rights Act (VARA).[8] Questions relating to the appropriate relationship between copyright and photography are endlessly fascinating and have been treated in a range of academic works.[9] Indeed, the highest courts in the United States have struggled to define the measure of creativity necessary for a given work to merit copyright protection.[10] The aim of this particular paper is to parse two slightly different questions that have received less academic treatment,

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3. *What Photographers Should Know about Copyright*, U.S. COPYRIGHT OFF., https://www.copyright.gov/engage/photographers/#:~:text=Generally%2C%20the%20author%20and%20initial,or%20%E2%80%9Ctakes%E2%80%9D%20the%20photo [https://perma.cc/BQN2-Q9HB] (last visited Oct. 22, 2022).

4. *See* Otto v. Hearst Commc'ns, Inc., 345 F. Supp. 3d 412, 432 (S.D.N.Y. 2018) (holding that a photographer's amateur status does not preclude him from engaging in sales of his work).

5. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991) (establishing the "modicum of creativity" test for copyrightability).

6. 17 U.S.C. § 101 ("Definitions. 'Pictorial, graphic, and sculptural works' include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. . . .").

7. *Id.* ("Definitions. A 'work of visual art' is—(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.").

8. 17 U.S.C. § 106A.

9. *See, e.g.*, Jessica Silbey, Eva E. Subotnik & Peter DiCola, *Existential Copyright and Professional Photography*, 95 NOTRE DAME L. REV. 263 (2019); Justin Hughes, *The Photographer's Copyright—Photograph as Art, Photograph as Database*, 25 HARV. J.L. & TECH. 339 (2012); Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385 (2004).

10. *See, e.g.*, Howard B. Abrams, *Originality and Creativity in Copyright Law*, 55 LAW & CONTEMP. PROBS. 3, 3–44 (1992); Katherine L. McDaniel & James Juo, *A Quantum of Originality in Copyright*, 8 CHI.-KENT J. INTELL. PROP. 169 (2009).

but are now receiving real-world attention: When a photograph of a person surpasses the low but obligatory originality threshold, is the originality therein always due only to the photographer? Could a subject be a co-author or a co-owner of that work? Depending on the facts and circumstances involved, the answers to these questions could diverge from the general rule that photographers are the sole authors of their photographs.

The invention of photography in the 1820s introduced a quandary that copyright law continues to grapple with today: whether a photograph is a mere reflection of facts in the world or whether the photograph reflects the creative contributions of the photographer, necessitating legal protection therefor. Court decisions across the globe demonstrate inconsistent application of their own domestic laws, and to the extent there is any international harmonization on the copyrightability of photography, interpretation of this harmony tends to be overly simplistic.[11] Illustrating the inconsistency are two recent cases in Italy and France. In 2019, an Italian court denied copyright protection to a casual photograph of two well-known Italian judges because the court determined that the photograph lacked creativity or beauty, thereby adding an extralegal element of aesthetic subjectivity into the legal analysis.[12] In 2017, a French appeals court overturned a trial court decision that had found a professional portrait photograph of Jimi Hendrix lacked originality, while other jurisdictions—and France as well, following the appeal of this case—find it virtually incontestable that a professional photographer contributes adequate creativity to his photographs to merit copyright protection.[13]

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11. For example, WIPO Copyright Treaty (WCT) Article 9 overrides Berne Convention Article 7(4), nullifying countries' ability to protect photographic works for shorter periods of time than other copyrightable works so, in theory, all WCT Members should apply copyright protection to photographic works on the same terms as they protect other copyrightable works. *Compare* WCT art. 9, Dec. 20, 1996, 2186 U.N.T.S. 121 ("In respect of photographic works, the Contracting Parties shall not apply the provisions of Article 7(4) of the Berne Convention."), *with* Berne Convention, article 7(4), S. Treaty Doc. No. 99-27 (1986) [The 1979 amended version does not appear in U.N.T.S. or I.L.M] ("It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work.").

12. *See* Rome Court of First Instance, 17th Civil Section, Sep. 12, 2019, No. 14758; *see also* Italy's Law for the Protection of Copyright and Neighbouring Rights, Legge [Law] 633 of April 22, 1941 (as last amended by Legislative Decree No. 68, April 9, 2003).

13. Professional photographer Gered Mankowitz took portrait photographs of musician Jimi Hendrix in 1967. In 2013, Mankowitz saw that a French company selling electronic cigarettes reproduced the photograph and used it for its advertisements, replacing Jimi Hendrix's original cigarette with one of its e-cigarettes. The assignee of Mankovitz's rights had not been

With respect to paparazzi photographs in particular, litigated examples are fewer. In 2007, for example, a Paris Court of Appeal held that a photograph of Prince William and then-girlfriend Kate Middleton in the French Alps was not sufficiently original to merit copyright protection.[14] Later French courts have continued this trend, denying such protection to paparazzi because, in their view, a paparazzo does not express her own originality in taking such a picture.[15] This remains the case[16] despite other European countries broadening and somewhat harmonizing their treatment of copyright in photographs in the wake of Court of Justice of European Union (CJEU) jurisprudence, describing the baseline for originality of photographs as the same baseline as exists for other forms of creative media.[17]

These examples highlight that the recent history of copyright protection for photographs is uneven at best, both in international

asked for permission or a license. The photographer and assignee sued the advertiser for copyright infringement and violation of moral rights. In the brief filed before the French Court, the plaintiffs explained the originality of this obviously original work, by laying out the author's choices. The lower court decided that originality did not exist, but the appellate court found that it did by pointing to the photograph's coloring, the type of camera used, the type of film used, the angle and framing as manifested in the photograph, and the fact that the photographer had a long and well-known career as a professional portrait photographer. *Compare* Tribunaux de grande instance [TGI] Paris, 3ème chambre 1ère section, jugement rendu le 21 Mai 2015, *with* Cour d'appel [CA] Paris, arrêt du 13 juin 2017, no. 15/10847.

14. Cour d'Appel [CA] [regional court of appeal] Paris, 4ème Chambre, Dec. 5, 2007, 06/15937.

15. *See, e.g.,* Cour d'Appel [CA] [regional court of appeal] Paris, 4ème Chambre, Feb. 20, 2008, 06/22330. In this case, only some of the photographer's pictures were considered original and it was those for which he directed actress Brigitte Bardot to pose in a certain manner. *Id.* The other photographs, where she was acting in conformance with the role she was playing without the photographer's input, were deemed unoriginal for purposes of copyright protection because the photographer had no traceable input into whatever creative aspects of the photograph could be found. *Id.*

16. *See* PIERRE-YVES GAUTIER, PROPRIETE LITTERAIRE ET ARTISTIQUE §§ 115–118 (11th ed. 2019).

17. *See* Case C-145/10, Eva-Maria Painer v Standard VerlagsGmbH and Others, ECLI:EU:C:2011:239 (Apr. 12, 2011) ("Accordingly, the requirements governing copyright protection of a photo under Article 6 of Directive 93/98 and of Directive 2006/116 are not excessively high. If this criterion is applied, a portrait photo may be protected by copyright under Article 6 of Directive 93/98 and of Directive 2006/116 where the work was produced by the photographer as a result of a commission. Even though the essential object of such a photo is already established in the person of the figure portrayed, a photographer still enjoys sufficient formative freedom. The photographer can determine, among other things, the angle, the position and the facial expression of the person portrayed, the background, the sharpness, and the light/lighting. To put it vividly, the crucial factor is that a photographer 'leaves his mark' on a photo.").

comparative law and within countries individually.[18] Some of that inconsistency stems from a foundational riddle about the act of photography—is it a straightforward act of capturing visual facts with the assistance of a camera (which would argue against a finding of copyright protection for want of creativity), or is it a creative act of capturing at least some combination of reality and artistry?[19]

Photographs may be registered with the US Copyright Office as visual works,[20] but registration does not create the right. Copyright in

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18. In his 2004 WIPO publication summarizing the WIPO-administered copyright treaties, Mihály Ficsor included a useful footnote outlining the treatment of photography throughout the Berne Convention's updates and until the WIPO Copyright Treaty's removal of any special treatment for photography, showing where the medium of expression became less important than the manner in which it was expressed:

> National treatment was granted to photographs (except for the term of protection where material reciprocity was applicable) irrespective of whether they were placed on the same footing as artistic works, or were rather protected by a special law. . . . At the 1908 Berlin Revision Conference, it was agreed that all countries of the Union should protect photographs. In the Berlin act, . . . the law of each country was relevant. It was also allowed to national laws to determine freely the nature and duration of such protection. . . . At the 1948 Brussels Revision Conference, the term 'photographic works and works produced by a process analogous to photography' were inserted in the non-exhaustive list of literary and artistic works in Article 2(1) of the Convention. The 1967 Stockholm Revision Conference. . . replaced the expression 'photographic works and works produced by a process analogous to photography' by the expression 'photographic works to which are assimilated works expressed by a process analogous to photography.' By this modification, *it was emphasized that the manner in which the work was expressed was the decisive factor* in the definition rather than the nature of the technical process. An agreement was reached at last about the term of protection of photographic works. Article 7(4) provided as follows: 'It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works. . .; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work.' It was, at the same time, the last difference between the status of photographic works and literary and artistic works in general, which finally has been removed by Article 9 of the WCT.

MIHÁLY FICSOR, GUIDE TO THE COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO AND GLOSSARY OF COPYRIGHT AND RELATED RIGHTS TERMS, WIPO Publication 891 n.228 (2004) (emphasis added), available at https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf [https://perma.cc/QP4M-XKKD].

19. 1 NIMMER ON COPYRIGHT § 2A.08 (2022) (internal citations omitted) ("On the one hand, photography attempts to capture reality in front of the camera. In this respect, it seems to assert a truth about the world and may be aptly characterized as embodying principally factual content. . . . Yet, if photographs are accepted as embodying purely factual information, they become automatically ineligible for protection under copyright. Alternatively, photography may be understood as an act of original authorship. US copyright law has long endorsed this alternative conception."); *see also* Terry S. Kogan, *The Enigma of Photography, Depiction, and Copyright Originality*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 869 (2015) (proposing that photography is differentiated by stylistic choices made by the photographer, akin to choices made by an artist).

20. *Registration: Photographs*, U.S. COPYRIGHT OFF., https://www.copyright.gov/registration/photographs/ [https://perma.cc/S6W4-PPKT] (last visited Nov. 4, 2022) ("The Copyright

the United States subsists the moment an original work is fixed in a tangible medium of expression.[21] Copyright in a photograph does not protect the "facts" that the photographer has captured; rather, it protects the photographer's expression—his artistic choices, including the selection and positioning of the subject, the selection of a camera lens, the placement and angle of the camera, the lighting, and the timing.[22] This basic formula for copyrightability in a photograph exists in many other countries' laws as well.[23] That said, there is no apparent, universally applicable test to determine the copyrightability of a given photograph.[24]

Act protects a wide variety of photographic works. This category includes photographs that are created with a camera and captured in a digital file or other visual medium such as film. Examples include color photos, black and white photos, and similar types of images.").

21. 17 U.S.C. § 102.

22. U.S. COPYRIGHT OFF., CIRCULAR 42, COPYRIGHT REGISTRATION OF PHOTOGRAPHS 1 (2021) ("The copyright in a photograph protects the photographer's artistic choices, such as the selection of the subject matter, any positioning of subject(s), the selection of camera lens, the placement of the camera, the angle of the image, the lighting, and the timing of the picture.").

23. *See, e.g.*, *Copyright Act 1968* (Cth) s 208 (Austl.).

24. *See, e.g.*, SHL Imaging, Inc., v. Artisan House, Inc., 117 F. Supp. 2d 301, 309–10 (S.D.N.Y., Sept. 28, 2000) ("There is no uniform test to determine the copyrightability of photographs.") (citing Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884) ("considering pose, selection and arrangement of costumes, draperies and other accessories, lighting and shading"); Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992) ("emphasizing photographer's 'inventive efforts' in posing couple holding improbably numerous puppies between them, and photographic printing"); Gross v. Seligman, 212 F. 930, 931 (2d Cir.1914) ("considering pose, background, light, and shade"); Eastern Am. Trio Prods., Inc. v. Tang Elec. Corp., 97 F. Supp. 2d 395, 417–18 (S.D.N.Y. 2000) ("considering 'lay-out', angles, lighting, and computer enhancements"); Kisch v. Ammirati & Puris, 657 F. Supp. 380, 382 (S.D.N.Y. 1987) ("considering selection of lighting, shading, positioning, and timing")). "The difficulty in identifying a common set of protectible elements may be attributable to the 19th century prejudice against the creation of works by mechanical means. This prejudice is rooted in unfounded suspicion that photographic equipment restricts creativity. . . . The technical aspects of photography imbue the medium with almost limitless creative potential. For instance, the selection of a camera format governs the film size and ultimately the clarity of the negative. Lenses affect the perspective. Film can produce an array of visual effects. Selection of a fast shutter speed freezes motion while a slow speed blurs it. Filters alter color, brightness, focus and reflection. Even the strength of the developing solution can alter the grain of the negative. The elements that combine to satisfy *Feist*'s minimal 'spark of creativity' standard will necessarily vary depending on the photographer's creative choices. The cumulative impact of these technical and artistic choices becomes manifest in renowned portraits, such as 'Oscar Wilde 18.' The measure of originality becomes more difficult to gauge as one moves from sublime expression to simple reproduction." *Id.* at 310.

A. The Nature of Photography and Special Challenges in Portrait Photography

In the late nineteenth century, while in New York City on a lecture tour, Irish author and poet Oscar Wilde sat for a series of portrait photographs, nearly a decade before he published his hugely successful *The Picture of Dorian Gray*.[25] The photographs were taken by Napoleon Sarony, a renowned photographer and lithographer at the time.[26] *Dorian Gray* is the only book Wilde ever wrote[27]; it highlights, through the talisman of a handsome man's painted portrait, a life in which beauty and hedonism play a central but ultimately unsatisfying role.[28] Ironically, a portrait of Oscar Wilde himself—albeit a photographed one—ultimately became the concern of a US Supreme Court case that confirmed the validity of a statutory extension of copyright protection to photographs.[29]

While a passage from that decision is frequently and correctly cited for the finding that photographs are protectible works under US copyright law, the decision does not explore the authorship question as between Sarony and Wilde—the two had established a contractual relationship under which Sarony was specified as the copyright holder.[30] Nor does the case stand for the proposition that all photographs are inevitably copyrightable—indeed, the decision hints that a good number of photographs may well lack the requisite quantum

25. Photograph of Oscar Wilde, *in Oscar Wilde / Sarony*, LIBR. OF CONGRESS, https://www.loc.gov/item/98519710/ [perma.cc/2YDM-H7VF] (last visited Nov. 4, 2022).

26. *Napoleon Sarony*, GETTY: MUSEUM COLLECTION, https://www.getty.edu/art/collection/person/103KFN [perma.cc/JEN6-MDUN] (last visited Nov. 4, 2022).

27. OSCAR WILDE, THE PICTURE OF DORIAN GRAY (1890); Karl Beckson, *Oscar Wilde*, BRITANNICA (Aug. 20, 2022), https://www.britannica.com/biography/Oscar-Wilde [perma.cc/2YDM-H7VF].

28. *See generally* WILDE, *supra* note 27.

29. *See generally Burrow-Giles*, 111 U.S. 53.

30. *Id.* at 60 ("[I]n regard to the photograph in question, that it is a 'useful, new, harmonious, characteristic, and graceful picture, and that plaintiff made the same . . . entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.' These findings, we think, show this photograph to be an original work of art, the product of plaintiff's intellectual invention, of which plaintiff is the author, and of a class of inventions for which the Constitution intended that Congress should secure to him the exclusive right to use, publish and sell, as it has done by section 4952 of the Revised Statutes.").

of originality to merit copyright protection.[31] Napoleon Sarony conceded this point as well; he was not arguing that all photographs are copyrightable, just that his specific portrait photograph of Oscar Wilde was copyrightable.[32]

Napoleon Sarony, *Oscar Wilde No. 18*, Albumen silver print, 1882

31. *Id.* at 58–59 ("We entertain no doubt that the Constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author. . . . [Some argue that a photograph] is the mere mechanical reproduction of the physical features or outlines of some object animate or inanimate, and involves no originality of thought or any novelty in the intellectual operation connected with its visible reproduction in shape of a picture. That while the effect of light on the prepared plate may have been a discovery in the production of these pictures, and patents could properly be obtained for the combination of the chemicals, for their application to the paper or other surface, for all the machinery by which the light reflected from the object was thrown on the prepared plate, and for all the improvements in this machinery, and in the materials, the remainder of the process is merely mechanical, with no place for novelty, invention or originality. It is simply the manual operation, by the use of these instruments and preparations, of transferring to the plate the visible representation of some existing object, the accuracy of this representation being its highest merit. This may be true in regard to the ordinary production of a photograph, and, further, that in such case a copyright is no protection. On the question as thus stated we decide nothing.").

32. Brief for Defendant, at 14, Burrows-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) (emphasis in original) available at https://www.copyrighthistory.org/cam/tools/request/showRepresentation.php?id=representation_us_1883a&pagenumber=1_001 [https://perma.cc/A27U-2LEJ] ("Nor is it a proper construction of this statute, as claimed by the infringers, that the same protection is granted to all photographs and negatives. As well might it be said that the same protection is granted to all inventions and discoveries under patent law; and to all books, prints, etc., under the copyright law. In every case the Court determines whether the subject matter in litigation is or is not a proper subject matter for protection under the law. And just as inventions and discoveries, books and prints, have been passed upon, and determined to be or not to be properly the subject of protection under the law, so it will be with photographs and negatives thereof.").

In its decision, the Supreme Court left open the possibility that persons beyond the photographer may play a role in and contribute to the creative aspects of a photograph on which its copyright eligibility is based.[33] Importantly, the photographer and subject had a contract in place that secured rights for the photographer.[34] The Court simply did no violence to that arrangement.[35]

In today's technology- and image-saturated society, with biometric search algorithms producing millions of results for images of people across the Internet,[36] the fate of Wilde's portrait from 1882 does not immediately seem important. This article aims to demonstrate, however, that the issues raised in *Burrow-Giles* are all too relevant and timely,[37] and that courts remain poised to recognize the creative

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33. *Burrow-Giles*, 111 U.S. at 58–59. It is worth asking what creative contribution, if any, Wilde made to the photograph. The Metropolitan Museum of Art owns the 1882 albumen silver print of the Sarony photograph at issue in the Supreme Court case. *See Oscar Wilde*, METRO. MUSEUM, https://www.metmuseum.org/art/collection/search/283247 [https://perma.cc/NK57-3Q87] (last visited Nov. 4, 2022). In its description of the photograph, it notes:

> Wilde appeared in Sarony's studio dressed in the attire he would wear at his lectures: a jacket and vest of velvet, silk knee breeches and stockings, and slippers adorned with grosgrain bows—the costume he wore as a member of the Apollo Lodge, a Freemason society at Oxford. Sarony took many photographs of Wilde, in a variety of poses. Here, his features not yet bloated by self-indulgence and high living, Wilde leans toward the viewer as though engaging him in dialogue, the appearance and calculated pose of the dandy secondary to the intelligence and spontaneous charm of the conversationalist.

By many accounts of the portrait session, Wilde selected his own garments and, aesthete that he was, contributed not an insignificant portion of creative expression to the portraits by way of his poses, expression, and visually perceptible mannerisms. The description provided by the Metropolitan Museum of Art points in the direction of Wilde adopting a premeditated persona to highlight to the public how he wanted to be perceived. Professors Eva Subotnik, Jane Gaines, and Christine Farley have made similar observations specifically with respect to Sarony's sitting with Wilde. *See* Eva Subotnik, *The Author Was Not An Author*, 39 COLUM. J.L. & ARTS 449, 451 (2016) ("So, was Wilde a moldable piece of clay in Sarony's hands, or did he contribute more than that? Or as Jane Gaines asked in her treatment of the case, 'Why did the photographer, rather than the celebrity subject, emerge as the creator of the image?' It may be too late in the day to imagine the Court deeming Wilde the author of the photograph, but what about an author?"); *see also* Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 433–35 (2004) ("[I]t is difficult to imagine someone like Oscar Wilde, the self-proclaimed aesthete, who was so careful and deliberate in the construction of his celebrity persona, freely submitting to the whims of Napoleon Sarony. Specifically, his trademark look with his head resting on his hand cannot be said to owe its origin to Sarony.").

34. *Burrow-Giles*, 111 U.S. at 54–55.

35. Aalmuhammed v. Lee, 202 F.3d 1227, 1232–33 (9th Cir. 2000).

36. *See, e.g.*, *Company Overview*, CLEARVIEW AI, https://www.clearview.ai/overview [https://perma.cc/8GXY-FJWH] (last visited Nov. 4, 2022).

37. In recent years, social media has become a business in and of itself and photographs of celebrities and "influencers" have shown themselves to be substantial commodities. When the subjects of photographs re-display or "share" photos of themselves taken by a paparazzo, some of

contributions of photographic subjects. As new social media platforms proliferate, celebrities and everyday individuals have emphasized quality over quantity, selectively curating their online personae, making individual photographs all the more significant.[38] Reuse and recontextualization of photographs only exacerbate the unauthorized, unexplained use of people's likenesses.[39] For example, photo editors frequently find and use photos from archives without relaying the purpose or context of the image, and they use photos in connection with unrelated stories, further stripping the original photo of its original meaning.[40] In the absence of privacy or publicity claims, there is no explicit cause of action for this type of error under current copyright law, where the photographer is considered the sole author.[41] Whereas some photographers handle their photographs of people with extreme

these photographers have filed lawsuits seeking significant monetary damages. *See, e.g.*, *Burrow-Giles*, 111 U.S. at 53. Given the high visibility that these famous subjects have acquired—and the corollary public scrutiny that accompanies it—they tend to settle these lawsuits, thereby postponing the development of this paper's focus, which is what the law is—and what it could be—for fact patterns that raise copyright, privacy, and personality concerns. *See, e.g.*, Ellen Durney, *Emily Ratajkowski Has Settled a History-Making Copyright Lawsuit*, BUZZFEED (Apr. 14, 2022, 10:43 AM), https://www.buzzfeednews.com/article/ellendurney/emily-ratajkowski-settled-paparazzi-copyright-lawsuit [perma.cc/B97Q-WHV9]. Many artists and creators, including photographers, are in a perpetual fight against easy online infringement. In some cases, these paparazzi lawsuits are a straightforward attempt by reasonable photographers to exercise their legitimate exclusive rights by attempting to control whether and how their works are made available to the public. A deeper analysis of the paparazzi industry and the multifaceted recipe that produces the popular images it produces is needed, not only to address social media, but also to add some nuance to inevitable future inquiries into celebrity photographs captured and marketed by artificial intelligence as well as other photographs that are not infused with a requisite amount of authorial creativity.

38. *See, e.g.*, Hussein Kesvani, *The Future of Social Media Is Sharing Less, Not More*, WIRED UK (Apr. 26, 2021, 6:00 AM), https://www.wired.co.uk/article/social-media-future-sharing [https://perma.cc/LB6M-UUR6] (discussing how social media is now being geared towards more careful and deliberate posts for an intended audience).

39. Silbey et al., *supra* note 9, at 319.

40. *Id.*; *see also* Alyssa Lukpat, *B.J. Novak's Face Is on Products Worldwide. He's Not Sure Why,* N.Y. TIMES (Oct. 27, 2021), https://www.nytimes.com/2021/10/27/business/bj-novak-photo-public-domain-products.html [https://perma.cc/9VEF-JJTX] (explaining that the actor's photograph, taken by an unknown photographer, had been uploaded by a third party to a website and then used and re-used on a variety of products from Uruguayan face paint to Chinese electric razors).

41. *See Group Registration for Published Photographs*, U.S. COPYRIGHT OFF., https://www.copyright.gov/eco/help/group/grpph.html#:~:text=The%20author%20of%20a%20photograph,the%20author%20of%20the%20photos [https://perma.cc/94MV-KEJA] (last visited Nov. 4, 2022).

care, empathy, and concern for privacy, that kind of careful attention is not mandated by the law and is far from the norm.[42]

While the Supreme Court did not address the issue of whether Wilde may have been a co-author of his own portrait, its decision does not preclude that possibility in other scenarios.[43] Some academic treatments that have considered the question whether subjects might contribute authorial expression to a photograph have suggested that a person's very *persona* deserves copyright protection[44] as an oeuvre in itself. Yet, under a more traditional understanding of copyright law, protectable expression is limited to the subject's particular creative iteration in the photograph, rather than subsisting in the subject him- or herself.[45] In other words, just as it does with an originality review or a fair use analysis, the law must address copyrighted works *qua* works, one at a time.

Although courts have occasionally mentioned the possibility of a subject being an author or a co-author,[46] none (to this Author's knowledge) have squarely conferred onto them any exclusive rights in the absence of a contract. But the idea has surfaced on more than one occasion, from the English Court of Queen's Bench in 1883[47] to two recent law review articles. One such article, by Kelley Bregenzer, directly recommends modified co-authorship in American law for

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42. *See, e.g.*, *Gillian Wearing: Wearing Masks*, GUGGENHEIM, https://www.guggenheim.org/exhibition/gillian-wearing-wearing-masks [https://perma.cc/FJ4G-LPC4] (last visited Nov. 4, 2022) (explaining how Wearing gives the subjects a voice in her art); *see also* the work of Alison Colby Campbell, *Alison Colby Campbell: About*, WORD PRESS, https://alisoncolbycampbellphotography.wordpress.com/about/ [perma.cc/W4SF-29BE] (last visited Nov. 4, 2022) (featuring a copyright warning at the bottom of the webpage warning against unauthorized use); Silbey et al., *supra* note 9, at 319 (discussing Alison Campbell's relationship with her photograph subjects).

43. *See* Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 252–54 (2001).

44. *See, e.g.*, Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151, 160 (2001); Kelley Bregenzer, *Modifying Co-Authorship for the Digital Age: Paparazzi Photographs as Joint Works*, 13 DREXEL L. REV. 449, 479–80 (2021). While the Author agrees with Kwall on some of her findings regarding joint authorship for paparazzi subjects, the Author continues to believe that individual photographs should be judged insofar as their individual copyrightable aspects.

45. *See* Bregenzer, *supra* note 44.

46. *See, e.g.*, Robinson v. Buy-Rite Costume Jewelry, Inc., No. 03 CIV. 3619 (DC), 2004 WL 1878781 at *2 (S.D.N.Y. Aug. 23, 2004).

47. Nottage v. Jackson [1883], L.R. 11 Q.B.D. 627 at 631 (Eng.) ("Here you have . . . two gentleman stated to be authors. Can two people be the authors of a photograph? It is difficult to say, but if they are, for whose life is it to last?"). The plaintiffs were owners of a photographic studio, and photographs of a visiting Australian cricket team had been taken by the studio's photographers at the instigation of management. *Id.* The court rejected the plaintiffs' claim because they were not the authors of the photographs for purposes of copyright law. *Id.*

paparazzi subjects.[48] The other article, by Jaden Warren, suggests that the subject of a copyrighted work has an urgent personal interest in the use of such work, thereby justifying a personal use privilege.[49]

The present analysis differs from existing treatments insofar as it applies beyond paparazzi and keeps itself contained to existing copyright law. As mentioned above, this Article is not suggesting legislative change; it is suggesting an approach to existing law that reexamines first principles unburdened by a branch of case law that ignores a class of creators.[50] This Article's approach may or may not influence courts' decisions about other types of authorship, but the principle should apply across media. Creative authorship, when it meets the threshold of originality and is fixed in a tangible medium of expression, should benefit from the grant of rights.[51] Unlike Bregenzer's approach, this Article does not argue in favor of copyrightability of personas or personalities themselves,[52] only to individual works as they present themselves to copyright law. And unlike Warren's proposal, this Article does not seek to introduce a subcategory of a personal use exception in the law that is based in assertion of self-identity,[53] nor does it seek to amend US copyright law to apply differently to social media posts.[54] Rather, this Article suggests that the concept of joint authorship is already flexible enough to accommodate the rights of contributing authors where adequate creative expression can be found.[55] This can be true even in the absence of communication or agreement among the putative authors—the photographer and the subject—because jointness is self-evident from the relationship between the two.[56] Freedom of expression may also play a supporting

48. Bregenzer, *supra* note 44, at 454.

49. Jaden Warren, *Express Yourself: A Personal Use Privilege for the Subjects of Copyrighted Works*, 29 TEX. INTELL. PROP. L. J. 273, 275 (2021).

50. *See supra* Abstract.

51. *See Copyright Basics*, UNIV. OF MICH. LIBR., https://guides.lib.umich.edu/copyrightbasics/copyrightability [perma.cc/5BTZ-3YTX] (last visited Nov. 4, 2022).

52. Bregenzer, *supra* note 44, at 474–76 ("Celebrities contribute to the progress of art and society, whether the public at large would like to admit it or not. Celebrities hold both commercial value and symbolic cultural importance. . . . Given their significance in society, courts can surely craft a remedy allowing celebrities to share others' photos of themselves on social media while still respecting photographers' intellectual property rights."). Unlike Bregenzer, this Author does not advocate for copyright law taking a person's fame into account; that is the province of the right of publicity.

53. Warren, *supra* note 49, at 284–85.

54. *Id*. at 290–92 ("[E]xisting copyright law is inadequate to address the dilemma posed."). This Article suggests that existing copyright law is adequate but requires some courts to interpret it differently than they have done.

55. *See infra* Section II.C.

56. *See infra* Section II.C.

role in this conclusion, as will be explored in the next Section of this Article.[57]

II. PAPARAZZI AND A SHORT HISTORY OF CO-AUTHORSHIP

A. An Opening Illustration

Two thought experiments help distill and demonstrate how a court might—or might not—find rights for both a photographer and a subject. These situations also highlight how the freedom of expression plays a role in this analysis. This section aims to show that this proposal does not overreach and apply beyond the realm of copyright. Issues related to privacy, publicity, and even freedom of religion may come into play when parsing a photograph's legal existence. Copyright law does not need to usurp that space, nor should those issues cloud copyright law.

Whereas a fashion show or fashion magazine shoot tends to benefit from highly detailed contracts among parties, "street photography" does not.[58] It is a genre in and of itself and is not immune from controversy, the most distressing concern of which is arguably privacy.[59] Granting subjects some exclusive rights in their likenesses would probably not apply frequently in this scenario because street photographers capture what they see in front of them, and their subjects tend to be unwitting contributors.[60] An important layer to the street photography scenario is, of course, freedom of speech and expression.[61] These rights risk being curtailed in the event the law were to require that a photographer locate and enter into contract negotiations with his subjects.[62] In the 2007 case *Nussenzweig v.*

57. *See infra* Section II.A.

58. *See What is a Model Release Form (and Why Does it Matter?)*, INDY, https://weareindy.com/blog/what-is-a-model-release-form-and-why-does-it-matter [perma.cc/HZE3-B9R6] (Nov. 3, 2022).

59. *See, e.g.*, Philip Gefter, *Street Photography: A Right or Invasion?*, N.Y. TIMES, Mar. 17, 2006 (noting that the *diCorcia* case was "[r]emarkably . . . the first case to directly challenge that right"). This Author acknowledges, however, that street photographers struggle with enforcing their own copyrights.

60. *See* Gefter, *supra* note 59.

61. *See id.*

62. An issue that this Article does not address is the common-law principle of first possession. There may be an interesting line of reasoning in considering that the photographer takes and has physical possession of his photograph, regardless what he captures with his lens, and that in possessing the photograph, he arguably has a better legal argument in owning its associated copyrights. That said, this Article does not explore the issue further here because the photographs the Author is interested in analyzing are generally online, and a subject does not need

diCorcia, for example, the court dealt with this situation exactly.[63] Its troublesome finding may complicate courts' willingness to find joint authorship in creative photographic subjects, although the Nussenzweig court's rationale limits itself to issues of privacy, not copyright.[64]

Over the course of several months starting in 1999, photographer Philip-Lorca diCorcia set up a tripod in Times Square in New York City.[65] He obtained a city permit, attached bright strobe lights to scaffolding on the other side of the street from where he stood, and took photographs of hundreds of individuals as they walked by.[66] At the time, the Pace/MacGill Gallery in Manhattan represented diCorcia.[67] He selected seventeen of these street photographs and exhibited them at the gallery in a show he called "Heads" in 2001.[68] Some of the photographs are of identifiable people, some are not; some photographs are flattering, others are not. But none identified their subjects by name, as diCorcia took the pictures without interacting with them in any way.[69]

In 2005, Erno Nussenzweig, a retired diamond merchant, learned of the photograph diCorcia took of him and filed a lawsuit, claiming that diCorcia and the gallery had violated his privacy rights under Sections 50 and 51 of New York's Civil Rights Law, and that, as a Klausenburg Orthodox Jew, this display of his likeness violated the Commandment in the Torah against graven images.[70] DiCorcia and the gallery argued that the photograph comprised artistic expression, was protected by the First Amendment, and, further, that the statute of

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to be in physical proximity to the photographer to assert nonexclusive rights in the photograph. For an excellent exploration of the issue of first possession, see Dotan Oliar & James Y. Stern, *Right on Time: First Possession in Property and Intellectual Property*, 99 B.U. L. REV. 395 (2019). For a thoughtful response to that article, see Eric R. Claeys, Claim Communication in Intellectual Property: A Comment on Right on Time, 100 B.U. L. REV. ONLINE 4 (2020).

63. Nussenzweig v. diCorcia, 878 N.E.2d 589, 589–90 (2007).

64. *Id.*; *see also, e.g.*, *Photography: Picturing People: Lesson 2*, OXFORD ART ONLINE, https://www.oxfordartonline.com/page/photography:-picturing-people:-lesson-2/photography-picturing-people-lesson-2 [perma.cc/69US-5LP2] (last visited Nov. 4, 2022) (discussing how, although the photos were taken from far away, they were still intimate).

65. *Nussenzweig*, 878 N.E.2d at 589.

66. *Id.*

67. *Id.* at 590.

68. Rachel A. Wortman, *Street Level: Intersections of Art and the Law Philip-Lorca diCorcia's 'Heads' Project and* Nussenzweig v. diCorcia, GNOVIS JOURNAL (2010).

69. *Id.*

70. Ashley Yu, IMPACT Interview: *Philip Lorco diCorcia: Head On*, MUSÉE MAGAZINE, Sept. 23, 2019, available at https://museemagazine.com/features/2019/9/23/impact-philip-lorca-di-corcia-head-on [https://perma.cc/EK9M-JY9F].

limitations had expired.[71] In February 2006, the court ruled in favor of diCorcia and the Pace/MacGill Gallery and dismissed the lawsuit on both counts because, firstly, freedom of expression exempted the photographer from state privacy laws and, secondly, the statute of limitations had run.[72]

While this analysis is not comprehensive enough to re-parse the important issues inherent in privacy law here, this example highlights that certain tensions between the rights of a photographer and a photographic subject are best decided outside of copyright law. Assuming Nussenzweig's expression would not amount to a creative contribution in the photograph (his expression was blank and stoic as he was walking down the street, unaware of being photographed; he is wearing the traditional black garb of the Hasidic Jewish faith),[73] this example shows that the proposal offered here is tailored to a subset of photographs of people.[74] While certain aspects of the "Heads" portraits

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71. *Id.*

72. Nussenzweig v. DiCorcia, 814 N.Y.S.2d 891 (N.Y. App. Div. 2006); Nussenzweig v. DiCorcia, 832 N.Y.S.2d 510 (N.Y. App. Div. 2007); Nussenzweig v. DiCorcia, 9 N.Y.3d 184 (N.Y. 2007).

73. Yu, *supra* note 70 ("The reason I won the case was because of the statute of limitations. . . . The first time I went to court, there was a group of Hasidic people inside the court and in the hallways. I walked in there, and they were all saying, 'That's him. That's him!' I had no idea it was such a big deal.").

74. *Id.* Likewise, this Article's proposal unfortunately may or may not rectify or address the situation cited in this paper's introduction wherein photographs of African American slaves are owned by Harvard University, if only because the subjects did not demonstrate creativity in their expression, pose, garments or other obvious outward appearance. The photographs were commissioned by a Harvard University professor in 1850 and one of the slave's descendants filed a lawsuit against Harvard in an effort to gain assignment of the copyright; that lawsuit was dismissed. *See* Lanier v. President & Fellows of Harvard Coll., No. 1981CV00784, 2021 WL 8015862, *1, *6 (Mass. Super. Mar. 1, 2021) ("Fully acknowledging the continuing impact slavery has had in the United States, the law, as it currently stands, does not confer a property interest to the subject of a photograph regardless of how objectionable the photograph's origins may be."); *see, e.g.,* Brunette v. Humane Soc'y, 40 F. App'x. 594, 597 (9th Cir. 2002) (rejecting conversion claim even if photographic image was serious or offensive invasion of privacy).

> Unfortunately, this Court is constrained by current legal principles, as it is the role of the Legislature or Massachusetts Appellate Courts to determine whether or not to recognize causes of action and to provide the redress Lanier now seeks. Accordingly, because (the subjects of the photograph) did not possess a property interest in the photographs, Lanier (the plaintiff), likewise, does not have a possessory interest in them.

Lanier, 2021 WL 8015862, at *6. The Author struggles with this decision but believes its correction sits at the nexus of privacy law and freedom of expression, not copyright law. Another example that this Article's proposal may or may not address is a photograph of a doctor taken after she had spent hours working on Covid patients. The photographer won a prestigious and monetary prize for capturing her likeness, but the doctor herself won nothing. *See* Michael Zhang, *Portrait of a COVID-19 ER Doctor Wins $120,000*, PETAPIXEl (Sept. 14, 2021),

may implicate joint authorship, this case demonstrates that copyright law remains silent on the issue.[75]

Unlike street photography, for which contractual relationships between photographers and subjects are few and far between, staged and creative productions are more likely to be organized and offer opportunities for contributory authorship.[76] In a ballet, for example, the professional dance company is involved, as is an orchestra, a crew of costume designers, a team of makeup artists, an audience, and a booked venue.[77] The press may attend one of the opening night performances to write up a review accompanied by a photograph or two. This fanfare is expected, as are the contracts, employment agreements, and union rules that generally govern participants' rights and responsibilities.[78] Unlike musical performers by way of existing copyright law,[79] or movie actors by way of the proposed Beijing Treaty,[80] ballet dancers are not customarily afforded a joint authorship right in their likenesses captured while they are performing, although the law permits it.[81] This example illustrates the straightforward analogy between movie actors

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https://petapixel.com/2021/09/14/portrait-of-a-covid-19-er-doctor-wins-120000/ [https://perma.cc/NY7P-B4V5]. Bassous is the first prize winner of the tenth annual Hamdan International Photography Award (HIPA). *See* Ary Bassous (Brazil), *Duty,* LATIN AM. NEWS (July 31, 2021), https://www.pressreader.com/saudi-arabia/arab-news/20210731/282183654092020 [https://perma.cc/PPW8-4JFM].

75. Although requesting and obtaining permission to reproduce Nussenzweig's likeness may have better demonstrated this Article's points and illustrated this Section (manifested as "Head #13"), the Author respects the fact that Nussenzweig objected to his image being reproduced in the first place. The Author understands, however, that reasonable minds may differ on this point and understands that the careers of great photographers like Bill Cunningham (longtime street and fashion photographer for the New York Times) and Scott Schuman ("The Sartorialist") would be severely curtailed if legal restrictions arose in this space. *Cf.* Wortman, *supra* note 68 ("Though Nussenzweig filed suit against diCorcia and Pace/MacGill for violating his right to privacy, this article suggests that he is the one who violates himself as a result of his lawsuit. Furthermore, through the legal proceedings Nussenzweig initiated, he is the one who attaches his name to the photograph and draws increased attention to 'Head', thus making the viewers see him and not the city.").

76. Sarah Howes, *Creative Equity: A Practical Approach to the Actor's Copyright*, 42 MITCHELL HAMLINE L. REV. 70, 73 (2016).

77. *Id.* at 91.

78. *Id.* at 76.

79. Section 1101 of the US Copyright Act, sometimes referred to as an anti-bootlegging provision, provides fixation rights to performs in respect of their live musical performances. 17 U.S.C. § 1101(a).

80. Part of the proposal for US law to accommodate the Beijing Treaty is to extend the protection currently provided to musical performances to performances of all types of works that are capable of being performed. *See* THE "BEIJING TREATY IMPLEMENTATION ACT OF 2016" STATEMENT OF PURPOSE AND NEED AND SECTIONAL ANALYSIS, U.S. PAT. & TRADEMARK OFF. (2016), available at https://www.uspto.gov/sites/default/files/documents/Beijing-treaty-SOPAN-sectional-analysis.docx [https://perma.cc/RA9V-XGJB].

81. Howes, *supra* note 76, at 91.

and ballet dancers (and, by extrapolation, to any individual whose likeness is taken while they are offering creative and copyrightable expression) and argues that the latter should be eligible to receive analogous rights when their creative expression is captured by another.

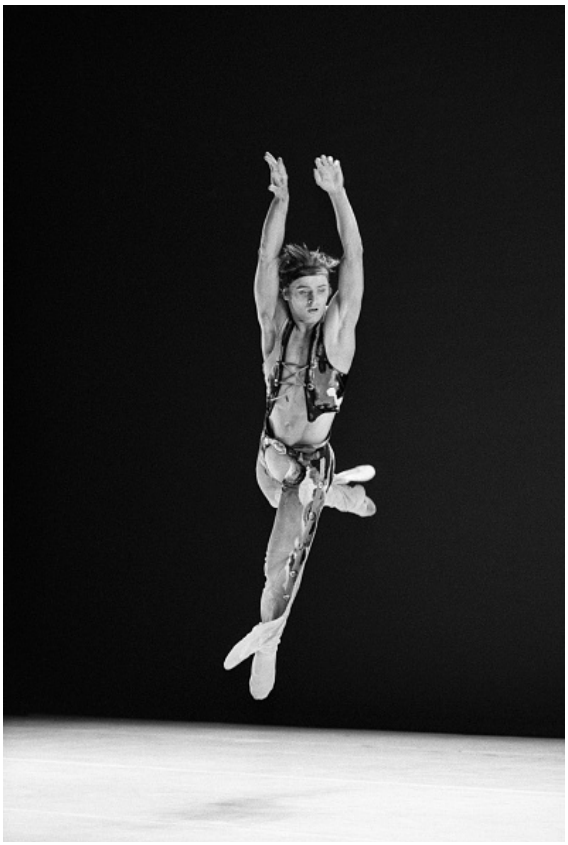
This picture of Alina Cojocaru, Principal Ballerina with the Royal Ballet, was taken after a 2007 performance of the ballet *Jewels* at the Royal Opera House in London. Creative Commons user "Scillystuff" captured the image.

If a dancer wants to use his or her captured likeness in a portfolio or as part of a written work, that privilege should come in the form of a right and not a defense to a presumption of infringement.[82] Uses of a subject's likeness that do not entirely undercut or usurp the photographer's market for remuneration should be permitted by way of a positive nonexclusive right of reproduction, making available, and display. As freedom of expression protects photojournalists' ability to photograph what they see on the street,[83] so too should it safeguard individuals' use of their own creative likenesses. In this photograph of Alina Cojocaru above, for example, she is not executing dictated

82. The fair use defense is an affirmative defense to a claim of copyright infringement. *See* 17 U.S.C. § 107. Although the same result may be found, wherein the subject is permitted to reproduce or display the image, the permission should be a right and not a defense to infringement.

83. *See supra* note 72.

choreography, but merely curtseying at the end of the performance.[84] The creativity in the photograph lies in her particular pose—the angle of her neck, the bend of her wrists, her turnout, and even in her smile.



Bettmann Archive, Mikhail Baryshnikov, Eliot Feld's *Santa Fe Saga*, April 14, 1978. © Getty Images

Likewise, in the photograph of Mikhail Baryshnikov here, taken in New York in 1978, the dancer demonstrates creativity by way of his dynamic skill, jump height, artistry, expression, and grace.[85] Whether the costume designer and choreographer should also have claims to a set of rights is debatable, but the dancer's claim to creative contribution should be without question.

84. Scillystuff, Photograph of Alina Cojocaru, Principal Ballerina with the Royal Ballet, after a 2007 performance of the ballet *Jewels* at the Royal Opera House in London, *in File:AlinaCojacaru.png*, WIKIMEDIA COMMONS (Feb. 9, 2009), https://commons.wikimedia.org/wiki/File:AlinaCojacaru.png [https://perma.cc/7MDX-KW4W].

85. Photograph of Mikhail Baryshnikov, *in Mikhail Baryshnikov Archive, Jerome Robbins Dance Division*, N.Y. PUB. LIBR. (1978).

When an individual contributes creative expression to another's photograph, allowing that individual a nonexclusive right to their likeness both recognizes their contribution and fuels copyright as an "engine of free expression."[86] An individual cannot fully express himself if someone else has control over a fixation of his image. The circumstances bringing this issue to the news lately are a series of copyright lawsuits brought by paparazzi against celebrities reproducing images of themselves—captured by paparazzi—on the celebrities' own social media streams.[87] But the issue will continue to have relevance so long as images of individual people continue to permeate the internet—and whatever may come after the internet.

B. Paparazzi and Copyright Today

While paparazzi have been a phenomenon for decades, online social media is, of course, a more contemporary occurrence. Recent research by Elena Cooper, a fellow at the University of Glasgow School of Law, highlights how celebrities from as early as the eighteenth century were aware of the importance of their public image, but they had no ability to control the dissemination of their likenesses.[88] While the academic conversation in this space has been rooted in the rights of privacy and publicity, a co-authorship right based in copyright could add an important opportunity for individuals to manage their likenesses.[89] The root of this issue may be traced back to the High Court of England and Wales in 1849 when Prince Albert filed a lawsuit against a publisher, William Strange, who had published a catalogue of sixty-three etchings that the Prince and Queen had created for their personal use and to give to friends.[90]

86. Harper & Row v. Nation Enters., 471 U.S. 539, 558 (1985).

87. Philip Ewing, *'Influencing' Copyright Law; Reevaluating the Rights of Photograph Subjects in the Instagram Age*, 17 OHIO ST. TECH. L.J. 321, 332–33 (2021).

88. Elena Cooper, ART AND MODERN COPYRIGHT: THE CONTESTED IMAGE 171 (Cambridge Univ. Press, 2018).

89. *Id.*

90. Prince Albert v. Strange (1849) 41 Eng. Rep. 1171.

Etching by Queen Victoria depicting
Princess Victoria and her Nurse, 1841

The court, basing its reasoning in a mix of copyright and privacy law, prohibited the exhibition, prevented further publication of the etchings, and ordered the surrender of the copies then in circulation.[91] The court specifically noted that "[t]he publication of a drawing of a house or a tree in a park, which are necessarily public, and may be seen by anybody, does not apply to this case."[92] Here, upon the plaintiff's request, the court enjoined the creation of likenesses of royal children and other recognizable individuals.[93] Photography may not have been the medium, but the likenesses of people were the subject, and those subjects were protected. The court found that "[p]rivacy is a part, and an essential part, of this species of property."[94]

In the United States in 1890, Samuel Warren and Louis Brandeis applied this same reasoning in a seminal law review article, where, in reference to the above case, they noted:

91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*

> Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life. . . . [T]he protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. . . . The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but *that of an inviolate personality*. If we are correct in this conclusion, the existing law affords a principle from which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, *the photographer*, or the possessor of any other modern device for rewording or reproducing scenes or sounds. . . . If, then, the decisions indicate a general right to privacy for thoughts, emotions, and sensations, *these should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression*.[95]

Again, this Article is not seeking to undertake a full exposé on the right of privacy or whether and how Warren and Brandeis fully grasped the tenets of copyright law. But *Albert v. Strange* and Warren and Brandeis's writing on photography—describing it as a new technology that made previously private moments public by dint of the resultant photograph not being in the hands of its subject[96]—demonstrate at least that the law may treat depictions of people as different from depictions of inanimate objects.

Cooper's research demonstrates that a fascination with people's images (and with curating one's own public image) is nothing new in the contemporary age of instant online reproduction and social media.[97] Today's social media is likely to look old-fashioned to the next generation of social media users, but reproductions of individuals' likenesses will likely only become more prevalent.[98] Indeed, the ability to match a likeness to an actual person has become a reality.[99]

For an example of a portrait photograph that gained immense international recognition, look no further than Steve McCurry's 1985

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95. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 195, 205–06 (1890) (emphasis added).

96. *Id.*; *see also* Prince Albert v. Strange (1849) 41 Eng. Rep. 1171.

97. Cooper, *supra* note 88.

98. *See, e.g.*, Uday Tank, *7 Experts Predict the Future of Social Media in 2030*, STORMLIKES (Mar. 2021), https://www.stormlikes.net/blog/7-experts-predict-the-future-of-social-media-in-2030 [perma.cc/UXX9-MYDC] (highlighting one expert who envisions a rise in interactions based on holograms, which stem from photographic likenesses).

99. *See, e.g.*, *Facial Recognition Market Size, Share & Trends Analysis Report By Technology (2D, 3D, Facial Analytics), By Application (Access Control, Security & Surveillance), By End-use, By Region, And Segment* Forecasts, *2021 – 2028*, GRAND VIEW RSCH. (May 2021), available at https://www.grandviewresearch.com/industry-analysis/facial-recognition-market# [https://perma.cc/L38F-GHYQ]. According to this Report, the global facial recognition market size was valued at USD 3.86 billion in 2020 and is expected to expand at a compound annual growth rate (CAGR) of 15.4% from 2021 to 2028. *Id.*

photograph of Sharbat Gula, whose haunted but piercing green eyes made her famous around the world as National Geographic's "Afghan girl."[100] More than thirty years after the photograph was published, by which point Gula was a national celebrity, the Afghan government gifted her a home of her own, after her husband had died of Hepatitis C and she herself was sick with it while raising three children.[101] Another example is a series of semi-nude and nude photographs of Emily Ratajkowski as a twenty-year-old model released by the photographer years after the photoshoot without her consent.[102] The photographer claimed the model's agent signed a release.[103] To recoup some control of her image and identity, Ratajkowski wrote a well-publicized editorial recounting the photo shoot and, at Christie's, auctioned off a non-fungible token (NFT) of a more tasteful photograph that shows her standing in front of *another* co-opted image of herself.[104]

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100. Jenny Gross, *'Afghan Girl' From 1985 National Geographic Cover Takes Refuge in Italy*, N.Y. TIMES, Nov. 26, 2021.

101. Nina Stochlic, *Famed 'Afghan Girl' Finally Gets a Home*, NAT'L GEOGRAPHIC (Dec. 12, 2017), https://www.nationalgeographic.com/pages/article/afghan-girl-home-afghanistan [https://perma.cc/BLT4-Q6EA] ("Photographer Steve McCurry's picture of her made her the unwitting posterchild for the plight of thousands of Afghan refugees streaming into Pakistan. In her homeland she became known as the 'Afghan Mona Lisa.' Now she has become a symbol of a return to Afghanistan that hundreds of thousands of refugees are undertaking after decades away.").

102. Emily Ratajkowski, *Buying Myself Back: When Does a Model Own Her Own Image?*, THE CUT (Sept. 15, 2020), https://www.thecut.com/article/emily-ratajkowski-owning-my-image-essay.html [https://perma.cc/L9LM-V5FL]. The photographer in question is Jonathan Leder, labeled by a film magazine as "low-tech hero" for his work with polaroid photographs and a "fashion erotic photographer" by an art and culture forum. *See Jonathan Leder – Low Tech Hero*, ANATOMY FILMS, https://www.anatomyfilms.com/jonathan-leder-low-tech-hero/ [https://perma.cc/E8PP-NAU9] (last visited Oct. 30, 2022); *Polaroids from Jonathan Leder*, JUXTAPOZ (Apr. 22, 2013), https://www.juxtapoz.com/news/news/polaroids-from-jonathan-leder/ [https://perma.cc/5BEF-GQC8].

103. Ratajkowski, *supra* note 102.

104. *Id.*; Emily Ratajkowski, *Buying Myself Back: A Model for Redistribution,* CHRISTIE'S (Apr. 25, 2021), https://www.christies.com/lot/lot-emily-ratajkowski-buying-myself-back-a-model-6317722/ [https://perma.cc/35GK-AEKB] ("Photographed, publicized, promoted and propagated, Emily Ratajkowski (b. 1991) is intensely familiar with having her image wrested from her for another's profit, as chronicled in her cataclysmic essay *Buying Myself Back*, published in the September 2020 issue of *New York Magazine*. . . . The visual manifestation of Ratajkowski's token—a JPEG file linked to the token ID—is definitively *not* the artwork itself. Instead, the JPEG features Ratajkowski in front of a work she owns from Richard Prince's Instagram painting series for which Ratajkowski was the subject. A member of the Pictures Generation working at the junction between popular culture and fine art, Prince recently debuted his Instagram series, in which the well-known appropriation artist prints images of mainly female social media posts, including his added public comments, onto canvas for redistribution. Ratajkowski's example from the series illustrates her own Instagram post of an image from a 2014 *Sports Illustrated* swimsuit issue photo shoot, where, clad only in the painted branding of the magazine, Ratajkowski left the set with $150 in compensation and the implied, unquantifiable reward of visibility in the famed

These later serendipitous events—the house gifted from the Afghan government and the model's $175,000 auction sale of the *double entendre* NFT—provided some belated monetary recompense to these photographic subjects.[105] These arguably positive outcomes[106] are far from the norm in such scenarios; however, they provide at least a monetary argument for granting a co-authorship right to subjects of photographs. Above and beyond remuneration, photographic subjects have an interest in using their likenesses for their own benefit. Ratajkowski was the defendant in a recently settled lawsuit for reposting a paparazzo's photograph of herself to her social media feed.[107] In that case, contrary to standard paparazzi photographs where a celebrity is instantly identifiable, the photograph in question does not show the model's face or anything recognizable about her; she had shifted a bouquet of flowers in front of her head and supplemented the image with the text "mood forever" on her Instagram feed, ostensibly communicating her disenchantment with the paparazzi.[108]

Like other defendants in similar paparazzi cases, Ratajkowski pled the defense of fair use with respect to her online reuses of the photograph.[109] The Copyright Act lists four nonexhaustive factors that courts should consider when evaluating whether a use is fair:

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publication. Shortly thereafter, Ratajkowski's social media attempt to exert authority over her image landed as a post in a Prince painting, complete with the number of Instagram 'likes' and three unrelated comments. . . . [S]he acquired the painting for $81,000. The JPEG accompanying the present token of the model-cum-artist in her home before Prince's inkjet portrait of her, then, raises questions surrounding the nature of authorship, specifically when it comes to the digital realm, while figuratively returning the Instagram post to its digitally native terrain. Thus, Ratajkowski's work surpasses such meta-narratives of the Pictures Generation by being an appropriation of an appropriation—an image of an image—ad infinitum."). Note that, while this Article only touches on the complicated and charged topics of revenge porn or deep fakes, it does ask at what point an image of an individual should benefit from that person's custodianship, accompanied by attendant legal rights.

105. *See* Nina Stochlic, *Famed 'Afghan Girl' Finally Gets a Home*, NAT'L GEOGRAPHIC (Dec. 12, 2017), https://www.nationalgeographic.com/pages/article/afghan-girl-home-afghanistan [https://perma.cc/2BWR-JDK6]; Ratajkowski, *supra* note 104.

106. *See* Gaia Pianigiani, *'Afghan Girl' From 1985 National Geographic Cover Takes Refuge in Italy*, N.Y. TIMES (Nov. 26, 2021), https://www.nytimes.com/2021/11/26/world/europe/afghan-girl-national-geographic.html?searchResultPosition=1 [https://perma.cc/L3TU-DL67]. Indeed, Gula was evacuated to Italy in late 2021. *See id.* As one commenter noted, "The Taliban don't want women to be visible, and she's an extremely visible Afghan woman." *Id.*

107. O'Neil v. Ratajkowski, No. 19 Civ. 9769 (AT), 2022 WL 1115050 (S.D.N.Y. Apr. 13, 2022).

108. O'Neil v. Ratajkowski, 563 F. Supp. 3d 112, 122 (S.D.N.Y. 2021).

109. *Id.* at 128. Adding a simple line of text to an existing photograph has been argued to be a fair use. In the recent case, *McNatt v. Prince*, in which fine art photographer Donald Graham sued appropriation artist Richard Prince for taking the entirety of his photograph, enlarging it, and adding lines of text to the bottom of it, the defendant argued:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[110]

In weighing these factors, courts should undertake a holistic and context-sensitive analysis without bright-line rules.[111] While fair use is relevant to the present analysis, granting nonexclusive rights to some photographic subjects is the more reasonable approach, and the one that will better serve copyright law's goals in the long run.

Exhibit B from Complaint against Emrata Holdings, LLC, Emily Ratajkowski. Docket No. 1_19-cv-09769, Document filed by Robert O'Neil Oct. 23, 2019.

> In using an image that Prince found on Instagram, but repositioning it in a larger-than-life form in the physical media of canvas made to appear like a giant iPhone, adding his comments to it, reproducing it in a painting using elements of the Instagram frame, and displaying it with other Instagram-themed portraits, Prince has imbued what was once an austere depiction [of a Rastafarian smoking marijuana] into part of Prince's ode to social media.

Mem. of Law in Supp. of Def.'s Mot. for Summ. Judgment at 2, McNatt v. Prince (No. 1:16-cv-08896), available at https://www.courthousenews.com/wp-content/uploads/2020/07/prince-mcnatt-msj.pdf [https://perma.cc/USX3-HV5L].

110. 17 U.S.C. § 107.

111. *See, e.g.,* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26 (2d Cir. 2021).

The Ratajkowski lawsuit, like many of its kind, settled out of court.[112] Whether the fair use defense in such scenarios would have prevailed was left unanswered. Another such affected celebrity, Kim Kardashian, has opted to hire her own personal paparazzo in the wake of a similar lawsuit so that she and her fans can post and repost images without restraint.[113] In response to being sued by a paparazzo under similar circumstances, Gigi Hadid suggested that her own creative contributions to the photograph in question offset any finding of infringement.[114] She cited her clothing, her posture, and her general consent to being photographed as manifested by her expression as creative contributions.[115] Hadid's response is relevant to this Article because it tees up the proposition that a subject's contributions to a photograph not only militate against a finding of infringement, but also that the subjects are in themselves copyrightable expression.

Image from Exhibit 1, Complaint against Ms. Jelena Hadid.
Xclusive-Lee, Inc. v. Jelena Noura "Gigi" Hadid, 1:19-cv-00520 (E.D.N.Y.)

112. *O'Neil*, 2022 WL 1115050 at *1.

113. Kim Kardashian West (@KimKardashian), TWITTER (Feb. 7, 2019, 8:59 PM), https://twitter.com/KimKardashian/status/1093343487335059458 [https://perma.cc/8427-R32L] ("Btw since the paparazzi agencies won't allow the fans to repost, all of my pics are taken by my own photog and you guys can always repost whatever you want.").

114. Memorandum of Law in Supp of Def.'s Mot. to Dismiss at 7–14, Xclusive-Lee, Inc., v. Hadid, No. 1:19-cv-00520-PKC-CLP (E.D.N.Y. June 5, 2019).

115. *Id.* at 10–12 ("Where creative features come not from the photographer but rather from the subject, holding the subject liable for infringement does nothing to 'foster' what the Copyright Act values. . . . More pointedly still, the photograph here was only possible because of the cooperation of Ms. Hadid in the photograph's creation. . . . [I]n this instance Ms. Hadid indulged the photographer and posed as he captured her image.").

Embedded in these and other paparazzi cases are the rights of privacy and publicity. Generally, a photographer does not encroach upon a model's privacy when she is photographed on a busy street because she is not in a space where she would expect privacy.[116] Likewise, her right of publicity is probably not implicated unless a paparazzo somehow implies with his photograph—or the model implies in the way she communicates it—that she is endorsing a product or service.[117]

Copyright attaches only to works, such as photographs, that pass a threshold of originality, defined by accumulated case law as something that displays a modicum of creativity or an author's own intellectual creation,[118] to use American and European verbiage, respectively.[119] The exercise of identifying where creativity—or originality, in terms of copyright eligibility—lies, assists in parsing whether and when it may be with the subject.[120] As outlined earlier in the article, not all works are copyrightable, either for want of original creative expression or for lack of authorship.[121] This is perfectly consistent with copyright law's goals; there are simply certain works that copyright law does not aim to protect.[122] This is also true of photographs; they are what Burrow-Giles, the plaintiff in the Oscar Wilde case, would have noted are "not the production of something new; [they are] at best a new arrangement of something extant."[123]

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116. *See* Susan F. Corbett, *The Case for Joint Ownership of Copyright in Photographs of Identifiable Persons*, 18 MEDIA & ARTS L. REV. 3 (2013).

117. For a useful overview of the high thresholds courts require for a finding of infringement with respect to either of these bodies of law, see *id.* at 9. Professor Corbett argues that joint ownership for identifiable people in photographs as a way to fill the gaps that privacy and publicity laws fail to fill. *Id.*; *see also* Jeffrey Malkan, *Stolen Photographs: Personality, Publicity, and Privacy*, 75 TEX. L. REV. 779, 780 (1997) (exploring the difficult dynamics of these three terms of art and how they play out in the law). It also describes the classic law review article on privacy, which provided the basis for US privacy laws, as conflating some privacy and copyright interests. *Id.* at 798 (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)).

118. *See, e.g.*, Case C-145/10, Eva-Maria Painer v Standard VerlagsGmbH and Others, ECLI:EU:C:2011:239 (Apr. 12, 2011); Case C-469/17, unke Medien NRW GmbH v.Bundesrepublik Deutschland, ECLI:EU:C:2019:623 (Oct. 25, 2018).

119. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 341 (1991).

120. *Id.* at 359.

121. *See supra* Section II.A.

122. *See supra* Section II.A.

123. Brief for Plaintiff, at 11, Burrows-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) (emphasis in original) available at https://www.copyrighthistory.org/cam/tools/request/showRepresentation.php?id=representation_us_1883b [https://perma.cc/XN64-DJFE]. The Brief went on to note: "Sarony did not create Oscar Wilde, although he may have placed him in the position we see in the photograph." *Id.* This Article recognizes, however, that some commenters argue against this

Other examples of uncopyrightable photographs include a photograph of a mountain lion on the loose taken by a doorbell camera,[124] footage from taxi dashboard cameras, and photographs resulting from police speed cameras.[125]

In 2005, when copyright treatise author William Patry hosted a blog on copyright issues, he wrote a post entitled "Photography and Copyright,"[126] in which he explored the promise of a collaboration between the International Center of Photography and the George Eastman House.[127] Although the collaboration is now defunct, it provided an opportunity for the author to breathe some life into the idea of joint authorship as between a photographer and his subject, "not as a matter of law, but as a matter of fact . . . given the subject's contributions to the aesthetics that gave rise to the originality."[128] Patry dismissed the idea of a legal basis for joint authorship since the Copyright Act only recognizes joint authorship when authors *intend* that their contributions be merged into inseparable or interdependent parts of a whole.[129] But he also notes that "there is no per se rule against . . . claims [of joint authorship]";[130] indeed, the plain-language reading of the statutory definition of a joint work leaves open the possibility that photographs of people result from the contributions of more than one person.

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line of thinking. *See, e.g.*, Kogan, *supra* note 19, at 877 ("Attacks based on the photograph's truthfulness assume that the object or scene that a viewer perceives in the image . . . plays a major role in determining the image's originality. But this is rarely the case. If a photograph is original, it is because the photographer's choices in placing surface design markings meet *Feist*'s minimal creativity standard. A photograph of the Grand Canyon is no more a *fact* in the world than a realistic painting of the Grand Canyon is a *fact* in the world. Rather, both are *pictures* composed of surface design markings that *depict* objects and scenes in the real world.") (emphasis in the original). While the Author follows this logic, the Author also believes that a painting is (usually) innately more creative than a photograph.

124. James Crump, *Mountain Lion on the Loose in San Francisco Spotted on Doorbell Camera*, NEWSWEEK (May 19, 2021), https://www.newsweek.com/mountain-lion-spotting-san-francisco-1592802 [https://perma.cc/MBA2-UGDZ].

125. Letter to Mr. Barker from Alexandra Karrouze (June 28, 2009), available at http://www.thenewspaper.com/rlc/pix/uk-sussexltr.jpg [https://perma.cc/MC4K-ZGXZ]. The Solicitor for the Sussex Police sent the equivalent of a "takedown" letter to an individual who had the ability to remove photographs of speeding cars from a news website; in so doing, she asserted that the "content of these photographs are the property of the Sussex Police and publication of them is a breach of copyright." *Id.* Whether that presumption would prevail in court is unclear, but the Author's argument here is that it should not.

126. William Patry, *Photography and Copyright*, THE PATRY COPYRIGHT BLOG (July 21, 2005), http://williampatry.blogspot.com/2005/07/photography-and-copyright.html [https://perma.cc/HS55-QMPM].

127. Photomuse, as the project was then called, is no longer in existence.

128. *See* Patry, *supra* note 126.

129. 17 U.S.C. § 101 (defining "joint work").

130. *See* Patry, *supra* note 126.

Susy Frankel, professor of law at Victoria University of Wellington, has raised the issue of privacy in likenesses in tandem with a review of the nexus between copyright and privacy laws in common-law jurisdictions. She determined that, although copyright law should not extend privacy law in general, the protection of a person's image may be an exception to this overall approach.[131] Korea, for example, is addressing photographic portraits in its body of personality rights.[132] Furthermore, the European Parliament released a study in the summer of 2021 with a similar concern about the tension between privacy law and copyright law.[133] The United States should not necessarily follow a similar path, but it should note that countries are noticing and starting to address legal loopholes in the protection of a person's image or portrait.[134]

Professor Rosati argues that it is not the photographer, but the person depicted in the photograph that makes the photo original and valuable.[135] She also notes that paparazzi photographs are by no means automatically presumed to reach the requisite level of originality to obtain copyright protection due to recent decisions of the CJEU.[136] She highlights, too, that the commercial value of paparazzi photographs does not stem from the photographer's artistry, but rather from the

131. Susy Frankel, *The Copyright and Privacy Nexus*, 36 VIC. UNIV. WELLINGTON L. REV. 507, 528 (2005).

132. *See* Simon D. Lee, *Don't Take That Photo! How Taking Someone's Picture Can Land You in a Korean Jail*, PUREUM LAW OFF. (Aug. 20, 2017), https://pureumlawoffice.com/blog-updates/dont-take-photo/ [https://perma.cc/TF9V-HE2R].

133. *See* MARIËTTE VAN HUIJSTEE, PIETER VAN BOHEEMEN, DJURRE DAS, LINDA NIERLING, JUTTA JAHNEL, MURAT KARABOGA & MARTIN FATUN, EUR. PARLIAMENTARY RSCH. SERV., TACKLING DEEPFAKES IN EUROPEAN POLICY 64 (2021) (internal citations omitted), available at https://www.europarl.europa.eu/RegData/etudes/STUD/2021/690039/EPRS_STU(2021)690039_EN.pdf [https://perma.cc/VVW6-3BB8].

134. *Id.* at 60 ("Since individuals generally do not own a copyright interest in their own image, copyright law is not very suitable for individuals to protect their own persona. However, in some EU Member States there are other legal provisions for the protection of a person's image or portrait. Although the protection of image rights in the EU still remains far from harmonised, most Member States recognize at least some form of legal protection. Furthermore, in a ruling in 2009, the European Court of Human Rights stated that the right to the protection of one's image is 'one of the essential components of personal development and presupposes the right to control the use of that image.' The contracting states of the European Convention of Human Rights (ECHR) should respect this ruling.").

135. Eleonora Rosati, *A European Perspective on Paparazzi Photographs of Celebrities and Lawsuits Against Celebrities Over the Posting of Photographs of Themselves*, THE IPKAT (Oct. 20, 2019), https://ipkitten.blogspot.com/2019/10/a-european-perspective-on-paparazzi.html [perma.cc/K6YP-4NN4].

136. *Id.*; *see, e.g.*, Case C-145/10, Eva-Maria Painer v Standard VerlagsGmbH and Others, ECLI:EU:C:2011:239 (Apr. 12, 2011); Case C-469/17, unke Medien NRW GmbH v.Bundesrepublik Deutschland, ECLI:EU:C:2019:623 (Oct. 25, 2018).

identity of person depicted in the photograph, adding further support for the extension of authorship rights for which this Article advocates.[137]

C. Joint (or Contributing) Authorship and Copyright Ownership: Barriers and Possibilities

Paparazzi photographs present a strong case for recognizing joint authorship, but any broadened understanding of joint authorship should not be restricted to paparazzi. There is very little case law on joint authorship in photographs.[138] Joint authorship is both amorphous and restrictive in the United States and across the globe.[139] Amorphous, insofar as it is not always clear who qualifies for the privilege of authors' rights;[140] and restrictive, insofar as joint authors, absent a contract to the contrary, are often expected—but not mandated—to exercise the bundle of exclusive rights they are granted as if they were a single entity.[141] That is, each joint author can do as he pleases without the others' permission so long as he does not actively diminish the value of the work in question.[142] Importantly for the purposes of this analysis,

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137. *See* Rosati, *supra* note 135.

138. Gillespie v. AST Sportswear, Inc., No. 97 Civ. 1911 (PKL), 2001 U.S. Dist. LEXIS 1997, *1, *18 (S.D.N.Y. Feb. 22, 2001).

139. For a historical review of joint authorship law across the globe, see Luiz S. Rosengart, *Principles of Co-Authorship in American, Comparative, and International Copyright Law*, 25 S. CAL. L. REV. 247 (1952).

> The study of our law, together with the survey of thirty foreign legal systems, clearly shows the great diversity of the principles governing the works of joint authorship throughout the world. Lawmakers and courts seem to have been puzzled by the complexity of the problems involved. The difficult task of finding satisfactory solutions has been even more complicated by certain misunderstandings which, however, may be clarified. The term 'indivisible whole' is being used in a quite different sense not only on either side of the Atlantic, but also on either side of the Rhine.

Id. at 286.

140. Marshall W. Woody, *The Collaborative Calamity: Moving Joint Authorship Analysis toward Statutory Uniformity*, 80 UMKC L. REV. 511, 513 (2011) ("It is of no help that the copyright statute defining what comprises a 'joint work' completely demurs on the issue of initial ownership of that joint work.").

141. *See id.* at 515.

142. Rosengart, *supra* note 139, at 287. But, just as in 1952, almost every question one may have about the actual implementation of joint authorship remains an open question. In 1952, Luiz Rosengart noted that, with regard to the relationship among co-authors,

> it will be difficult to establish strict rules satisfying all legitimate interests. The collaborators are holders of a joint copyright and (in) principle have equal rights. Should the consent of all be required for the utilization of the work? Should the courts, or any panels of experts as arbitrators, intervene in case of disagreement or failure to reach a majority decision among the co-authors? . . . [If] each co-author has the right to use or

however, the law does not generally mandate the equal division of rights in a work.[143] The current legal interpretation of joint authorship creates needless confusion for co-authors collaborating in real life, raising questions about how much each person must contribute and whether creative contributions can or should be quantified.[144]

In the United States, the Copyright Act provides that the "authors of a joint work are co-owners of copyright in the work," but it does not provide a formula by which the authors' respective ownership shares may be allotted.[145] While contractual relationships in established creative industries apportion percentages of a copyrighted work among creative contributors almost down to the penny,[146] a court must establish a reasonable allocation of remuneration and privileges among co-authors who are not in privity of contract.[147] A possible impediment to this approach is that courts assume that joint authorship means that joint authors are entitled to an equal share of the money flowing from the copyrighted work in question; this assumption distorts joint authorship questions and provides motivation for courts to decide no joint authorship exists.[148] Courts do have that precedent to overcome,[149] but, notably, there is no union of portrait subjects to represent and establish a contract template for individuals

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> license the joint work, subject to an accounting, his activity may either increase or diminish the value of the joint copyright.

Id.

143. *See* Justin Hughes, *Actors as Authors in American Copyright Law*, 51 CONN. L. REV. 1, 50 (2019) ("To the degree that courts have struggled to avoid judgments of joint authorship, they may have done so in the mistaken belief that a finding of joint authorship would require equal shares among the joint authors."); *see also* Thomas Margoni & Mark Perry, *Ownership in Complex Authorship: A Comparative Study of Joint Works in Copyright Law*, 34 EUR. INTELL. PROP. REV. 22, 32 (2012) ("Tenancy in common rules should be used as an 'extreme ratio' in all those cases where it is impossible, or too costly, to operate otherwise, namely when and only when contributions are not distinguishable.").

144. *See* Woody, *supra* note 140, at 511–12.

145. 17 U.S.C. § 201(a); *see also* McCater & English Newsletter, *Joint Ownership and Assignments of Intellectual Property Rights: Part II – Copyrights*, LEXOLOGY (May 27, 2011) (citing Oddo v. Ries, 743 F.2d 630, 633 (9th Cir. 1954), https://www.lexology.com/library/detail.aspx?g=6cf9c2fd-fc6c-4495-bce1-eff6921ee4aa [perma.cc/K57Q-7ZUX] ("It is well settled that the duty to account does not derive from the copyright law's proscription of infringement in the Copyright Act. Rather, it comes from equitable doctrines relating to unjust enrichment and general principles of law governing the rights of co-owners.").

146. *See, e.g.*, Ruth Towse, *Contracts for Creators and Performers in the Creative Industries,* in TEACHING CULTURAL ECONOMICS 115 (Trine Bille, Anna Mignosa & Ruth Towse eds., 2020).

147. *See* Childress v. Taylor, 945 F.2d 500, 517 (2d Cir. 1991).

148. Hughes, *supra* note 143.

149. *See, e.g.,* Pye v. Mitchell, 574 F.2d 476, 480 (9th Cir. 1978) (holding that co-authors automatically held an undivided interest in the whole work).

who become photographic subjects.[150] Courts can and should step in to set a precedent by conferring certain rights to those subjects who contribute copyrightable expression.[151]

Given the convoluted formulation for joint authorship in the United States, other countries' approaches to the issue are instructive, if only to understand whether these approaches are more successful. French law provides for joint ownership explicitly, noting that a work may be co-owned whenever it results from the collaboration between two or more persons.[152] All acts that affect the use or disclosure of the work, including assignments and licensing, require the unanimous agreement of all the co-authors.[153] However, French law also provides that a civil court can step in and mandate other arrangements when joint authors disagree,[154] although authors need not wait for a court's decision before beginning to exploit the work.[155] In the United Kingdom, the law provides that a "work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors; and it lays out four elements for joint authorship to subsist, including (a) collaboration, (b) authorship, (c) contribution, and

150. Every genre of creative venture inevitably has norms built into it, if not hardwired contractual customs. The Screen Actors Guild (SAG) and the American Federation of Television and Radio Artists (AFTRA), for example, were formed in the 1930s and have now merged into a single union to ensure that a variety of individuals in theater, television, radio, and now other outlets such as the internet and online games are remunerated and recognized for their work. *See, e.g.*, *Mission Statement*, SAG-AFTRA, https://www.sagaftra.org/about/mission-statement [perma.cc/6UQW-MKWX] (last visited Oct. 30, 2022) ("SAG-AFTRA represents approximately 160,000 actors, announcers, broadcast journalists, dancers, DJs, news writers, news editors, program hosts, puppeteers, recording artists, singers, stunt performers, voiceover artists and other media professionals.").

151. Two decades ago, Professor Russ VerSteeg suggested that a better term for such authors might be "contributing author" as opposed to "joint author," if only to alleviate the perceived concern that joint authors might need to share all rights in an equal split. *See* Russ VerSteeg, *Intent, Originality, Creativity and Joint Authorship*, 68 BROOK. L. REV. 123, 164–65 (2002) ("A contributor whose contribution is copyrightable but not substantial enough to make him a joint author is still, nevertheless, considered an author. The term 'contributing author' may be appropriate to describe such an author.").

152. Code de la propriété intellectuelle [C. Intell. Prop.] [Intellectual Property Code] art. 113-2 (Fr.).

153. *Id.* An exception to this general rule is cases where the contribution of each author can be considered separable from the overall work, in which case, each author may exercise his copyright on his own part of the work, provided it does not affect the overall work. *Id.*

154. *Id.*

155. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 24 1993, Bull. civ. I, No. 341, note Edelman (holding that "tranché, il est vrai, sur le terrain des droits patrimoniaux; mais les questions sont souvent mêlées lors de l'exercice du droit de divulgation") (Translation provided by author: This judicial intervention must be prior to the acts of exploitation.).

(d) non-distinctness of contribution.[156] While the contribution requirement seems to preclude a photographic subject as a co-author, a recent Court of Appeals decision clarified that what constitutes an authorial contribution is "acutely sensitive to the nature of the copyright work in question" and must be considered on a case-by-case basis.[157] Furthermore, courts do not need to mandate that joint authors share equally in the value of the work, but can take a pro rata approach, depending on, for example, the type of media at issue and the perceived amount of creativity contributed.[158] This elasticity and focus on the copyrighted work and other facts in question reflect the flexibility for which this Article advocates.

The Berne Convention, the world's premier copyright treaty that provides some consistency in copyright laws across jurisdictions, does not provide real clarity on any of these points regarding authorship or ownership and is simply silent on the issue of joint authorship.[159] Alternative jurisdictions have adopted varying definitions of co-authorship, with each adopting its own criteria for when a contributor may become a co-author under the copyright law.[160]

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156. *See* Copyright, Designs and Patents Act 1988, C. 48, § 10 (UK).

157. Kogan v. Martin et al., [2019] EWCA Civ 1645, Case No: A3/2018/0070, para. 53(6) (Eng.).

158. *Id.* at para. 53(11).

159. At best, it provides indirect guidance by providing that an author self-identifies when his "name appear[s] on the work in the usual manner." Berne Convention for the Protection of Literary and Artistic Works art. 15.1, Sept. 9, 1886, 1161 U.N.T.S. 3 (revised on July 24, 1971). A variety of national laws provides similarly ambiguous definitional help for both authorship and joint authorship. *See generally* Code de la propriété intellectuelle [Intellectual Property Code] art. 113-1 to 113-3 (Fr.) (provides that authorship status is conferred to the person whose name appears on the publicly available work); Copyright, Designs and Patents Act 1988, C. 48, § 9 (UK) (holding that "in relation to a work, means the person who creates it"); *id.* at C. 48 § 10 (defining a "work of joint authorship" as "a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors"); 17 U.S.C. § 101 (defining a "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole").

160. *See, e.g.*, Margoni & Perry, *supra* note 143, at 22–32. The authors demonstrate how the verbiage of American and Italian joint authorship law is similar but results in different results due to different implementations of joint tenancy concepts in real property and other societal, legislative, and technological changes that have influenced the law. *Id.* Furthermore:

> While in cases of inseparable contributions tenancy in common is probably the most efficient regulatory solution in terms of ownership, in cases of interdependent contributions, it no longer seems to be the case. If the individual contribution of the co-author is separable (in the sense that it is interdependent) from the joint work, and on the top of that, the contribution is independently copyrightable, then the idea that this part of the work should be governed by tenancy in common rules with the relative 'appropriation' risk, instead of a 'classic' copyright rule, is to be rebutted. . . . [I]f the purpose is to protect the final work as a whole, then the ownership rules that apply to

The Berne Convention is also silent on a range of other important issues, including the significance, if any, of authorial intent.[161] With respect to the central topic in this paper—potential contributing author rights for subjects of photographs—the issues of authorial intent and independent copyrightability are of paramount importance. As Professors Ginsburg and LaFrance have noted elsewhere, independent copyrightability is subject to criticism for its utility and relevance in the joint authorship equation.[162] Moreover, the requirement of independent copyrightability faces insurmountable delineation issues. Both prongs—independent copyrightability and authorial intent—are due for review and revision.[163]

1. Independent Copyrightability

In 1991, the US Court of Appeals for the Second Circuit held in *Childress v. Taylor* that any contribution by a potential joint author must be independently copyrightable.[164] In other words, each joint author must contribute a copyrightable work that meets the minimum level of creativity, and each work must be fixed in a tangible medium of expression.[165] Although *Childress* is arguably more notable for its emphasis on authorial intent, as discussed more fully in the next section,[166] the independent copyrightability aspect of the decision has

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> collective works seem to be more appropriate. In this manner, not only the final collaborative product, but also the individual, autonomously copyrightable, and separable contribution would be protected, and any 'appropriation risk' is avoided.

Id. at 31 (internal citations omitted).

161. *See generally supra* note 159.

162. *See generally* Jane Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063 (2003); LaFrance, *supra* note 43, at 194.

163. *See, e.g.*, Ginsburg, *supra* note 162, at 1087–88 ("Intent, I suggest, does not make a contributor more or less creative, but it may supply a means to sort out the equities of ownership in cases in which more than one contender is vying for authorship status. There, the problem is not such much whether the contenders intended to be creative, as whether they intended to share the spoils of creativity, that is, whether they intended to be joint owners of the copyright. Certainly that is the only way that the intent test, applied to determinations of co-authorship in US caselaw, can be made coherent. As a principle of authorship decoupled from ownership, however, I believe an intent standard obscures more than it enlightens."); *see also* LaFrance, *supra* note 43, at 194 ("[C]ourts have not taken a sufficiently rigorous approach to (the type and amount of creative contribution necessary to establish that a particular contributor is an 'author'), and, as a result, they have found it necessary to answer the . . . question (what type of subjective intent is necessary to establish a person's co-authorial status) in a manner that distorts the language and purpose of the joint works definition."); Seth F. Gorman, *Who Owns The Movies? Joint Authorship under the Copyright Act of 1976 after* Childress v. Taylor *and* Thomson v. Larson, 7 UNIV. CAL. L.A. ENT. L. REV. 1 (1999).

164. Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991).

165. *See id.*

166. *See id.* at 507–09.

been equally influential and problematic.[167] The court concluded that requiring that each contribution to a joint work be separately copyrightable would prevent specious claims and encourage authors to settle their rights through contract.[168]

The Nimmer Treatise, on the other hand, requires that a contribution by a joint author be simply more than *de minimis*.[169] This approach permits a larger swath of creativity to be eligible for copyrightability, making room for new forms of creativity that depend on the creative contributions of more than one artist.[170] While this Article does not tackle exciting technological advances in art, several new, emerging types of media will benefit from a copyright scheme that recognizes and grants rights to a multiplicity of creative actors.[171] A short list of examples includes immersive art like Culturespace's *Starry Nights* Van Gogh tribute exhibition,[172] digital painting over photographs like those that Andrew Rae and Ruskin Kyle undertake,[173] and wholly collaborative art production like GCC Art Collective produces.[174]

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167. *See* Gorman, *supra* note 163, at 2.

168. *Childress*, 945 F.2d at 507 (noting that it is "more consistent with the spirit of copyright law to oblige all joint authors to make copyrightable contributions, leaving those with non-copyrightable contributions to protect their rights through contract").

169. 1 NIMMER ON COPYRIGHT § 6.07 (2021) (internal citations omitted) ("It is not necessary that the respective contributions of several authors to a single work be equal, either quantitatively or qualitatively, in order to constitute them as joint authors. However, each such contribution must, in any event, be more than *de minimis*. That is, a person must add more than a word or a line to qualify as a joint author.").

170. *See* Laura Biron & Elena Cooper, *Authorship, Aesthetic and the Artworld: Reforming Copyright's Joint Authorship Doctrine*, 35 LAW & PHIL. 55, 79 n.89 (2016).

171. *See, e.g.*, Virginia Gewin, *How to Shape a Productive Scientist-Artist Collaboration*, 590 NATURE 515 (2021) (describing, e.g., an artist's collaboration with scientists at CERN).

172. Aušrys Uptas, *This Unique Audiovisual Exhibit Will Let You Experience What It's Like To Be A Part of a Van Gogh Painting*, DEMILKED, 2019, https://www.demilked.com/van-gogh-digital-exhibition-culturespaces/ [https://perma.cc/HP75-5GDB]. "Produced by Culturespaces and created by Gianfranco Iannuzzi, Renato Gatto, and Massimiliano Siccardi, the exhibition features some of the artist's most famous works projected onto the art center's walls by over a hundred projectors and music by composer Luca Longobardi." *Id.*

173. Laura Staugaitis, *Phone Buddies Lurk and Ooze Out of Screens in Embellished Photos by Andrew Rae and Ruskin Kyle*, COLOSSAL (Nov. 21, 2019), https://www.thisiscolossal.com/2019/11/phone-buddies/ [https://perma.cc/T2ZH-8Z4F].

174. GCC, MITCHELL-INES & NASH, https://www.miandn.com/artists/gcc [https://perma.cc/N8DM-JXQN] (last visited Oct. 27, 2022).

> GCC, an acronym that does not necessarily stand for but alludes to the Gulf Cooperation Council (the intergovernmental political and economic partnership that connects six countries in the region), is an artist "delegation" or collective composed of eight members, all of which have strong ties to the Arabian Gulf region of the Middle East. The group was formed in 2013 at Art Dubai and has since shown at

Unwilling to depend on a rule that took such a narrow approach to authorial contribution, Judge Richard Posner of the Seventh Circuit has adopted the *de minimis* standard from the Nimmer Treatise in joint authorship cases.[175] Posner held that the rule requiring intent to co-author went too far if it denied joint copyright when more than one author's efforts were necessary to produce a single work, "for that would be 'peeling the onion until it disappeared.'"[176] Posner summarized his stance—a distinct, minority view—on joint authorship by including the following illustrative example in his opinion in *Gaiman v. McFarlane*:

> Here is a typical case from academe. One professor has brilliant ideas but can't write; another is an excellent writer, but his ideas are commonplace. So they collaborate on an academic article, one contributing the ideas, which are not copyrightable, and the other the prose envelope. . . . Their intent to be the joint owners of the copyright in the article would be plain, and that should be enough to constitute them joint authors.[177]

Posner's approach reflects a "*de minimis* plus" type of approach, requiring some sort of contribution and intention to collaborate.[178] As it fairly and accurately reflects the co-authorship relationships in which it is applied, this Author believes this is the correct approach to authorial intent.

2. Intent and Creative Community Norms

In the United States, an author's intent with respect to *creating* his work is superfluous in analyzing whether a work is copyrightable.[179] Under the tenets of copyright law, whether an artist draws what he considers a throwaway doodle or a great masterpiece, copyright will subsist in each work regardless.[180] As suggested above, copyright law

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> Kraupa-Tuskany Zeidler in Berlin; Project Native Informant in London; The New Museum, Whitney Museum of Art, and MoMA PS1 in New York; Musée d'Art Moderne in Paris; 9th Berlin Biennial; Sharjah Art Foundation, UAE; Fridericianum in Kassel; and Brooklyn Academy of Music in New York.

Id.

175. Tim Wu, *On Posner on Copyright*, 86 U. CHI. L. REV. 1217, 1227 (2019); *see* 1 NIMMER ON COPYRIGHT § 6.07 (2022).

176. Wu, *supra* note 175 (citing Gaiman v. McFarlane, 360 F.3d 644, 659 (7th Cir. 2004)).

177. *See Gaiman*, 360 F.3d at 659.

178. *See id.*

179. *See* U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFF. PRACS. § 310.5 (3d ed. 2021).

180. For example, did a putative author mean to create a work of art by spattering wine on a tablecloth or did he just accidentally spill wine on a tablecloth that subsequently requires a good stain remover? Under copyright law, if an art gallery frames the tablecloth and it becomes a work of art because of the way it exists in the world, that does not pose a problem. *Id.*

should always judge works as they exist *qua* works. Likewise, it should be unnecessary to analyze an author's intent with respect to "jointness" when collaboration in a work is clearly manifested in that work. US circuit courts have inconsistently determined whether authors' intent at the time of the making of the work is—or is not—a crucial factor in determining joint authorship.[181] When one takes intent into account, there is no clear standard for determining that intent.[182] Melville

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> When examining a work for original authorship, the [US] Copyright Office will not consider the author's inspiration for the work, creative intent, or intended meaning. Instead, the Office will focus solely on the appearance or sound of the work that has been submitted for registration to determine whether it is original and creative within the meaning of the statute and the relevant case law.

Id. Another example is Marcel Duchamp's ceramic sculpture *Fountain*, a urinal tilted on its side and inscribed with a pseudonym. *See Marcel Duchamp, Fountain, 1917/1964*, S.F. MUSEUM OF MOD. ART, https://www.sfmoma.org/artwork/98.291/ [https://perma.cc/M5VL-8SXT] (last visited Oct. 27, 2022). *But see* J. Alex Ward, *Copyrighting Context: Law for Plumbing's Sake*, 17 COLUM.-VLA J.L. & ARTS 159, 161 (1993).

181. *Compare* Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991) (holding that each joint author must make a copyrightable contribution to the work), *with* Gordon v. Lee, No. 1:05-CV-2162-JFK, 2007 U.S. Dist. LEXIS 35361, at *24–25 (N.D. Ga.) (holding that this requirement is not necessary).

> With regard to the *Childress* court's requirement that each joint author must prove that he or she made a copyrightable contribution to the work, there is not a general consensus among the circuit courts about whether the Copyright Act itself provides such a requirement. As even the *Childress* court recognized, 'The [Copyright] Act surely does not say that each contribution to a joint work must be copyrightable, and the specification that there be 'authors' does not necessarily require a copyrightable contribution.' Professor Nimmer's position is that while the finished work must be copyrightable, each author's contribution need not be copyrightable. The Seventh Circuit adopted this viewpoint in *Gaiman v. McFarlane*, and noted that while '[t]here has to be some original expression contributed by anyone who claims to be a co-author,' the requirement that each contribution be independently copyrightable leads to paradoxical results in some situations. The contributors' joint labors may have sufficient originality and creativity to be copyrightable, but no single individual's contributions would be copyrightable. In such a situation, under the holding in *Childress*, no one could claim a copyright in the work. For these reasons, the court finds the reasoning of Professor Nimmer and the Seventh Circuit to be persuasive.

Gordon, 2007 U.S. Dist. LEXIS 35361, at *24–25 (internal citations omitted).

182. *See supra* note 181. For a different approach than the one used by the *Childress* court, see, e.g., Napoli v. Sears, Roebuck & Co., 835 F. Supp. 1053, 1059 (N.D. Ill. 1993) ("Sears has demonstrated sufficient involvement in that process that we can not say, as a matter of law, that Sears is not a joint author. . . . [W]e find that a genuine issue exists as to whether Napoli and Sears are joint authors."). The approach of the Nimmer Treatise condones research into authors' intent and is skeptical of bestowing rights on any co-author who has not clearly expressed his intent along with his co-author's (or co-authors') concurrent intent:

> Where the common design for a joint work was not agreed upon by the several contributors until after one of the contributions was already created, what justification is there for inferring that the parties intend a joint authorship? . . .[I]s it proper to infer an agreement between the several authors that the combination of the earlier and later

Nimmer and Paul Goldstein, noted authors of two copyright treatises, approach the perceived intent requirement similarly, although there is a subtle difference in their respective approaches that could lead to different outcomes.[183] Nimmer's interpretation of the intent requirement correlates with joint authorship, whereas Goldstein's approach correlates with the joint work.[184] In other words, intent to be a joint author is not the same objective as intent to join works together.[185] Returning briefly to the example of the paparazzo and the celebrity, while neither person may intend to be a joint *author* of a photograph (the paparazzo because he does not want to share authorship and the celebrity because it does not occur to her, for example), both people may intend to create a joint *work* (the paparazzo because he is explicitly including the celebrity as the focal point of his photograph and the celebrity because she smiles for the camera).[186]

The Second Circuit, since *Childress*,[187] has created unhelpful precedent in the United States for a wide range of would-be authors for whom the law has not bestowed the rights of co-authorship.[188] The unofficial rule from the case—requiring manifested intent—is not set in stone, however.[189] The legislative history behind the Copyright Act reflected the writers' intent to allow then-current case law to control, envisioning either authors' collaboration *or* their intent to merge works

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> contributions shall be regarded as a joint work? In the absence of a clear expression of such intent it would seem that such an inference may not be proper.

1 NIMMER ON COPYRIGHT § 6.02 (2022).

183. Steven S. Kan, *Court Standards on Joint Inventorship & Authorship*, 19 DEPAUL J. ART TECH. & INTELL. PROP. L. 267, 282 (2009). A more frequently cited difference between the two authors' joint authorship approaches treats the nature of the joint author's contribution. *Id.* at 280–81. Nimmer suggests that a joint author's contribution must be more than *de minimis*; Goldstein suggests the joint author's contribution must in itself rise to the level of copyrightable expression. *Id.*

184. *Id.* at 282.

185. *Id.*

186. *See id.*

187. *See generally* Childress v. Taylor, 945 F.2d 500 (2d Cir. 1991).

188. *See, e.g.*, Tehila Rozencwaig-Feldman, *The Author and the Other: Reexamining the Doctrine of Joint Authorship in Copyright Law*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 172 (2021).

> First, the (intention) test is ambiguous and does not provide a practical solution to define a joint collaborative work. Second, the intention test may be abused by secondary authors to make frivolous claims about the existence of a joint intention in order to gain recognition as a joint author. Third, the test may be abused to make a claim for lack of joint intention that will confer too much control to the dominant authors of a work.

Id. at 187–88.

189. *See* G. Alexander Nunn & Alan M. Trammel, *Settled Law*, 107 VA. L. REV. 57, 68 (2021).

into a whole as acceptable criteria to determine joint authorship.[190] Although a collaborative and verifiable plan to be joint authors provides salutary certainty, such open intent does not capture the universe of creative works, and it neglects a class of authors who have created perfectly copyrightable content.[191] An expanded understanding of the statutory language, as adopted by the *Childress* court and others,[192] is inconsistent with statutory history and precedent. The intent clause in joint authorship should be read to give the terms their normal meaning and to give weight to the words Congress chose: "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[193] The significance of any authorial contribution, and therefore authorial intent, can be determined by analyzing the work in question.[194]

This type of holistic, work-centric approach is not necessarily supported by the way copyright registration is designed.[195] Unlike applications for a patent, for example,[196] an application for a copyright is largely accepted based on the information the applicant provides.[197] In registering joint works, the US Copyright Office generally accepts an applicant's submission as to whether a work is joint.[198] It advises an

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190. "[C]ourt-made law on this point is left undisturbed." H.R. REP. NO. 94-1476, at 120–21 (1976); S. REP. NO. 94-473, at 104 (1975).

191. Therese M. Brady, *Manifest Intent and Copyrightability: The Destiny of Joint Authorship*, 17 FORDHAM URB. L.J. 257, 300–01 (1989).

> The 1976 Act, attempting to clarify the standard of joint authorship, only plunged it deeper into the pitfalls of a modern legal lexicon. Once common design was transformed into 'intent,' its infusion with an equivocal state of mind standard was inevitable. By disregarding established copyright doctrine, the subjective intent standard leads not only to absurd results but also to the deprivation of authors' rights. The primary considerations in joint authorship should be whether the contribution is copyrightable in and of itself, whether it pre-existed as an independent work, and whether it is 'inseparable' or 'interdependent' with the contribution of others.

Id.

192. *See, e.g.*, Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991); Thomson v. Larson, 147 F.3d 195, 201 (2d Cir. 1998).

193. Gorman, *supra* note 163, at 32.

194. *Id.* at 13–14.

195. U.S. COPYRIGHT OFF., *supra* note 179, § 505.2.

196. *See* 37 C.F.R. § 1.104(a)(1) (2013).

197. U.S. COPYRIGHT OFF., *supra* note 179, § 602.4(C)–(D).

198. *Id.* § 505.2 ("As a general rule, the registration specialist will accept the applicant's representation that a work of authorship is a joint work, unless it is contradicted by information provided elsewhere in the registration materials or in the Office's records, or by information that is known to the specialist. If the claim appears implausible, the specialist may communicate with the applicant or may refuse registration. Examples of factors that may indicate that a work does not qualify as a joint work include the following: Evidence that one or more of the authors did not

applicant to provide the name of each joint author who contributed copyrightable authorship to the joint work for which the applicant is seeking registration.[199] The Office advises that each joint author must make a "sufficient amount of original authorship" to each work, although contributions need not be of the same magnitude, and it draws the line at *de minimis* contributions, which fall outside the realm of joint authorship.[200] With this construction, the determination of joint authorship comes down to the application of a single entity and, absent agreement or communication, has the potential to exclude joint authors.[201]

Despite varying theories, the current, prevailing legal standard narrowly circumscribes any consideration of "intent."[202] Whether co-authors intend for their respective creative contributions to comprise a single, joint work is the sole equation that needs to be solved.[203] Andrew Nietes, in *Bringing Swirly Music to Life: Why Copyright Law Should Adopt Patent Law Standards for Joint Authorship of Sound Engineers*, points out the important difference between intent to merge contributions into a single work versus intent to be joint authors.[204] Nietes emphasizes that the statute is completely silent on whether authors intend to be regarded as co-authors and cites a well-reasoned decision by Learned Hand.[205] In 1944, Hand wrote that "it makes no difference whether the authors work in concert, or even whether they know each other; it is enough that they mean their contributions to be complementary in the sense that they are to be embodied in a single work to be performed as such."[206] In this case, one individual composed

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intend to merge their contributions into a unitary whole; A work containing a number of separate and independent works, such as a book of photographs by different authors; A work containing a major contribution from one author combined with a minor contribution by another author, such as a book containing hundreds of pages of text by one author and an introduction or a few illustrations by another author.").

199. *Id.*

200. *Id.*

201. *See id.* §§ 405.1, 511.

202. *See, e.g.,* Lior Zemer, *Is Intention to Co-Author an Uncertain Realm of Policy,* 30 COLUM. J.L. & ARTS 611 (2006-2007). In arguing against the need for an analysis into intent, Zemer lays out how intent is currently interpreted in the United States and in the United Kingdom. *See id.*

203. *See* Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266, 267 (2d Cir. 1944).

204. Andrew Nietes, *Bringing Swirly Music to Life: Why Copyright Law Should Adopt Patent Law Standards for Joint Authorship of Sound Engineers*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1321, 1335 (2019).

205. *Id.* at 1337.

206. *Edward B. Marks Music Corp.*, 140 F.2d at 267.

the words for a song, which he sold to a publisher.[207] The publisher subsequently hired another individual to compose music for those words.[208] The publisher then combined the two, published the song, and secured the copyright for the work.[209] The individual authors did not meet each other or speak to each other until years later and "had not therefore worked in conjunction, except that Marks intended the words to be set to music which someone else should compose, and that Loraine understood that he was composing music for those particular words."[210] But since they intended that their contribution be part of a whole, this was enough to establish joint authorship.[211] This approach, absent the *Childress* mutual intent requirement, provides the correct, logical result in cases of prospective joint authorship.

Like the relationship between a songwriter and a lyricist, the relationship between a photographer and her subject necessitates that both parties contribute creative expression. The resultant song is the manifestation of this expression. A photograph of a person, likewise, is necessarily the result of a photographer and the photograph's human subject. The legislative history and subsequent commentary described above supports a framework in which each of those individuals may have contributed copyrightable expression to the resultant work such that they are joint authors.[212] Judge Denny Chin, then a trial court judge for the Southern District of New York, addressed the question of joint authorship in a photograph in the 2004 case *Robinson v. Buy-Rite Costume Jewelry, Inc.*[213] In his decision, after observing that the parties had not concluded an agreement to settle authorship, Judge Chin reviewed the factual indicia of ownership to find co-authorship.[214] His approach demonstrates how a careful review of the facts in a given circumstance can achieve a fair and sensible result.[215]

Copyright law, to reiterate, does not prohibit subjects from being co-authors.[216] That the subject of a photograph is factually integrated into a copyrightable work tends to support the subject's right to a share

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207. *Id.* at 266.

208. *Id.*

209. *Id.* at 266–67.

210. *Id.*

211. *Id.* at 267.

212. *See id.*; Childress v. Taylor, 945 F.2d 500, 505 (2d Cir. 1991); Gorman, *supra* note 163; Kan, *supra* note 183; Brady, *supra* note 191; H.R. Rep. No. 94-1476, at 121 (1976); S. Rep. No. 94-473, at 104 (1975).

213. Robinson v. Buy-Rite Costume Jewelry, Inc., No. 03 Civ. 3619 (DC), 2004 U.S. Dist. LEXIS 11542, *9–10 (S.D.N.Y., June 24, 2004).

214. *Id.*

215. *Id.*

216. *See, e.g., id.*

of the rights that inhere in the work itself.[217] Indeed, for paparazzi photographs specifically, the inclusion of the celebrity in a particular photograph is what makes that photograph socially and economically valuable, at least at its initial publication—not the background, lighting, or other aesthetic choices the photographer may have made.[218] The relevant question is whether the subject of the photograph has contributed authorial originality meriting copyright protection.[219]

Permitting courts to find co-authorship in this scenario is no more offensive to copyright authorship and no more legally questionable than permitting a painter to claim copyright authorship in a painting made by the hand of a more junior artist in his studio.[220] If holding the paintbrush does not guarantee sole authorship, neither should pressing the button on the camera. Doing the "fixing" of a work is not necessarily the key to being its author.[221] Contracts and the "work

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217. Another author advocating for paparazzi subjects to receive some kind of waiver from copyright liability noted:

> When this issue is distilled down to its essence, its unfairness is clear. Paparazzi make profits from the images they take solely because they contain a famous individual. A paparazzo profiting off of such a picture, either taken non-consensually . . . or consensually . . . without the individual from whom the picture derives its value having even limited, non-commercial rights to the use of that photograph is not an equitable situation.

Philip Ewing, *'Influencing' Copyright Law; Reevaluating the Rights of Photograph Subjects in the Instagram Age*, 17 OHIO ST. TECH. L.J. 321, 332–33 (2021).

218. *See* Rosati, *supra* note 135.

219. *See, e.g.,* VerSteeg, *supra* note 151, at 160 ("Unlike criminal law, which emphasizes and often relies upon an inquiry into the subjective state of a criminal's mind, contract law allows contracting parties to evaluate respective risks and plan their own future conduct, based upon reasonable expectations shaped by the objective manifestations of intent (and the promises implicit in those manifestations) of both parties. The analogy to joint authorship is evident: courts should consider the interaction between collaborators as relevant to the objective manifestations of the parties' intent regarding joint authorship. Contracting parties must be able to rely on the objective indicia of intent. An implied in fact contract of joint authorship need be no different. Joint authorship is probably best understood as an implied in fact contract.").

220. However, either an agreement must be in place for the senior painter to claim authorship, or he must do so via the mechanism of "work made for hire," under which certain employees must forfeit their copyrights in favor of their employers. This is because, generally, copyright subsists with its author as soon as a copyrightable work is fixed in a tangible medium of expression. *See* 17 U.S.C. § 101 ("work made for hire"); *see also* U.S. COPYRIGHT OFF., CIRCULAR 30: WORKS MADE FOR HIRE (Mar. 2021), https://www.copyright.gov/circs/circ30.pdf [https://perma.cc/2SXF-FZWC].

221. A useful corollary example is the phenomenon of the "selfie." At the 2014 Academy Awards, host Ellen DeGeneres walked into the audience and, next to Meryl Streep and a handful of other famous actors, invited Bradley Cooper, standing next to her, to capture a photograph of everyone who had surrounded the initial, smaller group. While Bradley Cooper pressed the button on the cellphone to capture the photograph, Ellen DeGeneres directed the capture, and is arguably the owner of the copyright that inheres in the photograph despite not pushing the button. *See*

made for hire" doctrine provide this reasonable workaround so that authorial benefits belong to the party who contributed creativity.[222] Other people can—and do—contribute copyrightable expression to visual artworks; a finding of co-authorship under a broader understanding of the concept would depend on the type of work and the individual work in question. A claim of co-authorship by the individual in the portrait would be more viable than a claim of co-authorship by one of the subway passengers. There is—and should be—a sliding scale determining a given work's measure of creativity and corollary scope of protection,[223] and there is not—but should be—a sliding scale determining authorial jointness. Joint authorship, as explored above, does not require that each party hold an equal stake in the work's remuneration stream.[224] Contractual arrangements and courts can apportion ownership rights according to the co-authors' respective contributions if and when a work is copyrightable in the first place. A reviewing court will have the competence to find a copyrightable contribution in a co-author, assuming the court undertakes an analysis to determine the extent of each co-author's contributions.

The norms of a particular creative community will generally dictate how individuals are compensated and recognized, and interpreting their legal relationship is only necessary when

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Michael Reed, *Who Owns Ellen's Oscar Selfie? Deciphering Rights of Attribution Concerning User Generated Content on Social Media*, 14 J. MARSHALL REV. INTELL. PROP. L. 564, 565–66, 577 (2015) (arguing that DeGeneres, not Cooper, is the proper author of the selfie). It does not seem generally questioned that a selfie is copyrightable, in which case certainly the photographer's creative contribution must be about more than lighting and angle when the photographer is only concerned about capturing himself in front of the Trevi Fountain, for example. All he can really control are his pose and facial expression and hope that he's pointing the phone's lens roughly in his direction.

222. *See* Ryan Vacca, *Work Made for Hire—Analyzing the Multifactor Balancing Test*, 42 FLA. ST. U.L. REV. 197, 199 (2014); 17 U.S.C. § 101 (defining work made for hire).

223. For example, a "product shot" for an advertisement has a "thin" layer of copyright protection, whereas a more creative work will have a "thick" layer. A thin layer protects against only a visually verbatim copy of the work. In the case of a photograph of a vodka bottle, for example:

> Though the Ets-Hokin and Skyy photographs are indeed similar, their similarity is inevitable, given the shared concept, or idea, of photographing the Skyy bottle. When we apply the limiting doctrines, subtracting the unoriginal elements, Ets-Hokin is left with only a 'thin' copyright, which protects against only virtually identical copying. . . . This principle has long been a part of copyright law. Indeed, as Judge Learned Hand observed in the context of stock dramaturgy: 'The less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly'. . . . The same is true here, where the range of protectable expression is constrained by both the subject-matter idea of the photograph and the conventions of the commercial product shot.

Ets-Hokin v. Skyy Spirits Inc., 323 F.3d 763, 766 (9th Cir. 2003) (internal citations omitted).

224. *See* Hughes, *supra* note 143, at 67.

disagreement arises. A studio artist working on one of Jeff Koons's large-scale projects does not expect his name to be attached to the work as it goes to auction, nor does he expect to receive any proceeds for the sale.[225] This industry norm, buttressed by the work made for hire doctrine and examples in contract law, generally keep that norm from becoming litigious.[226] Contrary to a situation involving a one-off photograph, the ongoing relationship between a titular artist and the studio artist also leaves space and time for the parties to come to an agreement—written or not—that encapsulates their expectations over time, although controversies arise there, too.[227] The same might be said for a makeup artist hired for a flat fee to work with a portrait photographer taking photographs of models for the cover of a fashion magazine. Expectations about compensation and attribution are understood and often memorialized in contracts.[228]

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225. A journalist describes a visit to one of Koons's studios in 1997; he had accompanied Koons back from a larger-scale studio in Brooklyn the same day. *See* David Rimanelli, *It's My Party, A Jeff Koons Studio Visit*, ARTFORUM, (Summer 1997), https://www.artforum.com/print/199706/it-s-my-party-jeff-koons-a-studio-visit-32798 [https://perma.cc/VET4-DJHY]. "Back in Manhattan, some twenty assistants are hard at work on the paintings and scale models for the sculptures that will be cast elsewhere. At one point in the mania of production, there were around seventy. *L'atelier Koons* is enormous." *Id.*; *see also* John Powers, *I Was Jeff Koons's Studio Serf*, N.Y. TIMES (Aug. 17, 2012), https://www.nytimes.com/2012/08/19/magazine/i-was-jeff-koonss-studio-serf.html [https://perma.cc/9GDT-3SKT].

> He paid me $14 an hour, doubling my previous salary as an undergrad shelf-stocker at the Columbia library. . . My job was simple: Paint by numbers. The most intricate sections required miniature brushes, sizes 0 and 00, their bristles no longer than an eyelash. The goal was to hand-fashion a flat, seamless surface that appeared to have been manufactured by machine, which meant there could be no visible brush strokes, no blending, no mistakes. . . [the work] sold at Christie's in London in 2003 for $501,933. At the time it was Koons's most expensive painting. Everything else I made in college ended up in a Dumpster on West 115th Street.

Id.

226. Exceptions arise, of course. For example, renowned glass artist Dale Chihuly filed suit against one of the artists in his own studio for allegedly copying too much expression from Chihuly's work. *See* Chihuly v. Kaindl. No. C05-1801-JPD, 2006 U.S. Dist. LEXIS 2420 (W.D. Wash., Jan. 11, 2006).

227. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 13, 1973, Bull. civ. I, No. 32, 533, note Colombet (Fr.). A French court of appeals found that Renoir had co-authored certain sculptures with an assistant despite the fact that he had advanced rheumatism that prevented him from personally handling the sculptures. Although his pupil Guino actually sculpted the pieces, Renoir was granted joint-ownership copyright in the works. *See* 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, 562 (2006).

228. Michael Gunlicks, *A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 601, 620–21 (2001).

But the subject of a photograph—or, to take it a step further, the couture designer who designed her coat[229]—does not necessarily expect to see her likeness propagated across the internet without her permission[230] or remuneration.[231] Indeed, beyond the subject of the photograph, the couture designer may have a copyright claim since, in some jurisdictions, the garment itself is a copyrightable work.[232] In the Gigi Hadid case described above, Hadid responded to the lawsuit, in part, by arguing that she contributed to the value of the photograph by smiling.[233] In the Oscar Wilde case, a similar line of reasoning was raised unsuccessfully.[234] A person cannot and should not expect to

229. In 2018, rapper Cardi B wore a floral Moschino coat to the Metropolitan Museum of Art Gala and was sued, along with Moschino's creative director Jeremy Scott and Moschino as a company, for posting to their respective social media feeds an image captured by paparazzi. Complaint for Copyright Infringement at 3–4, Splash News & Picture, LLC v. Moschino S.P.A., No 2:19-cv-09220-GW-FFM (C.D. Cal., Oct. 26, 2019). Moschino countersued, alleging among other claims that "[t]he Photographs . . . unlawfully depict the Work (the floral coat), thereby rendering the Photographs unauthorized derivative works that, among other things, lack their own copyright protection and constitute copyright infringements." Answer and Counterclaims by Defendant Moschino S.P.A. to Complaint at 21–22, Splash News & Picture Agency, LLC v. Moschino S.P.A., No. 2:19-cv-9220 (C.D. Cal. Jan. 6, 2020). All claims in this lawsuit were dismissed on March 27, 2020. At least in the United States, photographs of fashion do not generally engender any kind of copyright claim for the fashion designer. Clothing—even couture clothing—is considered functional and therefore not in itself copyrightable. Other jurisdictions handle clothing differently. *See, e.g.*, Violet Atkinson, Viviane Azard, Marie Malaurie-Vignal & William van Caenegem, *Comparative study of fashion and IP: Copyright and designs in France, Europe and Australia*, 11 J. INTELL. PROP. L. & PRAC. 518 (2016).

230. In addition to permission, attribution is also often absent from photographs. Although this Article raised attribution in this analysis, the Author acknowledges here that the Article is not squarely addressing the issue because the Author believes that would comprise another large analysis incorporating, among other issues, American implementation of Berne's moral rights requirement, the Beijing Treaty's Article 5 on moral rights, and the different strains of moral rights that exist in different jurisdictions. Given the breadth of this topic on its own, and the ambition of this proposal without that complication, this Article will not address it here.

231. This Article does not seek to cast all paparazzi in the same light or undertake any other kind of stringent finger-pointing. There are several accounts of paparazzi collaborating with their subjects to meet at a certain time and place, for example, demonstrating a situation under which the parties understand and assent to the mutual benefit to be gained by a paparazzo claiming sole authorship and ownership of the photographs.

232. *Moschino Counterpunches on Cardi B Paparazzi Pic*, BAKER HOSTETLER: AD-TTORNEYS LAW BLOG (Feb. 13, 2020), https://e.baker-law.com/rv/ff005a066af3c548c798c4e854488800bc8f36dc/p=8132535 [https://perma.cc/3HR2-NQKP].

233. Memorandum of Law in Support of Defendant's Motion to Dismiss at 13, Xclusive-Lee, Inc. v. Hadid, No. 19-CV-520, 2019 U.S. Dist. LEXIS 119868 (E.D.N.Y., July 18, 2019).

234. This line of rationale was argued unsuccessfully in the Oscar Wilde case, under which the "protagonists in Burrow-Giles's drama were Nature, the Sun, and the Camera, none of which qualify as an 'Author.'" Kogan, *supra* note 19, at 890. One might add God to this mix if one wants to argue that a human being is copyrightable.

benefit from copyright protection for simply existing in the world; he or she must contribute some copyrightable expression.

On the other hand, presumably the model dressed herself that day—costume selection being one of the creative factors specified by the Supreme Court[235]—and otherwise styled her hair and makeup. As Professor Rosati notes, the model is the bottom-line reason the photograph is interesting or valuable.[236] It would not matter enormously for reproduction in a magazine or a social media feed whether Irving Penn or a tourist pressed the shutter; the photograph's value is, on some level, due to its subject and whatever creativity she displayed in the moment.[237] The Supreme Court did not say that its list of sample creative factors[238] was exhaustive. With respect to the context of analyzing paparazzi photos, it is significant that the Court mentioned "costume" and "other various accessories" as potentially copyrightable choices.[239] When a celebrity makes these and other selections on her own or with a stylist, any element of creativity—and therefore copyrightability—must remain with the celebrity.

3. Ownership Versus Authorship

Copyright authorship does not always equate to copyright ownership, and that can be due to contractual arrangements or as a function of law.[240] Annemarie Bridy, former professor of law at the University of Idaho College of Law, has argued that subjects of paparazzi photographs should benefit from an implied license to make limited, unauthorized uses of the photographs taken of them.[241] She noted that "implied license" is a well-established defense to a claim of copyright infringement, based in theories of equity and unjust enrichment, and is clearly applicable to the cases presented here.[242] Referring to the Hadid example above, Bridy argues that Hadid's contributions to the photo's aesthetic and commercial value equaled or even exceeded those of the photographer.[243] In Bridy's view, to deny

235. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 54, 60 (1884).

236. Rosati, *supra* note 135.

237. *See* Kwall, *supra* note 44; Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 452 (S.D.N.Y. 2005).

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

239. Rosati, *supra* note 135.

240. 17 U.S.C. § 106A.

241. Annemarie Bridy, *A Novel Theory of Implied Copyright License in Paparazzi Pics*, LAW360 (Aug. 6, 2019), https://www.law360.com/articles/1185445/a-novel-theory-of-implied-copyright-license-in-paparazzi-pics [https://perma.cc/AN2G-TVEL].

242. *Id.*

243. *Id.*

Hadid a limited implied license to use the photograph of herself would be unjust due to her contribution and also due to the exploitative nature of paparazzi photography generally.[244]

Nevertheless, an implied license approach to joint authorship suffers from two problems. The first is that copyright law should reward creativity with exclusive rights. Providing less to photograph subjects may set a precedent that prejudices creators in unorthodox or currently unrecognized media.[245] The second problem is that moral rights could attach to exclusive rights.[246] In the United States, although the moral rights of attribution and integrity only attach to a narrow set of visual works by way of VARA,[247] they are mandated by international treaties and under review for potential expansion.[248] In any case, fine art photographers can already benefit from VARA's protections.[249] If a portrait subject were provided with these rights, she could potentially both ensure that her name is (or is not) associated with a photograph of her; and she could also object to one that is prejudicial to her reputation.[250] Although these types of rights are not yet normalized across the full set of existing authors, photographic subjects should not be relegated to a class of authorship that is barred from enjoying these rights.

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244. *Id.*

245. *See* U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 143 (Apr. 2019) [hereinafter AUTHORS, ATTRIBUTION, AND INTEGRITY], available at https://www.copyright.gov/policy/moralrights/full-report.pdf [https://perma.cc/9JAH-HJ7X].

246. *Cf. id.* at 38 (explaining the ways in which a broad, exclusive moral right would upset the current patchwork moral rights framework).

247. 17 U.S.C. § 106A.

248. *See, e.g.*, AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 245, at 5 ("VARA provides limited moral rights of attribution and integrity to authors of qualifying 'works of visual art.'"). Specifically, it protects a qualifying artist's right to claim or disclaim authorship in a work, and provides a limited right to prevent the distortion, mutilation, or modification of a work, as well as preventing the destruction of a "work of recognized stature." *Id.* The first proposed change would clarify that VARA's exclusion for "commercial art" is limited to artworks both created pursuant to a contract and intended for commercial use. *Id.* The second proposed change would add language clarifying how courts should interpret the "recognized stature" requirement, requiring courts to consult a broad range of sources. *Id.*

249. A work of visual art is "a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author." 17 U.S.C. § 101. For the rights that inhere in an author of a work of visual art, see also 17 U.S.C. § 106A.

250. *Id.*

D. When Copyright Subsists in Creative Works

While photographs are copyrightable, they must exhibit adequate originality before copyright can subsist.[251] This is true for all copyrightable works, no matter the medium.[252] Different countries require different thresholds of originality, and, so long as any originality can be found, copyright tends to subsist.[253] In the United States, *Mannion v. Coors Brewing Co.* from the Southern District of New York[254] highlights three separate ways in which a photograph may be copyrightable: rendition, timing, and "creation of the subject."[255]

The first category is "rendition."[256] Judge Kaplan, writing the court's decision, noted:

> First, 'there may be originality which does not depend on creation of the scene or object to be photographed . . . and which resides [instead] in such specialties as angle of shot, light and shade, exposure, effects achieved by means of filters, developing techniques etc.' I will refer to this type of originality as originality in the rendition because, to the extent a photograph is original in this way, copyright protects not what is depicted, but rather how it is depicted.[257]

This category fits nicely with copyright law's overarching goals and elegantly parallels the signals of originality, requiring "some minimal degree of creativity" or "slight amount" of creative expression, that the Copyright Office or a court look for in any given medium.[258]

With respect to timing, the court noted:

> [A] person may create a worthwhile photograph by being at the right place at the right time. I will refer to this type of originality as originality in timing. . . . A modern work strikingly original in timing might be *Catch of the Day*, by noted wildlife photographer Thomas Mangelsen, which depicts a salmon that appears to be jumping into the gaping mouth of a brown bear at Brooks Falls in Katmai National Park, Alaska. An older example is Alfred Eisenstaedt's photograph of a sailor kissing a young woman on VJ Day in Times Square, the memorability of which is attributable in significant part to the timing of its creation.[259]

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251. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 347 (1991).

252. 17 U.S.C. § 102(a).

253. *Feist,* 499 U.S. at 347.

254. Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444 (S.D.N.Y. 2005).

255. *Id.* at 452–53.

256. *Id.* at 452.

257. *Id.*

258. U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 308.2 (3d ed. 2021), available at https://www.copyright.gov/comp3/docs/compendium.pdf [https://perma.cc/Y5SD-DSUW].

259. *Mannion*, 377 F. Supp. 2d at 452–53.

This category is less persuasive as a whole, at least standing on its own.[260] The jumping salmon and Times Square kiss photographs may still be original for purposes of copyright law, but their originality does not solely seem to stem from the photographer's "timing."[261] To wait for hours on end for a fish to jump out of the water where one's camera is placed amounts to the "sweat of the brow" standard, which has slowly been ironed out of most jurisdictions' originality analyses.[262] By itself, capturing an image at a specific time does not reflect originality insofar as it is not due to the photographer's creativity.[263] When combined with other rendition-oriented elements, however—the angle of the camera, the background against which the jumping fish is photographed, or the type of lens selected to capture such a shot, for example[264]—these elements all demonstrate at least some measure of the "author's own intellectual creation," which is the correct standard for measuring originality.[265] That artificial intelligence and other technology can now do the proverbial "waiting for the right moment" on behalf of humans also tends to demonstrate that the "right place and time" factor does not by itself signal originality.[266]

An interesting counterpoint to this line of thinking is the work of celebrated French photographer Henri Cartier-Bresson, whose photographs he credited to the "decisive moment."[267] Yet, Cartier-Bresson's style evinced creative expression beyond simply waiting for the right moment. He eschewed careful preliminary steps in

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260. For a thoughtful reflection on the element of timing in light of today's technology, see, e.g., Jani McCutcheon, *Point and Shoot: Originality, Authorship, and the Identification of the Copyright Work in Modern Photography*', 43 SYDNEY L. REV. 163, 177 (2021) ("With the advent of digital photography and continuous shooting mode, the photographer can shoot away with minimal expense and effort, and with little judgment, and no concept of wastage. This is the difference between a single, carefully shot arrow and a scattergun of bullets, or a single harpoon compared to a fishing net. Analogies with the photographer as hunter are germane. . . . Perhaps we can locate originality in today's progressive photography in the photographer's choice of the range of time and the action occurring within it, shifting from the decisive moment to the decisive period.").

261. *Id.* at 174.

262. *See, e.g.,* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 352–53 (1991).

263. *See, e.g.,* Feist, 499 U.S. at 346.

264. *Mannion*, 377 F. Supp. 2d at 452. For an example of professional photographers' tips on how to effectively photograph wildlife, see, e.g., *Wildlife Photography Tips & Techniques*, OUTDOOR PHOTOGRAPHER, https://www.outdoorphotographer.com/tips-techniques/wildlife-techniques/ [https://perma.cc/R5H2-J3ZP]. A successful photograph will benefit from choices among various exposure and lens setting possibilities, for example. *Id.*

265. *Feist,* F. Supp. 2d at 362; *Mannion*, 377 F. Supp. 2d at 452.

266. *Mannion*, 377 F. Supp. 2d at 452–53.

267. Henri Cartier-Bresson, *Images à la Sauvette*, MODERNISM101.COM, https://modernism101.com/products-page/art-photo/cartier-bresson-henri-images-a-la-sauvette-paris-editions-verve-1952-the-decisive-moment-first-edition/#.Y1vtWezMI-S [https://perma.cc/2XA9-LQFX] (last visited Oct. 18, 2022).

taking his photographs, preferring to approach his work organically, ready to record a fleeting expression.[268] His work, although lightning-fast, was perfectly composed such that he could "make a story out of a stranger's casual gesture or a fleeting confluence of shadow and reflection."[269]

What the photographer's self-described style modestly misses is his own "intuition" and eye for the "perfect composition" reflected in each photograph.[270] He did not sit and wait for something to happen so much as he sought out subjects to capture at a time and place he felt was artistically meaningful.[271] Although photographing a stranger running through a puddle behind a train station[272] does not, in its textual description, sound particularly creative, Cartier-Bresson's framing, timing, and eye for interesting human moments reveal creativity. Furthermore, his timed photographs exhibit a different aptitude than a paparazzi photograph or even a jumping salmon photograph.[273] It is "timing," of course, but it is also "rendition."[274]

A recent argument that timing might, on its own, be adequate for purposes of demonstrating originality in photography is found in the recent Second Circuit decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*.[275] In deciding that Andy Warhol's graphical interpretation of Lynn Goldsmith's photograph of Prince was not a fair use, the court stated:

> As applied to photographs, this protection encompasses the photographer's 'posing the subjects, lighting, angle, selection of film and camera, evoking the desired

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268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. Henri Cartier-Bresson, *Behind the Gare Saint-Lazare, Paris* (photograph) (1932), https://www.sothebys.com/en/buy/auction/2022/photographs-3/behind-the-gare-saint-lazare-paris [https://perma.cc/LV99-DHQZ].

273. Markus Jaaskelainen, *The Decisive Moment: The Life and Photography of Henri Cartier-Bresson*, MARKUS JAASKELAINEN (Apr. 3, 2018), https://markusjaaskelainen.com.au/the-decisive-moment-the-life-and-photography-of-henri-cartier-bresson/#nav-mobile [https://perma.cc/2495-TG9A].

274. Leo Lubow, *Henri Cartier-Bresson: Finding a Decisive Moment for The Waiting Stage*, LUBOW PHOTOGRAPHY (Aug. 6, 2011), https://lubowphotography.com/2011/08/henri-cartier-bresson-finding-a-decisive-moment-for-the-waiting-stage/ [https://perma.cc/8YG5-WTBQ] ("Like many of Cartier-Bresson's images, there's more going on . . . than perfect timing . . . Regardless of how much time Cartier-Bresson waited to capture the image we see in this photograph, the setting is a good example of what I'll call a 'waiting stage.' Sometimes, as we walk through the world, we come upon a scene that is ripe for something special; all that is needed is an actor to enter and hit the mark in our mind's eye. . . . More often than not, in the best of the Cartier-Bressons, the background is every bit as important as the subject.").

275. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 992 F.3d 99, 118 (2d Cir. 2021).

> expression, and almost any other variant involved.' The cumulative manifestation of these artistic choices—and what the law ultimately protects—is the image produced in the interval between the shutter opening and closing, *i.e.*, the photograph itself. This is, as we have previously observed, the photographer's 'particular expression' of the idea underlying her photograph.[276]

Professor Jane Ginsburg, in reviewing the case and focusing on the "particular expression" language, observed that timing, even on its own, is a protectable element of an original work of photographic authorship.[277] In Professor Ginsburg's view, the Second Circuit does not limit the timing aspect to being dependent on rendition or anything else; timing can stand on its own.[278] While the French approach (more or less negating this idea) exists more logically with the requirements for originality absent a sweat of the brow prong, this interpretation of the case reflects current US law—at least, until the Supreme Court issues its opinion in the *Warhol* case on appeal.[279]

With respect to "creation of the subject," the *Mannion* court reiterated that a copyright does not confer any rights over the subject matter in a photograph; copyright subsists solely in the photograph itself.[280] Like the first category of originality possibilities, the third category hews closely to what copyright law aims to protect: creativity.[281]

While the photographer can most strongly express creativity by influencing the subject, the subject's creative self-determination makes a strong argument for authorship, too. In the *Mannion* case, in explaining its analysis, the court noted that the photographer's orchestration of the photograph and instruction to the subject contributed to the photograph's originality as a whole, as did the "man, sky, clothing, and jewelry in a particular arrangement."[282] In other words, it was the totality of the photographer and his subject along with the background, costume, and other factors that make the photograph what it is.[283]

Furthermore, underlying the "creation of the subject" element is "the principle that copyright . . . confers no rights over the subject

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276. *Id.*

277. Jane C. Ginsburg, *US Second Circuit Court of Appeals Tames 'Transformative' Fair Use; Rejects 'Celebrity-Plagiarist Privilege'; Clarifies Protectable Expression in Photographs*, 16 J. INTELL. PROP. L. & PRAC. 638, 645 (2021).

278. *Id.*

279. *Warhol*, 142 S. Ct. at 1412.

280. Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 453 (S.D.N.Y. 2005).

281. *Id.* at 454.

282. *Id.* at 455.

283. *Id.*

matter."[284] This only further confirms that the originality in a photograph must partly depend on the creativity of its subject (unless, of course, he or she is directed by the photographer). When a photographer shoots a tree, his creativity can be found in any number of decisions and artistry—the angle of the sunlight, the aperture of the lens, the angle of the approach, the inclusion of other objects, etc.[285] But he cannot prevent anyone else from photographing that tree,[286] and the copyrightable originality of his photograph does not include the majesty (or deterioration or fall foliage or any other qualities) of the tree itself. The same is true of a person unless the photographer has played a role in adorning or directing that person. The photographer cannot claim originality in the person's qualities and must point to other choices or qualities that differentiate his photograph from any other potential photographer's take on the subject.[287]

1. A Gray Area: The Selfie

These three potential modes in which a photograph may be copyrightable were offered before the rise of the "selfie,"[288] and the selfie introduces new lines of inquiry because it conflates the photographer and the subject in a single person. The question of whether a selfie is vested with copyright protection may not arise in the courts precisely because the photographer and the subject are generally the same person, although other people may be included in a selfie. However, analyzing what could make a selfie copyrightable assists in further supporting the argument that photographic subjects may be co-authors. If the classic construction of a copyrightable photograph includes attributes like lighting, lens selection, and framing of the subject—all "rendition" qualities—then a selfie-taker would have difficulty, in most cases, demonstrating that she had thought through those things while taking the picture.[289] This will not always be the case—certainly, it is possible to hold the camera in a particularly creative way such that the lens captures something beyond what merely flipping the phone around would capture. Timing the photograph to be taken in tandem with something taking place in the background, for example, may also contribute to the photograph's creativity. More commonly, however, it is what the subject expresses by way of facial expression and

284. *Id.* at 453.
285. *Id.* at 452.
286. *Id.*
287. *Id.* at 455.
288. *See id.* at 452; Reed, *supra* note 221, at 571.
289. *See Mannion*, 377 F. Supp. 2d at 452–53.

pose—"creation of the subject" qualities—that exhibits creative expression.[290] This creative contribution, in combination with the range of other copyrightable expressions if not on its own, argues further in favor of the potential status of co-author of the photographic subject. Professor Justin Hughes explored this concept briefly and noted that poses and facial expressions are candidates for expressive aspects of a selfie, and those are made by the subject.[291] A smile by itself is not copyrightable, but a smile combined with a pose, camera angle, lighting, and background could comprise creative expression that contributes to the copyrightable whole.[292] If a selfie's creativity lies in what the subject does or expresses, this argues in favor of subjects being legal co-authors of other portrait photographs.

E. When Copyright Does Not Subsist in Creative Works

1. Lack of Demonstrable Creativity or Authorial Activity

Not every photograph is—or should be—copyrightable, just as not every sentence or paint daub is copyrightable. While the threshold for originality is low for purposes of copyright protection,[293] it does exist, and its cornerstone is that the resultant work exhibits some minimal degree of creativity and is the author's own intellectual creation.[294] Until 1999, though, a looser standard for determining originality in photographs existed as a touchstone for this issue, described by *Graves' Case*, an 1869 decision from the United Kingdom that stood unchallenged for decades and uncontradicted by other countries' laws.[295] There, Judge Blackburn, in the controlling opinion, found that any photograph, including a photograph of an existing picture, was

290. *See id*. at 453–54.

291. Justin Hughes, *Gorgeous Photograph, Limited Copyright*, *in* ROUTLEDGE COMPANION TO COPYRIGHT AND CREATIVITY IN THE 21ST CENTURY 12 (Michelle Bogre & Nancy Wolff eds., 2020).

292. *See Mannion*, 377 F. Supp. 2d at 454.

293. *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 308 (3d ed. 2021) ("Originality is 'the bedrock principle of copyright' and the very premise of copyright law."); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) ("To qualify for copyright protection, a work must be original to the author,' which means that the work must be 'independently created by the author' and it must possess 'at least some minimal degree of creativity.").

294. *Feist*, 499 U.S. at 362. Note, also, that while this textual construction ("author's own intellectual creation") is European, it generally works outside of Europe as well, including in the United States. *See* Molly Stech, *The Semantics of Authorial Originality: Four Pillars*, 29 TEX. INTELL. PROP. L.J. 235, 235 (2021).

295. Grave's Case (1869) 4 QB 715; *see* SIMON STOKES, ART AND COPYRIGHT 129–30 (Hart Publ'g, 3d ed. 2021).

original for purposes of the Fine Art Copyright Act of 1862, since all photographs are copies of whatever they capture.[296]

This approach remained and arguably lingers in the United Kingdom.[297] But a 1999 district court case from the Southern District of New York encapsulates a different approach and demonstrates that copyrightability does not always exist in photographs. In *Bridgeman Art Library v. Corel Corp.*,[298] the court ruled that precise photographic copies of public domain images could not be protected by copyright in the United States because those copies lacked originality.[299] The decision recognized that accurate reproductions of these images likely necessitated appreciable skill, experience, and effort, but it also highlighted that these were insufficient and that *originality* determined the copyrightability of the work.[300] This decision is relevant to the discussion of photographs of individuals both in the United States and in other jurisdictions because it provides a useful reminder that photographs, no matter the time, skill, and effort they required, may not be copyrightable.[301] The photographer must still demonstrate his or her own creativity beyond what the subject conveys.[302] Otherwise, courts will recognize that the threshold of originality has not been

296. *Grave's Case*, *supra* note 295, at 723.

297. *See, e.g.*, KEVIN GARNET, JONATHAN RAYNER JAMES & GILLIAN DAVIES, COPINGER AND SKONE JAMES ON COPYRIGHT 3-104 (Sweet & Maxwell, 14th ed. 1999) ("Provided that the author can demonstrate that he expended some small degree of time, skill and labour in producing the photograph (which may be demonstrated by the exercise of judgement as to such matters as the angle from which to take the photograph, the lighting, the correct film speed, what filter to use, etc), the photograph ought to be entitled to copyright protection, irrespective of its subject matter."). For a fuller treatment of the similarities and differences among US, UK, and European law in the last several decades, see STOKES, *supra* note 295, at 126–41.

298. Bridgeman Art Libr. v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

299. *Id.* at 199.

300. *Id.* at 197–98.

301. *See* STOKES, *supra* note 295, at 135.

302. *Bridgeman Art Libr.*, 36 F. Supp. 2d at 196–97. The *Bridgeman* decision is not without controversy or critique. *See, e.g.*, Mitch Tuchman, *Inauthentic Works of Art: Why* Bridgeman *May Ultimately Be Irrelevant to Art Museums*, 24 COLUM.-VLA J.L. & ARTS 287, 312 (2001); Robin J. Allan, *After* Bridgeman*: Copyright, Museums, and Public Domain Works of Art*, 155 U. PA. L. REV. 961, 963 (2007). This has been solidified in Europe by way of Article 14 of the 2019 Digital Single Market Copyright Directive, which states

> Member States shall provide that, when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation.

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, art 14, 2019 O.J. (L 130) 92, 118. For an interesting commentary on the article and its reception by various stakeholders, see STOKES, *supra* note 295, at 140–41.

reached, and they will be hesitant to declare the work sufficiently creative for purposes of copyright protection.[303]

III. ANALOGOUS TREATMENT OF PERSONS IN FRONT OF A CAMERA: THE BEIJING TREATY

The Beijing Treaty, which the United States has signed but not ratified, provides copyright protection for film actors.[304] These actors demonstrate similar creativity to photographic subjects insofar as they exhibit copyrightable creativity that captures their viewers' interest, with or without the explicit orchestration of a film director or cameraman.

In 2019, Professor Justin Hughes published a valuable overview of the ways in which film actors can be authors for purposes of copyright law.[305] He helpfully undertakes an examination of what actually happens on a television or movie set and demonstrates the creativity expressed by actors in collaboration with producers and others.[306] One issue that he raises and discredits is the notion that too many authors in a given movie, for example, would make administration of copyright impossible.[307] The so-called "cast of thousands" or "millefeuille" problem diminishes substantially when considering that large productions like a movie are governed by contract; that any authorship claim would fail for only "*de minimis*" contribution; and that many other issues can be, and are, solved by way of the work made for hire doctrine or a theory of implied license.[308] The credits listed at the end of contemporary films

303. *Cf. Bridgeman Art Libr.*, 36 F. Supp. 2d at 196–97.

304. THE "BEIJING TREATY IMPLEMENTATION ACT OF 2016" STATEMENT OF PURPOSE AND NEED AND SECTIONAL ANALYSIS, U.S. PAT. & TRADEMARK OFF. (2016), available at https://www.uspto.gov/sites/default/files/documents/Beijing-treaty-SOPAN-sectional-analysis.docx [https://perma.cc/RA9V-XGJB].

305. Hughes, *supra* note 143, at 1.

306. *Id.* at 39–41.

307. *Id.* at 39; *see also* Mathilde Pavis, *The Author-Performer Divide in Intellectual Property Law: A Comparative Analysis of the American, Australian, British and French Legal Frameworks* (Mar. 2016) (Ph.D. thesis, University of Exeter) ("[I]t is submitted that the web of claims that copyright dispositions have created is no less complex or layered than provisions protective of performers' interests. The multiplicity of titles and the risk of competing rights were embedded at the core of the legal concept of authorship the moment legislators opted for a copyright covering all future uses of the work and allowed the assignment of those sub-rights independently from one another.").

308. Hughes, *supra* note 143, at 50–55.

> Copyright's bedrock requirement of *original expression* prevents most of these people from being in the universe of potential copyright claimants. In normal circumstances, the best boy–an assistant to an electrician on a film crew–would not contribute any original expression to the film. It is the same with an extra in a crowded marketplace

are long, but very few of those individuals will have contributed copyrightable expression to the film.[309] The issue raised here—a photograph of one person or a few people—likely demonstrates an analogously manageable number of interests.

Two interesting Ninth Circuit cases demonstrate a failure of joint authorship interests to inhere in creative contributions in the movies.[310] They have been decided in the absence of US implementation of the Beijing Treaty and show that a more permissive understanding of joint authorship paves the way for US implementation without legislative change.[311] As is the case for photographic subjects, so too have film actors been ignored under copyright law for their creative contributions. In 2000, a Muslim consultant, Jefri Aalmuhammed, was denied joint authorship for his contributions to the Spike Lee-directed movie *Malcom X*.[312] Among the reasons the plaintiff was not awarded joint authorship was his lack of "control over the work, and absence of control is strong evidence of the absence of co-authorship."[313] In other words, according to this court, while he rewrote several specific passages of dialogue and even added new scenes to the movie which were incorporated in the final cut, Aalmuhammed remained a consultant without authorial rights because he did not make any final creative direction or selection as to what would or would not be included.[314] The court found that the plaintiff's creative contributions were insufficient to obtain authorship rights in the movie.[315]

In 2015, the Ninth Circuit decided a case in which an actor, Cindy Lee Garcia, sent Google five takedown notices under the Digital Millennium Copyright Act, claiming that YouTube's hosting of the video infringed her copyright in her audio-visual dramatic performance of a

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> or battle scene: they probably contribute no original expression and, if they do, unauthorized reproduction would likely be *de minimis*.

Id. at 52 (internal citations omitted) (emphasis in original).

309. *Id.* Professor Hughes relies on the *de minimis* requirement, the work for hire doctrine, and implied licensing to point out that the "cast of thousands" problem will rarely, if ever, arise. *Id.* at 50–53.

310. *See id.* at 51–52.

311. *Id.* at 14–15, 33, 64.

312. Aalmuhammed v. Lee, 202 F.3d 1227, 1229–30 (9th Cir. 2000).

313. *Id.* at 1235.

314. *Id.* at 1229–30, 1235.

315. *Id.* at 1233, 1235. Notably, too, the court could not turn to any contract to determine the individuals' respective intentions because Aalmuhammed had not concluded a contract with Spike Lee or with any other relevant entity. *Id.* at 1230.

five-second portion of the short film Innocence of Muslims.[316] The plaintiff sought a copyright interest in her performance, which the Ninth Circuit ultimately denied by finding that it was a "weak copyright claim [that] cannot justify censorship in the guise of authorship."[317] Although the United States had just signed the Beijing Treaty on Audiovisual Performances, the Ninth Circuit did not find Garcia's short performance a separate copyrightable work for which she could claim a legal interest.[318]

In his dissent to that opinion, however, and in recognition of the United States' recent signature to the Beijing Treaty, Judge Kozinski warned that the court was robbing "performers and other creative talent of rights Congress gave them."[319] He highlighted that Garcia's performance was original, fixed, and thus copyrightable subject matter.[320] Judge Kozinski rightly pointed out that the author need not be the one who fixes the creative expression[321]—an important point for subjects of photographs as well. He went so far as to write that the majority opinion "[made] a total mess of copyright law."[322] His dissent demonstrates the unreasonable conclusions that can come from a presumption that creative performances are not eligible for their own copyright protection, separate from the copyright in the film as a whole.[323] In making these assertions, however, Judge Kozinski seemed to rely more on the Beijing Treaty than on prevailing US law.[324]

The essence of the Beijing Treaty is to "require contracting parties to recognize [performance and authorship] rights of nationals of other contracting states."[325] "Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in audiovisual fixations in any manner or form."[326] They equally

316. Garcia v. Google, Inc., 786 F.3d 733, 736 (9th Cir. 2015). This case suffered from complex facts, including that the plaintiff's voice was dubbed with a completely different—and inflammatory—line than the one she read during filming; and the nature of the film incurred death threats against her. *Id.* at 736–37. Justin Hughes has noted about this case that it is "a litigation tale more of fraud and fatwas than clear conclusions on copyright law." Hughes, *supra* note 143, at 4.

317. *Garcia*, 786 F.3d at 736–37, 747.

318. *Id.* at 749–52 (Kozinski, J., dissenting).

319. *Id.* at 749, 751–52.

320. *Id.* at 749.

321. *See id.* at 750. "Did Jimi Hendrix acquire no copyright in the recordings of his concerts because he didn't run the recorder in addition to playing the guitar?" *Id.* at 751.

322. *Id.* at 749.

323. *See id.* at 750, 752.

324. *See id.* at 751–53.

325. NIMMER, *supra* note 19, § 17.01(B)(1)(c)(i).

326. *See* Beijing Treaty on Audiovisual Performances art. 7, *adopted* June 24, 2012, 21 U.S.T. 149 (entered into force Apr. 28, 2020).

enjoy a right of distribution and an explicit right of "making available" their fixed performances.[327] The United States has signed but not ratified the Treaty.[328] Importantly, from a US perspective, the United States negotiated the Treaty on the supposition "that American copyright law provided the possibility that an actor could be an author of an audiovisual work, and that no additional rights or revisions would need to be made to the Copyright Act."[329]

As of December 2022, forty-seven countries have ratified the Beijing Treaty.[330] And, because it has only been in force for two-and-a-half years, no significant jurisprudence on it has yet developed.[331] Because the United States has not ratified the Beijing Treaty, further exploration on the Treaty's influence on US copyright law is not useful,[332] but the Treaty's mere existence suggests that persons on the other side of a camera may be eligible for copyright

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327. *Id.* at art. 8 § 1; *see also* NIMMER, supra note 19, § 17.01(B)(1)(c)(i).

328. NIMMER, supra note 19, § 17.01(B)(1)(c); *see also* Letter from Michelle K. Lee, Under Secretary and Director of the United States Patent and Trademark Office, to (then) President of the Senate Joseph Biden (Feb. 26, 2016), available at https://www.uspto.gov/sites/default/files/documents/Beijing-treaty-package.pdf [https://perma.cc/U6UF-5TR6] (regarding draft legislation to implement the Beijing Treaty entitled the "Beijing Treaty Implementation Act of 2016"). The Treaty remains unimplemented in the United States. *See* NIMMER, supra note 19, § 17.01(B)(1)(c).

329. Hughes, *supra* note 143, at 11. The Beijing Treaty ensures that participating Member States provide in their respective laws that they grant performers four kinds of economic rights for their performances fixed in audiovisual fixations, such as motion pictures: (i) the right of reproduction; (ii) the right of distribution; (iii) the right of rental; and (iv) the right of making available. *See* NIMMER, supra note 19, § 17.01(B)(1)(c)(i); *Summary of the Beijing Treaty on Audiovisual Performances (2012)*, WORLD INTELL. PROP. ORG., https://www.wipo.int/treaties/en/ip/beijing/summary_beijing.html [https://perma.cc/AT24-2L43] (last visited Oct. 24, 2022).

330. WIPO IP Portal, *Contracting Parties, Beijing Treaty on Audiovisual Performances*, WORLD INTELL. PROP. ORG., https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=841 [https://perma.cc/2RLN-NDGR] (last visited Oct. 24, 2022).

331. For the only caselaw discussing the Beijing Treaty, see Garcia v. Google, Inc., 786 F.3d 736 (9th Cir. 2015); Case C-147/19, Atresmedia Corporación de Medios de Comunicación S.A. v. Asociación de Gestión de Derechos Intelectuales (AGEDI) & Artistas Interpretes o Ejecutantes, Sociedad de Gestión de España (AIE), ECLI:EU:C:2020:597, 1–16 (July 16, 2020); C-484/18, Société de Perception et de Distribution des Droits des Artistes-Interprètes de la Musique et de la Danse (Spedidam) PG GF v. Institut National de l'Audiovisuel Joined Parties: Syndicat Indèpendant des Artistes-Interprètes (SIA-UNSA), Syndicat Français des Artistes-Interprètes (CGT), ECLI:EU:C:2019:970, 1–10 (Nov. 14, 2019).

332. NIMMER, *supra* note 19, § 17.01(B)(1)(c). For an insightful look at how actors are overlooked in current US law, see Howes, *supra* note 76, at 109.

> [W]ithout being a copyright owner, an actor cannot stop the unauthorized distribution of their image or likeness. It is the role of the judiciary to correct this mistreatment of the law. When the court rejects, without exception, an actor's performance as a matter of law, the court is depriving an actor control over his or her work, and is degrading an actor's economic potential.

Id.

protections down the line, should the Treaty attract the attention of US lawmakers.

IV. CONCLUSION

Certain portrait photographs, the subjects of which are clearly individual persons, may be works of joint (or "contributing") authorship for purposes of copyright law.[333] Original expression is the substratum on which copyright law is built, and its purpose and structure only make sense when authorship subsists in all individuals who contribute original expression to the final work.[334] That contribution need not be evidenced by a contract but should be perceivable by scrutinizing the work itself.[335]

Copyright law sometimes requires that works undergo close inspection by copyright users and by courts in order for the courts to determine whether the work is copyrightable or whether it infringes on an existing work.[336] A work's authorship status is no less important. In many photographs of individual people, the person photographed will have contributed original expression by selecting clothing, offering a certain facial expression, arranging the head or limbs in a certain way, or by any number of other manifestations of originality in their specific, fixed aggregate.[337] That is not to say that a smile is copyrightable, but that an individual's smile at a given point in time as captured by a specific photographer *is* potentially copyrightable.[338] Put more simply, a photograph's overall originality may be due to the photographer *and* the subject.[339] Whereas a photographer may select the lighting, background, and lens to capture his subject, so might the subject make a series of selections regarding how he presents himself to that lens.

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333. *See* Bregenzer, *supra* note 44, at 451–52.

334. Hughes, *supra* note 143, at 36, 52.

335. *See* Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991); Bregenzer, *supra* note 44, at 449, 451; *see, e.g.*, Hughes, *supra* note 143, at 50–51.

336. *See, e.g.*, Rich Stim, *Measuring Fair Use: The Four Factors*, STANFORD LIBRARIES: COPYRIGHT AND FAIR USE, https://fairuse.stanford.edu/overview/fair-use/four-factors/ [https://perma.cc/B6TT-FRXV] (last visited Oct. 24, 2022) (explaining how courts determine copyright and infringement).

337. *Id.* at 451, 478.

338. *See* Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 455 (S.D.N.Y. 2005).

339. *See* Hughes, *supra* note 291, at 79–80. Like the proverbial vodka bottle in the *Ets-Hokin* example, the particular smile, pose, and clothing combination captured in a given photograph would be limited to verbatim copying. *See supra* note 223; Ets-Hokin v. Skyy Spirits Inc., 323 F.3d 763, 766 (9th Cir. 2003). This keeps a smile from being copyrightable, just as it keeps a vodka bottle from being copyrightable. *See id.* The copyright is limited to the overall photograph in which the work is captured. *See* Hughes, *supra* note 291, at 83.

That symbiosis is what creates a compelling and copyrightable photograph.[340]

A court need not always find equal joint authorship—although that would be plausible in certain cases. It could also find contributing authorship and could allocate certain nonexclusive rights to the subject without materially prejudicing the photographer's rights, and it could require each party to identify the other in a nod to the attribution right.[341] This construction—already viable under existing law—could resolve recent lawsuits in which paparazzi have sued their subjects for reposting their likenesses to their social media feeds.[342] More importantly, it would reward creative expression for those who contribute it without excluding the very people whose likeness is being captured, reproduced, and distributed. Originality is the *sina qua non* of copyright law, and subjects are the *sina qua non* of portrait photographs. These subjects therefore deserve exclusive rights of their own.

340. *See* Bregenzer, *supra* note 44, at 451, 478.

341. *See* Hughes, *supra* note 143, at 67–68.

342. *See id.* at 67; Complaint at 3–4, Splash News & Picture, LLC v. Moschino S.P.A., No. 2:19-cv-09220-GW-FFM (C.D. Cal., Oct. 26, 2019).