

NEW YORK UNIVERSITY
JOURNAL OF INTELLECTUAL PROPERTY
AND ENTERTAINMENT LAW

VOLUME 8

FALL 2018

NUMBER 1

ANALYZING *AALMUHAMMED V. LEE* IN THE CONTEXT
OF ENTERTAINMENT INDUSTRY EMPLOYMENT

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In Aalmuhammed v. Lee, the Ninth Circuit established a test for determining whether an individual contributor to a work may qualify as a joint author. The test identified three main factors: 1) the author must superintend the work by exercising control; 2) the putative co-authors must make objective manifestations of a shared intent to be co-authors; and 3) the audience appeal of the work must turn on both contributions and the share of each in its success cannot be appraised. Applying these factors, the court concluded that authorship rights could not be granted to a film consultant hired to assist in the creation of the film Malcolm X despite his sizable contributions to the final product.

By analyzing the unique interplay between intellectual property rights and entertainment industry employment law, this Note explores the harmful effects of the Aalmuhammed test on employment and unions across all types of entertainment works. The Note argues that the Ninth Circuit's test hinders, rather than furthers Congress's explicit constitutional duty to promote the growth of the arts. In doing so, the test establishes a dangerous precedent that is incompatible with the modern operation of the entertainment industry and paradoxically is detrimental to the very people it intends to protect: creators. The Note concludes that the Aalmuhammed

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test should no longer serve as the standard courts rely on to determine authorship rights and offers various proposals for reform.

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INTRODUCTION

It may take two to tango, but it takes far more than two to make a film, television show, or music video. It is show business, after all. The rolling credits at the end of Denzel Washington's motion picture *Fences* or an episode of the hit television show *Game of Thrones* exemplify the vast number and diverse array of participants involved in the creative process. From makeup artists to background dancers to even the boom mic operator, any set will undoubtedly be filled with various creative contributors. The credits may fail to accurately portray, however, the frequency at which individuals in the entertainment industry step outside of their

designated roles. A background dancer may suggest new choreography or a film consultant can rewrite entire scenes, partaking in the collaborative process in non-stereotypical ways and influencing the direction or even the outcome of the work. This fluidity has freed the entertainment industry from having to stick to the script, allowing the creative process to thrive in an unbound, collaborative environment.

While such flexibility has fueled Hollywood for decades, it has also led many entertainment industry participants to litigate claims over the authorship rights to various creations. Recent litigation has explored this exact issue: who is an author of the work for the purposes of copyright law? In this capacity, the law of intellectual property plays a formidable role in the entertainment industry because of its ability to either grant or deny authorship status to creators. *Aalmuhammed v. Lee*¹ exemplifies the ambiguity surrounding which contributors can walk away with authorship rights. In this case, a film consultant that presented evidence that he independently wrote at least two entire scenes, translated Arabic into English for subtitles, and participated in editing tried to gain copyright to the motion picture, but was unable to do so because he was not found to be a joint author to the work.² In coming to this decision, the Ninth Circuit articulated a three-factor test to determine whether an individual qualifies as a joint author to a work.³ However, as this note will show, this test has proven to be inconsistently applied throughout the courts, leading both to confusion and a lack of direction when providing guidelines for determining authorship.

In this Note, I argue that the joint authorship test established by the Ninth Circuit is problematic, particularly with respect to the entertainment industry. Part I addresses the current copyright law landscape regarding authorship following *Aalmuhammed*. Part II showcases the recent inconsistent and ambiguous applications of the *Aalmuhammed* test, specifically of the audience appeal factor, as applied to different types of entertainment content, including screenplays, songs, and music videos. Part III introduces the interplay between intellectual property rights and entertainment industry employment law. Part IV discusses how the *Aalmuhammed* test is inconsistent with the modern operation of the entertainment industry. It argues that the application of the test yields negative effects on entertainment industry employment and unions. Part V offers resolutions to this problem by discussing various proposals for reform. This Note concludes that the

¹ *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000).

² *Id.* at 1230.

³ *Id.* at 1234.

Ninth Circuit’s *Aalmuhammed* test is not only incompatible with the functions of the entertainment industry, but also detrimental to employment in the industry, further demonstrating the need for reform.

I. COPYRIGHT LANDSCAPE

A. 1976 Copyright Act

The United States Constitution promulgates the Copyright Clause under Article I, Section 8, Clause 8. The Copyright Clause specifies that one of the powers of Congress is “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁴ Notably, included within this delegation of power is the specification that Congress is empowered to provide copyright protection to “authors.”⁵

The prevailing statute for copyright law in the United States is the 1976 Copyright Act, (“The Act”).⁶ Oddly, the words “author” and “authorship” have yet to be defined, despite their presence in the Copyright Clause and importance to the statutory scheme. Joint works, however, are defined 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.”⁷ Because “authorship” is left undefined, the legislative history surrounding the definition and inclusion of “joint work” is often used to shed light on the congressional intent behind the term. The House Report describes that the “touchstone” of the joint work question “is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit, although the parts themselves may be either ‘inseparable’ (as the case of a novel or painting) or ‘interdependent’ (as in the case of a motion picture, opera, or the words and music of a song).”⁸

The Act lists the different types of works of which authors may claim authorship. Works of authorship include the following categories: literary works,

⁴ U.S. CONST. art. I, § 8, cl. 8.

⁵ *Id.*

⁶ *See generally*, 17 U.S.C. §§ 101 et seq. (2012).

⁷ *Id.* § 101.

⁸ H.R. REP. NO. 94-1476, at 120 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736.

musical works (including any accompanying words), dramatic works (including any accompanying music), pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works.⁹ Under section 101, each of these categories is individually defined.¹⁰ Motion pictures, for example, are defined as “audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.”¹¹

B. Joint Authorship in the Ninth Circuit: Aalmuhammed v. Lee

Beginning in 1991, Warner Brothers along with Spike Lee and his production companies, entered into a contract to make the film *Malcom X*, based on the book *The Autobiography of Malcom X*.¹² Lee served as the director, co-writer, and co-producer of the film. The film’s leading actor, Denzel Washington, played Malcom X. Washington sought out Jefri Aalmuhammed to assist with the role specifically because Aalmuhammed had previously made a film about Malcom X, and was known to be well-informed and knowledgeable about the leader’s life.¹³

Although Aalmuhammed did not have a contract with Warner Brothers or the director, he still wanted to be credited as the co-writer of the film. In his complaint, he cited evidence showing that his involvement with the film was substantive.¹⁴ Aalmuhammed’s evidence revealed he had reviewed the shooting script, suggested extensive script revisions, directed Washington and other actors, “created at least two entire scenes with new characters, translated Arabic into English subtitles, supplied his own voice for voice-overs, selected the proper prayers and religious practices for the characters, and edited parts of the movie during post production.”¹⁵

Aalmuhammed subsequently sought a copyright with the U.S. Copyright Office. The Office issued him a “Certificate of Registration,” but noted there were conflicting previous registrations of the film. On November 17, 1995, he filed suit

⁹ 17 U.S.C. § 102.

¹⁰ *Id.* § 101.

¹¹ *Id.*

¹² *Aalmuhammed v. Lee*, 202 F.3d 1227, 1229 (9th Cir. 2000).

¹³ *Id.*

¹⁴ *Id.* at 1230.

¹⁵ *Id.*

against Spike Lee, Lee's production companies, and Warner Brothers alleging a variety of claims: breach of implied contract, quantum meruit, unjust enrichment, and federal and state unfair competition claims. Lee sought declaratory relief and an accounting under the Copyright Act.¹⁶ Most of these claims were dismissed under a motion to dismiss or on summary judgment.¹⁷ In February 2000, the Ninth Circuit heard argument in the case. The court heard the copyright claim, the quantum meruit claim, and the unfair competition claim.¹⁸

The court first addressed Aalmuhammed's joint authorship claim. To determine whether the motion picture qualified as a joint work, the court looked to the definition and language of "joint work" in the Act. It concluded that for a work to qualify as a joint work it must: 1) be a copyrightable work; 2) by two or more "authors;" 3) the authors must intend their contributions to be merged into inseparable or interdependent parts of a unitary whole; and 4) each author is required "to make an independently copyrightable contribution" to the disputed work.¹⁹

The court found that Aalmuhammed had established a genuine issue of fact for three of the four elements of a "joint work." Specifically, the court noted that *Malcolm X* was a copyrightable work and intended to be a unitary whole. Aalmuhammed's evidence that he "rewrote several specific passages of dialogue that appeared in the film" and "wrote scenes relating to Malcolm X's Hajj pilgrimage that were enacted in the movie" was credited by the court as a copyrightable contribution.²⁰ Further, all parties involved had the intent that Aalmuhammed's contributions would be merged into interdependent parts of the movie as a unitary whole.²¹ Despite the fact that Aalmuhammed readily met these standards, the court ultimately held he did not qualify as an "author" for the purposes of the Act, and thus found that Aalmuhammed was not one of at least two authors required to establish a "joint work."²²

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 1231.

²⁰ *Id.* at 1231-32.

²¹ *Id.* at 1232.

²² *Id.* at 1236.

The court devoted a significant portion of its decision to the joint authorship question. After noting that “authorship is not the same thing as making a valuable and copyrightable contribution,” the court analyzed the traditional uses and applications of the word “author,” concluding that the word “author,” as used in this context, refers to the “activity of one person sitting at a desk with a pen and writing something for publication.”²³ The idea and definition of “author,” the Ninth Circuit notes, is “relatively easy to apply to a novel” and “to two people who work together in a fairly traditional pen-and-ink way.”²⁴ The relatively easy application ends, however, when “the number of contributors grows and the work itself becomes less the product of one or two individuals who create it without much help.”²⁵ Reiterating the traditional bases of the word, the court added, “the word is traditionally used to mean the originator or the person who causes something to come into being, or even the first cause, as when Chaucer refers to the ‘Author of Nature.’”²⁶ Lastly, the court cited the Gilbert and Sullivan song, “I Am the Very Model of a Modern Major General,” to show that because Gilbert’s words and Sullivan’s tune are inseparable, the audience can know that both were the creative originators or authors.²⁷ The court then listed several theories that could help establish the authorship of a film. For example, they noted the author may be “the producer who raises the money.”²⁸ Or, under Eisenstein’s theory and the “auteur” theory, the author may be the editor or the director, respectively.²⁹ Lastly, they stated that “traditionally, by analogy to books, the author was regarded as the person who writes the screenplay, but often a movie reflects the work of many screenwriters.”³⁰

Turning to case law to shed further light on the discussion of who an author may be, the court cited the Supreme Court’s decision in *Burrow-Giles Lithographic Co. v. Sarony*.³¹ In *Burrow-Giles*, the Court expanded the concept of authorship to

²³ *Id.* at 1232.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 54 (1884).

include a photographer who exercised a sufficient degree of control over the subject of his photograph. The Court's support for this decision included various English authorities and the Founding Fathers of the Constitution.³² Ultimately, the Ninth Circuit concluded that an "author" is "the person to whom the work owes its origin and who superintended the whole work, the 'master mind.'"³³ Applying this definition to a film, the *Aalmuhammed* court finds that an author is limited "to someone at the top of the screen credits, sometimes the producer, sometimes the director, possibly the star, or the screenwriter - someone who has artistic control."³⁴ And, lastly, the *Aalmuhammed* court relied on *Thomson v. Larson*,³⁵ a Second Circuit decision in which it was affirmed that Larson, a playwright, did not intend joint-authorship with Thomson, the dramaturg for the Broadway musical *Rent*. The absence of both decision-making authority and billing as a co-author led the Second Circuit to find that the work was not joint.³⁶

Extracting from *Burrow-Giles*, *Thomson*, and the Gilbert and Sullivan example, the Ninth Circuit compiled a list of three factors that would constitute the criteria to establish who should be considered an author for the purposes of a joint work (assuming there is no contract stating otherwise): 1) the author must superintend the work by exercising control; 2) the putative co-authors must make objective manifestations of a shared intent to be co-authors; and 3) the audience appeal of the work must turn on both contributions and the share of each in its success cannot be appraised.³⁷ With respect to the first factor, the court specified that "this will likely be a person 'who has actually formed the picture by putting the persons in position, and arrang[ed] the place where the people are to be – the man who is the effective cause of that,'" or "the inventive or master mind" who "creates, or gives effect to the idea."³⁸ The second factor requires the putative co-authors make objective manifestations of a shared intent to be co-authors. For example, listing both "Gilbert and Sullivan" as the authors of the song would satisfy this requirement. Objective manifestation—as opposed to subjective manifestation—is required

³² *Id.* at 57-59.

³³ *Aalmuhammed*, 202 F.3d at 1233.

³⁴ *Id.*

³⁵ *Thomson v. Larson*, 147 F.3d 195, 207 (2d Cir. 1998).

³⁶ *Id.*

³⁷ *Aalmuhammed*, 202 F.3d at 1234.

³⁸ *Id.*

because a fraudulent outcome might result if co-authors were to conceal their true intentions regarding a work's authorship.³⁹ For example, an author could communicate to the other "author" that she intended to be co-authors to the work, only to register for a copyright in her own individual name. The court expresses concern over mutual intent under a subjective intent standard as becoming "an instrument of fraud."⁴⁰ And under the third factor, the audience appeal of the work must turn on both contributions and "the share of each in its success cannot be appraised."⁴¹ Notably, the court specified that control will be the most important factor in many cases. They also qualified that the factors "cannot be reduced to a rigid formula, because the creative relationships to which they apply vary too much."⁴²

In applying these factors, the court first found that Aalmuhammed did not superintend the work, and instead, Warner Brothers and Lee controlled it. Comparing Aalmuhammed to the dramaturg in *Thomson*, they found that Aalmuhammed may have made useful recommendations, but the film may not have benefited from them unless Lee chose to accept them.⁴³ Secondly, they concluded that there were no objective manifestations of intent to be co-authors among any of the parties involved.⁴⁴ The court did not address the third factor.

The court grounded its decision to withhold authorship from Aalmuhammed in policy concerns. According to the court, granting authorship to the plaintiff in this scenario would frustrate the constitutional goal to "promote the progress of Science and useful Arts." The court feared that the threat of losing sole ownership of the work itself may incentivize authors to insulate themselves throughout the creative process.⁴⁵ As a result, the overall decrease in collaboration could thereby impoverish the arts in terms of both quantity and quality.

Moreover, adopting Aalmuhammed's broader definition of joint authorship would allow many other contributors to deprive the sole authors of proper title.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 1235.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

Specifically, “research assistants, editors, and former spouses, lovers and friends would endanger authors who talked with people about what they were doing, if creative copyrightable contribution were all that authorship required.”⁴⁶ From the court’s point of view, the fear of being stripped of absolute title thus becomes even more prevalent, and consequently, the urge to resist collaboration as well.

II.

RECENT INCONSISTENT AND AMBIGUOUS APPLICATIONS OF THE AUDIENCE APPEAL FACTOR IN ENTERTAINMENT

The judicial system is no stranger to the issue of joint authorship in the entertainment industry. In applying the *Aalmuhammed* test, however, lower courts have reached inconsistent results when considering various kinds of entertainment works, such as screenplays,⁴⁷ songs,⁴⁸ and music videos.⁴⁹ In dealing with frequent litigation surrounding the joint authorship issue, courts have turned to the Ninth Circuit’s *Aalmuhammed* decision for guidance. The third factor of the *Aalmuhammed* joint work analysis, the audience appeal factor, poses particular

⁴⁶ *Id.* at 1235-36.

⁴⁷ *See, e.g.*, Complaint at 1, Horror, Inc. v. Victor Miller, No. 3:16-cv-01442 (D. Conn. Aug. 24, 2016) (Victor Miller, the author of the screenplay *Friday the 13th*, issued termination notices to the film’s producers to notify them that he was reclaiming his copyright in the original screenplay); Ron Dicker, *Filmmaker Says ‘Stranger Things’ Creators Stole His Ideas in New LawsUIT*, HUFFINGTON POST (Apr. 4, 2018, 10:39 AM), https://www.huffingtonpost.com/entry/stranger-things-suit-duffer-brothers_us_5ac4b7b7e4b093a1eb20d34c (Charlie Kessler filed suit against Matt and Ross Duffer alleging they stole his ideas for a sci-fi series called “Montauk” in their popular Netflix series “Stranger Things”).

⁴⁸ *See, e.g.*, Complaint at 4, Brittle v. Time Warner, Inc., No. 3:16-cv-00908-JAG (E.D. Va. Nov. 11, 2016) (Gerald Brittle sued Time Warner and other entertainment company defendants over the exclusive motion picture rights to the film *The Conjuring* based on the book he wrote called *The Demonologist*).

⁴⁹ Complaint, Frank Ocean v. Om’Mas Keith, No. 2:18-cv-01383 (C.D. Cal. Feb. 20, 2018) (Musical artist Frank Ocean brought a declaratory action of copyright non-ownership against music producer Om’Mas Keith, who claimed that he had co-written musical compositions with Ocean for the singer’s album titled *Blonde*).

issues with respect to entertainment works in that it is applied inconsistently and ambiguously to screenplays, songs, and music videos.⁵⁰

A. Screenplays

In *Richlin v. MGM*, for example, the same court that crafted the audience appeal factor admitted that “it is nearly impossible to determine how much of [a] Motion Picture’s audience appeal and success can be attributed to the [Screenplay].”⁵¹ The Ninth Circuit suggested that a film’s success might be attributed to a number of factors other than the screenplay itself, such as the actor’s “legendary comedic performance,” the composer’s “memorable score,” or the director’s “award-winning direction.”⁵² Despite acknowledging that there were various creative contributions, none of which could have independently and solely drawn in the audience, the court still found that the audience appeal factor favored the screenwriter plaintiffs seeking copyright of the film, because without their original screenplay, the motion picture would not exist. Ultimately, the analysis surrounding the audience appeal factor proved moot, as the court found that the first two factors weighed heavily in favor of the defendant, Metro-Goldwyn-Mayer Pictures, Inc., thereby outweighing the third factor entirely.⁵³

The treatment of the third factor in *Richlin* is problematic in three ways. First, many motion pictures stem from or are a derivative of a screenplay or book. Without the original writing, the motion picture, in many instances, would cease to exist. The conclusion that the audience appeal and success of a work can be attributed to the screenplay simply because the motion picture was derived from it represents an analytical gap in that it forecloses the recognition of any other valuable creative contributions. By limiting its reasoning to this logic, the Ninth Circuit set a standard in which the audience appeal factor of the *Aalmuhammed* joint work analysis may favor the party who contributed to the original work and seeks rights as a joint author. This approach circumvents the third factor analysis entirely, where the court would ordinarily need to compartmentalize the various creative contributions, such

⁵⁰ *Aalmuhammed*, 202 F.3d at 1234. (“[T]he audience appeal of the work must turn on both contributions and the share of each in its success cannot be appraised.”) (internal quotation marks omitted).

⁵¹ *Richlin v. Metro-Goldwyn-Mayer Pictures, Inc.*, 531 F.3d 962, 970 (9th Cir. 2008).

⁵² *Id.*

⁵³ *Id.*

as those of the writers, actors, composers, and directors, to determine which are responsible for the majority of the audience appeal.

Second, had the court performed a proper audience appeal analysis, they would have been met with a burdensome task that could result in divergent results given the subjective interpretations of motion pictures and what factors contribute to their success. The Ninth Circuit, acknowledging that this analysis would be “nearly impossible,” instead decided that concluding one could not exist without the other is sufficient.⁵⁴

Third, *Richlin* represents a case in which the first two factors weighed in favor of the defendants’ claim that the parties were not joint authors. The court left no guidance for a case in which the first two factors weigh in favor of the plaintiff seeking to establish joint authorship. In such a situation, it remains unclear if the third factor would be determinative or continue to carry little or no weight at all. The court also failed to explain whether a more thorough analysis, like the one the Ninth Circuit avoided, should take place. And although the Ninth Circuit qualified in *Aalmuhammed* that the factors could not be boiled down to an exact formula,⁵⁵ the court’s reasoning in *Richlin* leaves a great deal of ambiguity for litigants and courts to confront in future disputes.

B. Songs

There have been inconsistent ways of analyzing the audience appeal factor in the context of songs as well. For example, in *Eli Brown, III v. Michael C. Flowers*,⁵⁶ the plaintiff and defendant had formed a partnership called Hectic Records. Flowers and Brown recorded hundreds of demo R&B songs together, where Brown, in his role as sound engineer and producer, “added riffs and beats,” thus “establishing tempo, ambiance, echo, reverberation, treble, bass, frequency, gain, bandwidth, distortion, and equalizing.”⁵⁷ Flowers, a songwriter, then traveled to New York and New Jersey to market the songs he and Brown recorded, including “I Wish,” a track that Brown had engineered and produced. The song was picked up by singer Carl Thomas, who re-recorded the song and released it on an album that eventually went platinum. The partnership later dissolved, and, according to Brown, Flowers

⁵⁴ *Id.*

⁵⁵ *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 2000).

⁵⁶ *Brown v. Flowers*, 196 F. App’x 178, 184 (4th Cir. 2006).

⁵⁷ *Id.*

“applied for and received copyright registrations for these recordings” and “subsequently licensed these recordings to other artists, who, in turn, made re-recordings.”⁵⁸ Brown then filed suit against Flowers under the Copyright Act of 1976, alleging that the recordings were joint works and he thus had copyright in them as well.⁵⁹ The Fourth Circuit ultimately affirmed the district court’s dismissal of Brown’s federal copyright claim, finding he did not meet the requisite author requirement.⁶⁰

In an unpublished concurrence and dissent in part, Judge Gregory wrote a separate opinion in which he applied the *Aalmuhammed* three-factor test and reached a result that differed from the majority. He found that “because Brown allege[d] that he served as the engineer and producer of the master recordings, [he] conclude[d] that [Brown] had significant decision making authority over the substance and form of the master recordings.”⁶¹ Second, he found that Brown had sufficiently alleged that the parties made objective manifestations of their intent to be co-authors because of Brown’s allegations “that the parties collaborated over a period of four years in recording demo R&B songs under their Hectic Records partnership label and in attempting to distribute those recordings to third parties under that label.”⁶² Lastly, the third factor was met “because the audience appeal of R&B songs is attributable in large measure to their underlying riffs and beats, which, invariably, are incorporated into those songs by recording engineers and producers.”⁶³

Although he found joint authorship for Brown, Judge Gregory extracted from the ambiguity surrounding the *Aalmuhammed* audience appeal factor in ways that other courts may not. For example, despite attempting to apply an objective approach to the analysis, Judge Gregory generalized and promulgated stereotypes about the specific type of work at issue. In doing so, his analysis ran counter to the purpose of the audience appeal factor. His conclusion that the appeal of R&B songs is attributable in large measure to the songs’ “underlying riffs and beats,” neglects the subjective analysis owed to creative works of music. For example, the song at issue could depart from the expectation or standard that R&B songs are successful because

⁵⁸ *Id.*

⁵⁹ *Id.* at 184.

⁶⁰ *Id.* at 181

⁶¹ *Id.* at 191 (Gregory, J., concurring in part and dissenting in part).

⁶² *Id.*

⁶³ *Id.*

of those specific features. Judge Gregory does not constitute nor represent the “audience” and their views of the song. The vocalist on the song, for example, could be the sole reason the audience is drawn to the piece. Thus, while Judge Gregory did recognize Brown’s right, he did so in a way that did not provide for sufficient flexibility in the analysis that such creative works of entertainment are owed.

In *Ford v. Ray*,⁶⁴ a claim for joint authorship was dismissed based on the *Aalmuhammed* test. In this case, Ford, the plaintiff, collaborated with Ray, the defendant, on an album where Ford “independently created a handful of drum tracks, called ‘beats,’ that he thought would make a good foundation for hip hop songs” as well as “provided ‘scratching’ for the chorus of the song and a solo.”⁶⁵ Ray’s role was to choose which of the beats would be used for Sir-Mix-a-Lot’s Grammy award-winning song, “Baby Got Back.” Ray, without Ford’s knowledge, filed copyright registrations for some of the songs they worked on together, identifying himself as the sole author.⁶⁶ Ford subsequently filed suit alleging the works were “joint works” and that he was the co-author.

In employing the *Aalmuhammed* three-factor test, the United States District Court for the Western District of Washington found that the first two factors – that the author must superintend the work by exercising control and the putative co-authors must make objective manifestations of a shared intent to be co-authors – weighed in favor of Ray, and thus concluded that Ford was not a co-author.⁶⁷ In acknowledging the audience appeal factor, the court stated that Ford “fail[ed] to allege facts from which one could conclude that his contributions account for the appeal of ‘Baby Got Back.’”⁶⁸ The court sought more information such as “how much of the music was [Ford’s] creation and how much was edited, programmed, and altered by [Ray].”⁶⁹ They found the fact that Ray used one of Ford’s “drum tracks ‘as the basis for the song’ and incorporated [Ford’s] scratching” insufficient.⁷⁰ Relying on the complaint, the court concluded that Ford had made no contribution

⁶⁴ *Ford v. Ray*, 130 F. Supp. 3d 1358, 1359 (W.D. Wash. 2015).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 1364.

⁶⁸ *Id.* at 1363.

⁶⁹ *Id.* at 1364.

⁷⁰ *Id.* at 1363-64.

to the lyrics nor did he have any control over the music after handing it over to Ray.⁷¹ In coming to this conclusion, the court acknowledged that the audience appeal factor remains “something of an unknown” to the analysis and granted the dismissal based solely on the first two factors.⁷²

Brown and Ford are thus paradigmatic of how the *Aalmuhammed* test, particularly the audience appeal factor, has been interpreted, analyzed, and implemented inconsistently when applied to songs.

C. Music Videos

Litigation surrounding music video joint authorship issues further exemplifies the ambiguous application of the audience appeal factor with respect to various kinds of entertainment works. In *Morrill v. The Smashing Pumpkins*,⁷³ Morrill was a member of the band The Marked. The band produced a music video titled “Video Marked” which had been shown at various clubs where The Marked performed in order to promote their group.⁷⁴ Defendant Corgan, one of the members of The Marked and the sole permanent member of The Smashing Pumpkins, was a member of The Marked at the time the music video was made, but later left the group. Years later, defendants Corgan, The Smashing Pumpkins, and Virgin Records America released a video titled “Vieuphoria” which featured short clips of images from “Video Marked.”⁷⁵ Morrill brought suit against the defendants, alleging he was the sole owner of the copyright for the music video. The United States District Court for the Central District of California found that the first two factors favored a finding of a joint work.⁷⁶ With respect to the audience appeal factor, the court concluded that the audience appeal can be attributed to both parties because the appeal of “Video Marked” “was most likely based on the audience’s ability to view images of a younger Corgan. This is suggested by the packaging for ‘Vieuphoria,’ which advertises super secret, super special extra stuff shot by the band.”⁷⁷ The court focused on Corgan’s appearance as fulfilling the audience appeal requirement which

⁷¹ *Id.* at 1364.

⁷² *Id.*

⁷³ *Morrill v. Smashing Pumpkins*, 157 F. Supp. 2d 1120 (C.D. Cal. 2001).

⁷⁴ *Id.* at 1121.

⁷⁵ *Id.*

⁷⁶ *Id.* at 1126.

⁷⁷ *Id.* at 1125 (internal quotation marks omitted).

ostensibly “rests both on the video’s visual aspects and on the composition and performance of the music.”⁷⁸

In *Eagle Rock Entertainment, Inc. v. Coming Home Productions, Inc.*,⁷⁹ the Central District of California faced an ownership dispute over “Guns, God and Government,” a live concert video album filmed during shock rock musician Marilyn Manson’s controversial 1999-2000 world tour.⁸⁰ Both parties claimed to have produced the video by contributing to the editing and production of it. The court found the parties to be joint authors by analyzing the audience appeal factor and relying on *Morrill*. Unlike in *Morrill*, however, the court did not specifically address which aspects contributed to the visual appeal or the composition and performance of the music. Thus, the court seemed to employ the same standard to measure audience appeal differently in that it specifically sought out and emphasized an extra element in one music video, but did not require or address it in the other.

III.

THE INTERPLAY BETWEEN INTELLECTUAL PROPERTY RIGHTS AND ENTERTAINMENT INDUSTRY EMPLOYMENT LAW

The *Aalmuhammed* test proves significant even outside of the courtroom, where its application has a direct impact on the livelihoods of those who participate in the entertainment industry. Recent examples in pop culture reflect the close link between intellectual property rights and employment. Take Steven Jan Vander Ark, for example, the Harry Potter fanatic who sought to publish an encyclopedia⁸¹ featuring the many characters, settings, and overall magic of J.K. Rowling’s popular book series.⁸² Rowling and Warner Brothers Entertainment sued Vander Ark seeking to enjoin the publication of the book alleging it infringed their copyrights given the

⁷⁸ *Id.*

⁷⁹ *Eagle Rock Entm't, Inc. v. Coming Home Prods., Inc.*, No. CV 03-571 FMC(AJWx), 2004 WL 5642002, at *1 (C.D. Cal. Sept. 1, 2004).

⁸⁰ *Id.* at *3.

⁸¹ *See generally, Harry Potter Wish List*, <http://hpwishlist.warnerbros.com/> (last visited Nov. 11, 2018) (providing an example of an extrinsic encyclopedia and fan-site dedicated to J.K. Rowling’s book series).

⁸² John Eligon, *Rowling Wins Lawsuit Against Potter Lexicon*, N.Y. TIMES, Sept. 8, 2008, at B3.

substantially similar, if not equivalent, nature of the content.⁸³ While Rowling walked away victorious, Vander Ark was left sobbing on the stand stating that Rowling's public denunciation of his book "had ostracized him from the 'Harry Potter community.'"⁸⁴ Why was Rowling, a prominent, successful author of a world-famous series, so keen on stopping one author—or more properly labeled, a fan—from producing a Harry Potter encyclopedia? And why was Vander Ark left so concerned about his reputation among other Harry Potter fans?

Intellectual property rights hold so much force in the realm of entertainment employment that even renowned authors like J.K. Rowling are adamant about protecting them. As of November 2018, the U.S. media and entertainment industry is a \$735 billion market, representing a third of the global industry.⁸⁵ In 2017, the arts, entertainment, and recreation industry employed 2,370,160 people.⁸⁶ Duncan Crabtree-Ireland notes that "[a]lmost all workers in the entertainment industry . . . are dependent on intellectual property law (and particularly copyright) for their livelihoods."⁸⁷ Overall, the interplay between intellectual property and employment is a unique one in entertainment, where intellectual property rights serve as a policing mechanism to ensure that parties are rewarded for original works of authorship by establishing standards and thresholds for artists to qualify for the benefits of employment.

Despite the significant effect of intellectual property rights on employment opportunities, practices within the entertainment industry often make it difficult to determine the appropriate allocation of rights. First, the industry is inherently filled with intangible content that without proper regulation could be subject to taking.⁸⁸ Furthermore, technological developments have augmented the means through which

⁸³ Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

⁸⁴ Eligon, *supra* note 82.

⁸⁵ *Media and Entertainment Spotlight: The Media and Entertainment Industry in the United States*, SELECTUSA, <https://www.selectusa.gov/media-entertainment-industry-united-states> (last visited Nov. 11, 2018).

⁸⁶ *May 2017 National Industry-Specific Occupational Employment and Wage Estimates, Sector 71: Arts, Entertainment, and Recreation*, U.S. DEP'T OF LAB., https://www.bls.gov/oes/current/naics2_71.htm.

⁸⁷ Duncan Crabtree-Ireland, *Labor Law in the Entertainment Industry Supplemental Payments, Intellectual Property Rights, and the Role of Unions*, 31 ENT. & SPORTS L. 4, 4–5 (2014).

⁸⁸ *Id.*

audiences consume content, and facilitated the dissemination of entertainment content throughout the consumer marketplace. Cynthia Baron explains this phenomenon, noting how the “increasing convergence of film and new media ‘has simultaneously increased the availability of film and turned it into part of a data stream where images become information that is simply passing through.’”⁸⁹ In this capacity, “film has also become part of the flow,” blurring and stretching the origins of the content farther away from the original artist or author.⁹⁰ As a result, it becomes a challenge to pinpoint the original source or author of a work, leaving the claimant to intellectual property rights with a daunting task. Justice Scalia voiced similar concerns in *Dastar Corporation v. Twentieth Century Fox Film Corporation*,⁹¹ stating “without a copyrighted work as the basepoint, the word ‘origin’ has no discernable limits” and “figuring out who is in the line of ‘origin’” would prove difficult.⁹² The high transaction costs for identifying and crediting sources may serve to decrease, or even paralyze, creative cultural production.

Second, the length and pace of projects in entertainment production make it difficult to monitor the contributions and rights of those who work on entertainment projects. Employment in Hollywood’s film industry, in particular, is project-based so that employers can “quickly assemble personnel with highly specialized skills for a short period of time. Producers have no incentive to offer long-term contracts because informationally complex jobs are difficult to monitor.”⁹³ In hiring for short-term projects:

[T]he entertainment industries exist on ideas turned into deals. When an idea is ‘hot,’ immediate action is desired. Parties rush to agree, and, in the process, desire at times outraces common sense. The ‘deal,’ as it turns out, is strictly verbal, or there are scattered memos but no single, final, formal written agreement. If the production proceeds as

⁸⁹ Cynthia Baron, *The Modern Entertainment Marketplace, 2000-Present*, in ACTING 144 (Claudia Springer & Julie Levinson eds., 2015) (quoting author Stephen Keane).

⁹⁰ *Id.*

⁹¹ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

⁹² *Id.* at 35.

⁹³ William T. Bielby & Denise D. Bielby, *Organizational Mediation of Project-Based Labor Markets: Talent Agencies and the Careers of Screenwriters*, 64 AM. SOC. REV. 64, 66 (1999).

envisioned . . . [t]here is no problem because the idea becomes a deal that produces a success, and everyone is happy.⁹⁴

As a result of the quick pace of deal-making, oral contracts have replaced written agreements as the primary means of memorializing deals. The industry reliance on oral contracts—often referred to as the “handshake deal”⁹⁵—reflects the priority of completing projects on time. This priority, in turn, comes at the expense of fleshing out the full details of an employment agreement, which can suppress workers’ efforts to obtain credit for their contribution. If two parties orally and mutually agree to certain terms of a relationship or a course of conduct, the agreement becomes enforceable regardless of whether or not a written agreement was signed.⁹⁶ *Main Line Pictures, Inc. v. Basinger*,⁹⁷ one of the pivotal cases involving oral contracts in Hollywood, epitomizes the ubiquity and enforceability of oral contracts in the film industry.

In 1990, Main Line Pictures asked actress Kim Basinger to star in the movie “Boxing Helena.” On several occasions, Basinger orally agreed to star in the film. A year and a half later, Main Line learned through rumors that Basinger no longer intended to act in the film as she had agreed to do. Main Line subsequently filed a complaint alleging breach of an oral and written contract.⁹⁸ The jury concluded that Basinger had breached her oral contract with Main Line and awarded them damages.⁹⁹ On appeal, the California Court of Appeals took note of and gave credence to the practice of oral contracts in entertainment, explaining “because timing is critical, film industry contracts are frequently oral agreements based on unsigned ‘deal memos.’”¹⁰⁰ Even though this case was later reversed on a

⁹⁴ Gary M. McLaughlin, *Oral Contracts in the Entertainment Industry*, 1 VA. SPORTS & ENT. L.J. 101, 119 (2001).

⁹⁵ *Id.* at 120.

⁹⁶ See Jay M. Spillane, *Lawsuits Over "Handshake Deals" Are As Old As the Entertainment Industry (and Can Be Easily Avoided)*, 11 ENT. & SPORTS L. 15, 16 (1993).

⁹⁷ *Main Line Pictures, Inc. v. Basinger*, No. B077509, 1994 WL 814244, at *1 (Cal. Ct. App. Sept. 22, 1994).

⁹⁸ *Id.* at *4.

⁹⁹ *Id.* at *5.

¹⁰⁰ *Id.* at *2.

technicality and settled, it reiterates the control and influence of oral contracts in the industry.

Another common practice unique to the film industry is what Mihaela Mihailova has called “invisible labor,” where many contributors or collaborators to a film often go unrecognized.¹⁰¹ She notes that “Hollywood labor history is marred by a host of such obfuscations,”¹⁰² pointing to unrecognized contributions in Darren Aronofsky’s film *Black Swan* as exemplifying such an omission of credit. In *Black Swan*, actress Natalie Portman was largely recognized as the star of the film, displaying professional ballet movements on screen. In reality, however, ballet dancer Sarah Lane was the one who performed most of the challenging dance scenes. With the help of post-production technology, Lane’s face was simply replaced with Portman’s. Neither Lane nor the animation team were credited in the marketing or promotional materials, and instead Portman walked away with the accolades, winning an Academy Award.¹⁰³ Mihailova sums up this practice as a “policy of deliberately suppressing any public acknowledgment of the invisible labor that facilitates the star’s performance.”¹⁰⁴

Entertainment industry employees are heavily reliant on the recognition of intellectual property rights for employment opportunities. Industry practices, however, make it difficult to determine who can claim those rights. As will be discussed further, authorship can directly affect the salaries, royalties, and overall benefits associated with recognition. In addition to the numerous barriers these participants have to overcome, such as the implications of intangible property, the dominance of oral contracts, or the “invisible labor” theory, the *Aalmuhammed* test only exacerbates the difficulties creators in entertainment must face.

¹⁰¹ See Mihaela Mihailova, *Collaboration Without Representation: Labor Issues in Motion and Performance Capture*, 11 ANIMATION: AN INTERDISCIPLINARY J. 40, 46 (2016).

¹⁰² *Id.*

¹⁰³ Dean Goodman & Edwin Chan, *Natalie Portman Leaps to Oscar for ‘Black Swan’*, REUTERS.COM (Feb. 27, 2011, 11:20PM), <https://www.reuters.com/article/us-oscars-bestactress-idUSTRE71R19920110228>.

¹⁰⁴ Mihailova *supra* note 101, at 46.

IV.

WHY THE *AALMUHAMMED* TEST IS PROBLEMATIC FOR THE ENTERTAINMENT INDUSTRYA. *The Aalmuhammed test is incompatible with the operation of the modern Entertainment Industry*

The creative process is anything but streamlined and Hollywood's productions are no exception. While certain structures and processes exist as guidelines, deviation occurs far more often than in other industries. Many factors inherent to the filmmaking process lead to situations in which contributors take on roles outside of their designated responsibilities, such that even in the case of a formal written contract, departures from official roles are frequently made. Thus, while the credits to a film may describe the job titles that participants in the creative process held, they should by no means convey the message that the producer, for example, stuck solely to the responsibilities with which a producer is conventionally associated. The overall creative process behind filmmaking involves many people who played a role, small or large, in the creation of the film.

The three-factor test articulated in *Aalmuhammed* to determine joint authorship, however, does not adhere to the highly collaborative nature of the filmmaking process, nor to the widespread custom of creative collaboration in entertainment in general. One of the underlying reasons the test is incompatible with the contemporary practices of entertainment is that it is extracted from antiquated sources and thus has proven incongruous in the modern industry. The Ninth Circuit heavily rooted its analysis of "author" in tradition, citing cases from 1884, Eisenstein, Chaucer, and the Founding Fathers.¹⁰⁵ Instead, the Court should have drawn from these sources with greater generality to maintain an appropriate balance between tradition and innovation. For example, the court could have taken the idea of the writer as the "person behind the pen"¹⁰⁶ and applied it more liberally to the context at issue. While *Aalmuhammed* may not have been the physical person holding the pen and writing the screenplay, he did write entire scenes as well as much of the dialogue that was incorporated into the final product.

Scholars also support the argument that the *Aalmuhammed* test diverges from the Act's original intent and, as a result, is inconsistent with the needs and goals of the entertainment industry. Professors Shyamrkishna Balganes, Justin Hughes,

¹⁰⁵ See, e.g., *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232 (9th Cir. 2000)

¹⁰⁶ *Id.*

Peter Menell, and David Nimmer argue that “interpreting the statute so narrowly ignores the careful study and negotiation that went into crafting the Section 101 definitions.”¹⁰⁷ The professors assert that the definition of “joint work” included in Section 101 “recognizes a wide range of collaborative working arrangements by requiring only that the authors collaborated with each other, or if each of the authors prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors.”¹⁰⁸ Further, the use of the mastermind standard could be interpreted as an evasive strategy in that it could be used for the sake of “administrative convenience or to avoid unjustified windfalls, not out of fidelity to legislative intent.”¹⁰⁹ They further note:

Such an interpretation misses the broad and open-ended recognition of collaborative creativity that Congress intended. Undue emphasis on singular control (“the . . . mastermind”) is antithetical to the very nature of joint authorship, which is an intrinsically collaborative exercise. The nature of a collaborative enterprise is such that at times different authors will exercise more control than the others over the work. To require a contributor to exercise equal “inventive” control in order to be a joint author is therefore unrealistic. Second, under the control standard, it is impossible for contributing authors to know in advance whether they are exercising sufficient control over the unitary work while making their individual contributions. The joint authorship doctrine thereby becomes unpredictable, defeating the “paramount goal” of the 1976 Act.¹¹⁰

The Ninth Circuit also mistakenly assumed that the factors apply neutrally to all subject matter. The reliance on the Gilbert and Sullivan example assumes that a songwriter and film consultant have made equal contributions throughout the creation of the work and to the final product in identical ways. The creative process behind the song that Gilbert and Sullivan wrote, however, is extremely simplified

¹⁰⁷ Brief of Amici Curiae Professors Shyamkrishna Balganeshe et al. Supporting Neither Party, *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (No. 12-57302), at 17.

¹⁰⁸ *Id.* at 13.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 13-14.

and not representative of the creation of a motion picture.¹¹¹ Similarly, the court relied on *Thomson* and assumed that the process of creating a Broadway musical mimics that of a motion picture.¹¹² Another assumption undergirding the Ninth Circuit's opinion is that the creative process for one motion picture is the same for all other motion pictures.¹¹³ The function and operation of creative practices within the industry are far from uniform, and to assume so was a dangerous judicial mistake.

The test is also incompatible with the “above the line” versus “below the line” distinction in entertainment, which plays a primary role in monitoring the types of relationships formed during the creative process.¹¹⁴ Those in Hollywood who are “above the line” are recognized as the creative talent or financial supporters of a project.¹¹⁵ The people “below the line,” on the other hand, hold the technical and behind-the-scenes positions.¹¹⁶ In particular, the audience appeal factor of the test clashes with the first factor because the audience appeal of a film, more often than not, is owed to the “above the line” personnel such as the A-list stars like Meryl Streep or Emma Stone, who “would not qualify under the court’s ‘inventive or master mind’ test.”¹¹⁷ Instead, the director of the film is usually credited and recognized as the mastermind of the film. If these famous participants are unable to secure copyright interests in a work under such a test, it is further unlikely that a person who is “below the line” and part of the “invisible labor” that goes into a film, would either. Despite the frequency with which the *Aalmuhammed* test is employed

¹¹¹ See generally HOMER CROY, *HOW MOTION PICTURES ARE MADE*, (Goemaere Press 2009) (1918) and J.S. RUDSENSKE, *MUSIC BUSINESS MADE SIMPLE: A GUIDE TO BECOMING A RECORDING ARTIST*, (J.P. Denk ed. 2004).

¹¹² See generally JACK VIERTEL, *THE SECRET LIFE OF THE AMERICAN MUSICAL: HOW BROADWAY SHOWS ARE BUILT* (Sarah Crichton Books 2017) (2016).

¹¹³ See generally JAMES R. MARTIN, *CREATE DOCUMENTARY FILMS, VIDEOS, AND MULTIMEDIA: A COMPREHENSIVE GUIDE TO USING DOCUMENTARY STORYTELLING TECHNIQUES FOR FILM, VIDEO, THE INTERNET AND DIGITAL MEDIA NONFICTION PROJECTS* (Real Deal Press 2010); CROY, *supra* note 111.

¹¹⁴ See GAIL RESNIK & SCOTT TROST, *ALL YOU NEED TO KNOW ABOUT THE MOVIE AND TV BUSINESS* 36-37 (Simon & Schuster 1996).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Balganesch et al., *supra* note 107, at 14.

by numerous courts when discussing various entertainment works, the test has proven inapplicable to certain categories within the modern entertainment industry.

B. The Aalmuhammed test negatively affects entertainment industry employment

The inability of the *Aalmuhammed* test to adapt to the entertainment industry's practices yields unintended consequences on employment. Generally, joint authorship is an important intellectual property right that may play a part in establishing whether or not an individual can obtain future employment opportunities. If an individual meets the requirements to qualify as a joint author, then she will be able to register and obtain a copyright in the work. This further enables her to receive future benefits associated with the copyright, such as the opportunity to be involved with any sequel or a work tangentially related to the original work. This will then increase her exposure, and therefore her potential to garner greater recognition or reputation in the industry. Being known as a joint author may also signify to other creators her potential as a collaborator for future projects, thereby opening the door to future employment opportunities. Without recognition of joint authorship, a co-author may be deprived of the employment opportunities arising from or incidental to copyright ownership.

There are several more specific ways in which the *Aalmuhammed* test is unable to best serve the interests of those seeking employment and those currently employed in the entertainment industry. First, the audience appeal factor disincentivizes participants from contributing to a work because it does not adhere to the fluidity of the creative process. This is evidenced in *Ford*, where the plaintiff did not provide enough evidence upfront that his contributions throughout the creative process impacted the audience appeal of the work. Creators may therefore take additional precautions external to the creative process itself in order to abide by the types of inquiries a court may make upon reviewing whether an artist contributed enough to qualify for authorship rights. The creative process is a lengthy one, involving a broad spectrum of contribution ranging from the first spark of creativity to the final product. Drafts, shot suggestions, lighting changes, deletions, and many other steps that blur the process frequently occur. Requiring or expecting parties involved in the music creative process, for example, to memorialize agreements and document material information at all stages of production is a large burden, especially given the prevalence of oral contracts in the entertainment industry. The difficulty of proving specific contributions after the fact arguably discourages collaboration between creators, and, as a consequence, may adversely affect the labor market within the industry as well.

Second, the *Aalmuhammed* test reinforces the monopolization of the creative process evident in Hollywood and in doing so, inhibits the opportunities for employment growth in entertainment. A recent deal between the Walt Disney Company and 21st Century Fox, in which the former acquired the latter's assets for \$52.4 billion epitomizes how the "Hollywood heavyweights" continue to maintain and exert the upper hand in the broader entertainment industry.¹¹⁸ By expanding its empire even further, Disney undoubtedly will gain a strong foothold over 21st Century Fox's operations, employees included, and even "more control over some of the content that fuels [Disney's] business."¹¹⁹

Even for smaller scale projects in entertainment, employers normally will be able to fulfill positions needed for a music video or a film because prospective creators are eager for their "big break" in Hollywood and would not normally pass down a shot at fame. Those with established reputations such as Steven Spielberg and Quentin Tarantino, then, are able to maintain the upper hand in terms of bargaining power (and the subsequent copyrights), making it much more difficult for individuals to make a name for themselves. Different hiring structures or novel approaches to the distribution of responsibility will not be implemented as a result of the cemented status quo and monopoly over employment. Opportunities for employment growth and diversification are thus decreased in ways that harm those trying to break into the industry.

Third, as a consequence of increased litigation over co-authorship claims, courts have experimented with different approaches to applying the *Aalmuhammed* standard, resulting in inconsistent results and ambiguity for jobseekers and employers alike. As a result, proper fair notice is not offered to those who would benefit from awareness of the requirements of co-authorship under the *Aalmuhammed* test. This lack of prospectivity with respect to authorship rights will have a detrimental effect on entertainment industry employment because those who are hiring will not know what protocol or processes to put in place regarding the allocation of degree of control and distribution of responsibilities. That courts may or may not accord proper weight to the audience appeal factor leaves entertainment industry employers with little guidance for dealing with the co-authorship issue and avoiding potential lawsuits over joint authorship claims.

¹¹⁸ See generally Cynthia Littleton & Brian Steinberg, *Disney to Buy 21st Century Fox Assets for \$52.4 Billion in Historic Hollywood Merger*, VARIETY (Dec. 14, 2017 4:04 AM), <http://variety.com/2017/biz/news/disney-fox-merger-deal-52-4-billion-merger-1202631242/>.

¹¹⁹ *Id.*

Similarly, creators or authors will lack the necessary guidance for understanding whether or not they have to direct their contributions in a way that will affect the audience appeal of the work. One major incentive a participant to a project may have in agreeing to provide services is the potential recognition he or she could gain as a result of being listed as a co-author to a work. The incentive may be lost among the confusion caused by the unclear rules and judicially constructed obstacles blocking the path to legal recognition of joint authorship. Both parties involved may then lose the incentives needed for a successful employment relationship, thus decreasing the potential for collaborative creation.

Fourth, a false impression has been created that any standard other than the *Aalmuhammed* test will result in the overbroad dissemination of copyrights. This, in turn, makes those with more bargaining power overprotected while they employ others. In *Garcia v. Google*, for example, the Ninth Circuit relied on *Aalmuhammed* when addressing Google's argument that an actress hired to say a few lines in a film posted on YouTube did not qualify as a joint author to the work.¹²⁰ The court cited *Aalmuhammed* for the proposition that a work cannot be defined based on "some minimal level of creativity or originality" because such a definition "would be too broad and indeterminate to be useful."¹²¹ Further, the court noted that "its animating concern" in *Aalmuhammed* was that such a definition of "'work' would fragment copyright protection for the unitary film . . . into many little pieces" where anyone might qualify as an author.¹²² The *Google* court feared this would make "Swiss cheese of copyrights."¹²³ The court similarly stated that "treating every acting performance as an independent work would not only be a logistical and financial nightmare, it would turn cast of thousands into a new mantra: copyright of thousands."¹²⁴ The Ninth Circuit took a risk-averse approach, fearing that any alternative to the *Aalmuhammed* test may open the floodgates to copyright claims of joint authorship by every cast and crew member that worked on a film. By establishing *Aalmuhammed* as the only alternative to a world in which joint authorship claims run amok, the desire to keep *Aalmuhammed* as the standard is increased, as are concurrently, the limits on employment.

¹²⁰ *Garcia v. Google, Inc.*, 786 F.3d 733, 736 (9th Cir. 2015).

¹²¹ *Id.* at 742 (quoting *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000)).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 743.

C. The Aalmuhammed test has a negative effect on entertainment unions, which, in turn, further harms industry workers' employment opportunities

The *Aalmuhammed* test may also yield detrimental effects on employment by indirectly diluting the efficacy of entertainment unions to adequately represent workers. Specifically, the inability of the test to properly identify rights may lead to union strikes which, as has happened in the past, could cause networks to restructure their employment processes such that opportunities for post-production creation will be limited.

One of the unions in the entertainment industry that may be negatively affected by this phenomenon is the Writers Guild of America West (WGAW). The WGAW “is a labor union composed of the thousands of writers who write the television shows, movies, news programs, documentaries, animation, videogames and new media content that keeps audiences constantly entertained and informed.”¹²⁵ The Guild covers the rights of writers with respect to derivative works, specifically “minimums, residuals, credits, pension and health contributions, separated rights, and more.”¹²⁶ Strikes are an effective union bargaining tactic. Normally, union members strike in an effort to convince or coerce employers to change their employment practices and conditions. Common wisdom may suggest that the potential of the *Aalmuhammed* test to strip authors of the rights and recognition they deserve might encourage members of the WGAW, for example, to strike. However, striking in response to being denied recognition rights can harm union members' prospects for future employment.

The 2007 Writers Guild of America (WGA) strike against ABC Studios exemplifies the potential negative effects of a labor strike on the writers. Writers for the hit television show *Lost* went on strike in order to receive better recognition and compensation for their creations of derivative digital content tied to the original show.¹²⁷ During this time, innovations in technology had led to the proliferation of derivative works, including “blogs, alternate reality games (ARGs), and

¹²⁵ See generally *What is the Writers Guild of America West?*, WGA, <http://www.wga.org/the-guild/about-us/faq#general1> (last visited Nov. 11, 2018).

¹²⁶ See Denise Mann, *The Labor Behind the Lost ARG: WGA's Tentative Foothold in the Digital Age*, in *WIRED TV: LABORING OVER AN INTERACTIVE FUTURE* 118, 124 (Denise Mann ed., 2014).

¹²⁷ *Id.* at 118-19.

mobisodes¹²⁸ to promote the series.”¹²⁹ Recognizing the rights issues that arose from the growth of these markets, the WGA increased its support for enterprising authors or writers who sought to challenge the traditional studio employment model.¹³⁰ For example, the WGA website stated, “[i]n the age of YouTube, Hulu, Crackle, and MyDamnChannel, new media outlets and digital technologies provide writers increased opportunities to become true creative entrepreneurs, armed with the tools and distribution channels necessary to connect directly with audiences - and often without studio/network intervention - like never before.”¹³¹ While the WGA was increasing its support for such “entrepreneurial” writers, Denise Mann points out that following the strike:

[R]ather than embrace the mass collaborative approach to television explored during the *Lost* moment, the ‘big three’ networks appear to have bolstered their traditional bureaucratic fortresses to maintain singular control over all aspects of the broadcast business. In particular, ABC fired several of the principal executives involved in the *Lost* franchise and reabsorbed many of the functions that the *Lost* writers had performed in collaboration with the network’s programming, marketing, licensing, and merchandising divisions. Since 2011, the big three have reverted to more conventional programming choices (reality shows, sit-coms, episodic dramas), reasserted control over their licensed properties (computer games, novels, board games, and the like), and expanded their in-house digital marketing divisions to create and manage digital promotions tied to their series — all, it seems, in an effort to maintain stricter controls over their industry in the post-strike environment.¹³²

Mann further observes that, since the strike, studios and networks have turned to low-cost in-house labor in what appears to be an effort to escape the demands of

¹²⁸ A mobisode is an episode of television intended for viewing on a mobile device. *See generally* Scott Ruston, *Televisual Narratives in the Palm of Your Hand, Understanding Mobisodes*, PRODUCING TELEVISION, Spring 2008, <https://cinema.usc.edu/assets/054/10994.pdf>.

¹²⁹ Mann, *supra* note 126, at 118.

¹³⁰ *Id.* at 135.

¹³¹ *Id.*

¹³² *Id.* at 119-20

writers seeking greater recognition and remuneration for their contributions.¹³³ She concludes that powerful networks like ABC have displayed an “unwillingness to collaborate with creative partners to the degree seen during the *Lost* moment.”¹³⁴ More troublesome, however, is that “all of the networks have shown a reluctance to grant additional power to showrunners who wish to engage fans by embracing social media as a viable component of the television experience in the digital age.”¹³⁵ She describes that the networks are hesitant about working with outside partners, such as “WGA-represented transmedia czars, PGA-represented transmedia producers, super-fans who wish to contribute to the television experience, or the type of creative entrepreneurs that YouTube is hiring for its 100-channel partnerships.”¹³⁶ Overall, Mann noticed a trend of studios and networks trying to minimize the threat of collaboration by “taking a giant step backward toward their analog past.”¹³⁷

The treatment of the producers for the hit television show *Heroes* further demonstrates how networks have responded to the post-production creative boom in unfavorable ways. In 2007, the show’s producers proposed to network executives the formation of a “transmedia team” to be tasked with managing the continuity of any extensions of the show’s narrative as it expanded beyond its traditional television medium and format through the creation of bonus material made available on other media platforms. The responsibilities of this team would be divided into three main roles: “merchandising,” “coordinat[ing] all narrative mobilizations of the property across comics, the Internet, and the like,” and “work[ing] with the stars of the series to secure their participation in promotions and content made for these new media.”¹³⁸ However, the network ultimately dismissed the proposed model for maintaining narrative continuity and fidelity. This is a paradigm example of what Derek Johnson classifies as the “contradiction between singular authorship and the

¹³³ *Id.* at 122.

¹³⁴ *Id.* at 136.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See Derek Johnson, *Authorship Up for Grabs: Decentralized Labor, Licensing, and the*

Management of Collaborative Creativity, in WIRED TV: LABORING OVER AN INTERACTIVE FUTURE 32, 40–41 (Denise Mann ed., 2014).

decentralized creativity of networked production cultures.”¹³⁹ Regrettably, it appears that participants who seek alternative means of employment are only met by rejection.

Operating as an obstacle to the recognition of judicial rights and providing limited guidance on creators’ legal rights, the *Aalmuhammed* test arguably contributes to a growing dissatisfaction among entertainment industry unions. The outcome has been debilitating in certain instances. Although some minimums or residuals may be established in the short-term, networks may put up more barriers in response to such proposed changes in the long-term, as exemplified by the *Lost* strike and the doomed *Heroes* proposal. Given the weaker bargaining position of union members, big networks are well-placed to structure their operations in a manner that promotes their interests, much to the detriment of entertainment creators. Union mobilization would be disrupted and potentially paralyzed if networks take advantage of the *Aalmuhammed* test protections. Employee creators would struggle to avail themselves of joint authorship status under the three-factor *Aalmuhammed* test, especially in the emerging context of derivative supplemental and promotional content designed to “keep the story alive” as it migrates across consumption platforms. Creators would be hard-pressed to show that they contributed to the original story, that all relevant parties manifested mutual intent to be co-authors, and that they contributed to audience appeal.

Writers are also directly burdened by the adverse effects the *Aalmuhammed* test has on entertainment unions. Given the monopolization of the creative process, writers may struggle to obtain a writing credit for projects they worked on despite their sizable contributions. The WGA has a system in which “any writer whose work represents a contribution of more than 33% of a screenplay shall be entitled to screenplay credit. One exception exists for original screenplays in which any subsequent writer or writing team must contribute 50% to the final screenplay.”¹⁴⁰ In order to determine whether a writer meets this threshold, an arbiter is brought in to consider various elements of their contribution to the work at issue, including dramatic construction, original and different scenes, characterization or character relationships, and dialogue.¹⁴¹ Each work is looked at independently and there are no

¹³⁹ *Id.* at 34.

¹⁴⁰ See WRITERS GUILD OF AMERICA, SCREEN CREDITS MANUAL 16 (2010), <http://www.wga.org/contracts/credits/manuals/screen-credits-manual#4> (defining the term “writer”).

¹⁴¹ *Id.*

formulas an arbiter must use. The WGA, in contrast to the *Aalmuhammed* test, approaches the authorship analysis with much needed flexibility.

In Hollywood, receiving a writing credit signifies the writer's accomplishment and can bolster her reputation. A writing credit is an important touchstone of the writer's professional development because as "writers move from project to project, a career is created as people move from credit to credit."¹⁴² Further, a writing credit "facilitates the assessment of talent in a high-velocity labor market" and provides "residuals . . . [to] . . . compensate writers during periods of slack employment, thus keeping their human capital in the industry."¹⁴³ One way in which a residual provides better compensation to writers is through the allocation of a credit bonus, which is "a provision of an individual hiring contract stating that the writer will receive a bonus if the writer is determined to get screen credit."¹⁴⁴ By minimizing the writer's ability to legally establish co-authorship, the *Aalmuhammed* test may have adverse economic repercussions on writers by minimizing their ability to gain writing credit and its associated benefits.

Overall, the *Aalmuhammed* test-or-nothing approach creates obstacles to joint authorship status and future employment opportunities for creative contributors.

V. PROPOSALS FOR REFORM

That brings the analysis to the next question: what *should* be the standard by which joint authorship is determined?

Professor Balganesh et al. recommend implementing a test that analyzes the contributions made and the "mutual intent among the collaborators that they be joint authors," rather than focusing on the control element of the work.¹⁴⁵ Such inquiry as to mutual intent will only arise when the "parties have not expressly contracted ownership."¹⁴⁶ This approach would allow "all principal creative collaborators in the production of a motion picture, sound recording, or other collaborative work" to

¹⁴² Catherine L. Fisk, *The Role of Private Intellectual Property Rights in Markets for Labor and Ideas: Screen Credit and the Writers Guild of America, 1938-2000*, 32 BERKELEY J. EMP. & LAB. L. 215, 250 (2011).

¹⁴³ *Id.* at 248.

¹⁴⁴ *Id.* at 264.

¹⁴⁵ Balganesh et al., *supra* note 107, at 15-16.

¹⁴⁶ *Id.* at 16.

“qualify as joint authors”.¹⁴⁷ While the professors qualify that this would not result in every single contributor being granted joint authorship, this standard remains problematic with respect to the entertainment industry. For example, agreements to take on certain roles often do not go as far as establishing a mutual intent to be joint authors given the time constraints of production on set and the prevalence of oral contracts.

Professor Christopher Jon Sprigman proposes another systematic approach that imposes a default rule that parties may contract around to reach the idealized authorship relationship.¹⁴⁸ In practice, a default rule would establish which party would automatically be granted joint authorship status. Sprigman further suggests making the default rule “painful” so that the parties, in objecting to it, will have to provide information about which contributors they would prefer to credit with joint authorship status.¹⁴⁹ Parties have the ability to opt-out of the default rule and can negotiate against the background of clear rules. While this proposal offers an organized, approachable solution, it may not pair well with the elasticity and flexibility of the creative process. Specifically, there may not be time to engage in the contracting, nor would there be widespread knowledge of a default rule one would need to contract out of in the first place. Further, it places the parties in a situation where a negotiation, or at least a discussion, would have to take place from the outset. This may disincentivize collaboration, as creators may wish to avoid the trouble and cost of bargaining over authorship *ex ante*.

Another area of the law that has been proffered as a solution to the authorship question is the work made for hire doctrine. The Copyright Act defines a work made for hire as “a work prepared by an employee within the scope of his or her employment” or a work that is commissioned specifically to be used in a variety of listed works, including, in most relevant part, “as a part of a motion picture,” with the parties “expressly agree[ing] in a written instrument signed by them that the work shall be considered a work made for hire.”¹⁵⁰ In *Community for Creative Non-Violence v. Reid*, the Supreme Court delineated a list of factors that can be used to determine whether or not a work qualifies as a work made for hire by identifying the

¹⁴⁷ *Id.*

¹⁴⁸ Christopher Jon Sprigman, Remarks for Advanced Copyright Class at New York University School of Law (Spring 2018).

¹⁴⁹ *Id.*

¹⁵⁰ 17 U.S.C. § 101 (2012).

status of the person hired.¹⁵¹ Hiring status becomes determinative to the extent that the copyright lies with the employer if the creative contributor is an employee or independent contractor with the requisite signed written agreement. To determine the employment status of a hired party, the Supreme Court looked to the following factors:

the hiring party's right to control the manner and means by which the product is accomplished, the skill required, the source of the instrumentalities and tools, the location of the work, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work, the method of payment, the hired party's role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, whether the hiring party is in business, the provision of employee benefits, and the tax treatment of the hired party.¹⁵²

The proposed solution, then, is to have the employers tailor the course of employment to fit the *Reid* factors such that the person hired would affirmatively qualify as an employee. Employers would arguably use this strategy when they could anticipate a potential copyright claim. As evidenced by the fluctuations inherent to the entertainment industry in both hiring and throughout the creative process itself, predicting copyright claims or even framing the employment relationship to adhere to the *Reid* factors is, for the most part, too difficult to execute.

While more compatible with the functions and operations of the modern entertainment industry, a case-by-case analysis lacks the guidance courts may seek when addressing such joint authorship issues. Stripping courts of judicial guidance on the one hand, and rote application of an obsolete and poorly designed three-part test on the other, are both not ideal. Instead, a middle-ground approach should be adopted in order to provide the courts with necessary assessment tools and background knowledge, while still allowing them the freedom to embrace the fluidity they may encounter in the various fact patterns presented.

First, guidelines should be tailored to the subject or content at issue, whether it takes the form of films, television shows, musicals, music videos, or the like. Tests

¹⁵¹ *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

¹⁵² *Id.* at 752.

with distinct factors may be developed for the various kinds of content, as long as they allow for the flexibility inherent to the entertainment industry and permit creators to freely roam within its carefully crafted boundaries. For example, a test for motion pictures could account for creative contributions by film consultants by analyzing the quantum of control they exercised over the film. Under such a test, a court may determine that if Aalmuhammed had rewritten or had a significant impact on more than one half of the total scenes, then he should have been awarded joint authorship status. Musical works, too, should be analyzed in ways that account for more than stereotypical elements that are considered by a court to make a “rap” song popular or a “country” song identifiable. Instead, an objective approach should be implemented whereby the stereotypes that Judge Gregory had relied on in *Flowers* are removed.

Second, plaintiffs or defendants may introduce as evidence market studies that describe which aspects of an entertainment work served as most attractive to its audience members. By relying on what consumers actually think, this may reduce the potential for mistaken attributions of ownership and disputes over whose contributions made the biggest impact with respect to revenue or audience appeal. Market studies of this kind can also assuage the concerns of judges who fear the theoretical onslaught of endless co-authorship claims. This middle-ground approach will thus avoid any slippery slope, or as Google’s attorneys would like to say, “the Swiss cheese of copyrights.”¹⁵³

Another player that can improve the current framework surrounding joint authorship is Congress. Congress can amend the Copyright Act in ways that provide guidance not just to judges, but also to the creators themselves. For example, the Section 101 definition of “joint work,” as well as the Copyright Act in general, currently lack a definition of “author.” Congress can narrowly revise the Copyright Act to account for idiosyncratic works to which there are many contributors, by qualifying that “an author, particularly in creative works in which many different collaborators contribute, may not necessarily fit the ideal or traditional characteristics one would normally associate with the title.” Such a revision would clarify overbroad or vague language, while also loosening the standards to which collaborators may have felt previously bound. Such guidance could function as the proper notice collaborators should be able to rely on, thus diminishing any reluctance on the part of would-be collaborators to enter into a collaborative creative

¹⁵³ *Garcia v. Google, Inc.*, 786 F.3d 733, 742 (9th Cir. 2015).

relationship, reducing the likelihood of authorship battles erupting, and ultimately improving the overall efficiency of the entertainment industry.

CONCLUSION

*“Then he burst out crying. ‘Sorry,’ he said, regaining his composure. ‘It’s been difficult because there’s been a lot of criticism, obviously, and that was never the intention.’”*¹⁵⁴ – Steven Jan Vander Ark

The judicial system’s current treatment of those who seek vindication of their claims for joint authorship paints a rather bleak picture: one where enthusiastic creators like Steven Jan Vander Ark are reduced to tears on the stand. Vander Ark is joined by film consultants like Aalmuhammed, screenwriters like Richlin, sound engineers like Brown, and band members like Morrill who put their trust in the legal system to secure their authorship rights as creative contributors after their fellow collaborators denied them the credit and benefits they deserve. To their dismay, the Ninth Circuit’s three-part test to determine whether an individual qualifies as a joint author to a work was unaccommodating with respect to both the major creative roles they played as well as the modern functions of the entertainment industry.

Entertainment has proven to be one of the most booming industries in society today, providing high quality content in unprecedented ways across the globe. Yet while the industry continues to grow, the legal framework for the authorship question remains stuck in the past. Poorly suited for the expanded marketplace for collaboration and unchanged in the face of widespread innovative media technologies, the Ninth Circuit’s obsolete test hinders, rather than furthers Congress’s explicit constitutional duty to promote the growth of the arts. This paradox, where the judicial system’s treatment of authorship ultimately disincentivizes authors, the very people expected to create, heightens the necessity for reform. To improve employment in the modern entertainment industry and further the policy goals of copyright law, the Ninth Circuit’s test must no longer serve as the governing standard for evaluating joint authorship rights.

The judicial system must play its role in granting and reinforcing the allocation of intellectual property rights so that those who are deserving of credit in the creative process can do so without worrying about having their contribution minimized. This is a call to action for the courts to recognize its role in creating

¹⁵⁴ Anemona Hartocollis, *Sued by Harry Potter’s Creator, Lexicographer Breaks Down on the Stand*, N.Y. TIMES, Apr. 16, 2008, at B1.

barriers to employment in the entertainment industry and craft more appropriately tailored authorship tests to better accommodate those who are employed and who seek to be employed in the entertainment industry. A more carefully articulated framework can be implemented to strike a fair balance between infinite copyrights on the one hand and a monopoly over copyrights on the other. It is not solely up to the courts; Congress must amend the Copyright Act to overcome the inherent vagueness underlying the statutory definition of “author” as well. These reforms have been advanced by scholars and creators alike. In a multibillion dollar industry where success is highly correlated with authorship rights, it is simply too costly to leave the Vander Arks of the world stripped of their rightful legal protection.