School of Law
UNIVERSITY OF GEORGIA
Prepare. Connect. Lead.

Journal of Intellectual Property Law

Volume 31 | Issue 2 Article 7

July 2024

Guilty Pleasures: The Copyright and Labor of Reality Television

Emily Tracy
University of Georgia, htp42352@uga.edu

Guilty Pleasures: The Copyright and Labor of Reality Television

Cover Page Footnote

J.D. Candidate, 2025, University of Georgia School of Law.

Special thanks to Professors David Shipley and Weyman Johnson for their support and guidance in writing this Note. Extra special thanks to the friends and family who have shared and supported my love of reality television—all in the name of research, of course.

NOTE

GUILTY PLEASURES: THE COPYRIGHT AND LABOR OF REALITY TELEVISION

*Emily Tracy**

* J.D. Candidate, 2025, University of Georgia School of Law. Special thanks to Professors David Shipley and Weyman Johnson for their support and guidance in writing this Note. Extra special thanks to the friends and family who have shared and supported my love of reality television—all in the name of research, of course.

I. INTRODUCTION

At the height of *Keeping Up with the Kardashians*' final seasons on E!, 1.9 million viewers' guilty pleasure show was raking in just under $100 million for reality's royal family.[1] At the same time, E!'s production company offered one story producer with 13 years of experience in the industry a job on the show for a flat rate of only $1,100 per week.[2]

Story producers are the craftspeople behind a reality show's narrative.[3] They review copious amounts of material, among other tasks, to edit raw footage into the consumable, cohesive, and addicting reality episodes that millions of viewers hate to love and love to hate.[4]

The job, especially in recent years, is underpaid, thankless, and demanding. One longtime story producer recalls "'sobbing on the way to work . . . because [they] had worked 24 hours at that point and there was just not enough Adderall to stay awake.'"[5] Another story producer described a similar experience: "[i]t's 5 a.m., and my whole body is shaking. Not because I'm cold or having a caffeine or drug withdrawal, but because I have been up for 18 hours straight, six days a week, for the past three months."[6]

This Note focuses on story producers' labor. We begin with an exploration of reality television as a genre and an industry, followed by an explanation of the Writers Guild of America (the "WGA") and its history and mechanics. Next, keeping in mind the intellectual property aspects of the WGA, this Note scrutinizes courts' copyright analyses of reality television shows. Courts implicitly recognize the labor of reality story producers in this context as similar, if not identical, to that of scripted television writers. Thus, this Note argues that story producers belong in the WGA's collective bargaining unit.

---

[1] Emily Longeretta, *Kardashian-Jenner Family Will Split a Massive 9-Figure Salary for New Hulu Reality Series*, VARIETY (Mar. 10, 2022, 10:47 AM), https://variety.com/2022/tv/features/kardashians-jenners-salary-hulu-reality-show-1235201104/.

[2] *See* Katie Kilkenny, *Reality TV's Story Producers Face Decreasing Wages, Tougher Working Conditions*, HOLLYWOOD REP. (Sep. 17, 2019, 7:00 AM), https://www.hollywoodreporter.com/news/general-news/reality-tv-story-producers-face-decreasing-wages-tougher-working-conditions-1239626/ (emphasizing the weekly rate offered to this veteran story producer was at least a $1,400 pay cut per week, as compared to previous years).

[3] *See* Tanner Mirrlees, *Reality TV's Low-Wage and No-Wage Workforce*, 27 ALTERNATE ROUTES 187, 193 (2016) (explaining the role of story producers in creating reality television).

[4] *See* Kilkenny, *supra* note 2.

[5] *Id.*

[6] Toni-Ann Lagana, *Reality TV's Overburdened, and Underrepresented Workforce*, HOLLYWOOD REP. (Jan. 21, 2021, 6:45 AM), https://www.hollywoodreporter.com/business/business-news/reality-tvs-overburdened-and-underrepresented-workforce-guest-column-4118821/.

II. BACKGROUND

A. REALITY TELEVISION

Equally scorned and beloved, reality television is a massive force in the entertainment industry. This section describes both the history of the genre and the grody underbelly of labor that creates it.

1. The Genre

Popular reality television as we know it today has its roots at the turn of the twenty-first century, when the first airings of *Survivor* and *Big Brother* arrived on American televisions.[7] Audiences responded more than favorably, watching *Survivor* more than any other television program that year.[8] The following decade saw a boom of similar competition reality programs, including *American Idol*, *The Bachelor*, *Project Runway*, and *RuPaul's Drag Race*.[9]

Non-competition reality television, sometimes called docusoap or structured reality, was simultaneously thriving.[10] MTV's *The Real World* established the genre in 1992, with such household names as *The Real Housewives* and *The Hills* following closely in its footsteps.[11]

As a genre, reality television has endured long past its initial boom. Audience devotion to fan-favorite reality programs is certainly one factor, but other events contributed to the genre's evolution into the mammoth of entertainment it is today.[12] During the 2007 WGA strike, over 100 reality shows either debuted or returned to the air to fill out networks' strike-proof schedules and satiate audiences.[13] Further, the rise of streaming has produced a new body of quickly

[7] LAURIE OUELLETTE, A COMPANION TO REALITY TELEVISION 1 (2014).

[8] Bill Carter, *After Super Bowl, 'Survivor' Is the Season's Top Hit on TV*, N.Y. TIMES (Jan. 30, 2001), https://www.nytimes.com/2001/01/30/business/after-super-bowl-survivor-is-the-season-s-top-hit-on-tv.html.

[9] Judy Berman, *Reality TV Has Reshaped Our World, Whether We Like It or Not*, TIME (Aug. 4, 2022, 8:39 AM), https://time.com/collection/reality-tv-most-influential-seasons/6199108/reality-tv-influence-on-world/.

[10] *See* OUELLETTE, *supra* note 7, at 104, 116 (defining docusoaps as "deriving from both documentary conventions and drama" and structured reality as "a hybrid form that plays with dramatic construction and social interaction").

[11] Berman, *supra* note 9.

[12] *See* Matthew Bunker, *Reality Bites: The Limits of Intellectual Property Protection for Reality Television Shows*, 26 UCLA ENT. L. REV. 1, 3 (2019) ("[I]n the week of June 27-July 3 [2016], broadcast and cable reality shows captured seven of the top ten positions . . . .").

[13] Virginia Hogan, *Why This Could Be a Pivotal Moment for Reality TV Freelancers*, FORBES (June 2, 2023, 8:00 AM), https://www.forbes.com/sites/ginnyhogan/2023/06/02/is-now-the-moment-for-reality-tv-freelancers-to-unionize/?sh=1e21f3d667c2.

and constantly produced reality shows in recent years.[14] Many of these new shows found massive success and created a huge, if fleeting, cultural impact.[15]

2. The Labor

That reality television is unscripted is widely accepted as a laughable fiction.[16] This fiction serves to satisfy an audience demand for authenticity while maintaining a coherent storyline, but it also obscures much of the demanding labor involved in creating reality television.[17] Communications scholar Tanner Mirrlees argues:

> Reality TV is supposedly non-scripted, yet, writers, though not recognized as writers, shape what viewers see or don't see. These 'story producers,' 'story editors' and 'segment producers' turn hundreds sometimes thousands of hours of source material into compelling twenty-two to forty-four minute narratives with a beginning, middle and end, protagonists (heroes) and antagonists (villains) and conflict-driven action—all typical of scripted TV.[18]

Obscuring the labor of writing reality television does more than suspend audience disbelief; it devalues the work of the workers performing writing-like tasks for reality television programs. The vast majority of the workers who create reality storylines are nonunion, and with that distinction comes a host of labor problems.[19]

Reality television creators, compared with their unionized counterparts in the scripted sector, face longer hours, lower wages, and little to no long-term job

[14] *See* Berman, *supra* note 9 ("[T]he rise of streaming has intensified the race to create as much addictive, populist content as possible, as quickly and cheaply as possible."); *see also* Sarah Shevenock, *Reality TV Is Having a Second Renaissance on Streaming*, MORNING CONSULT PRO (Oct. 5, 2021, 1:33 PM), https://pro.morningconsult.com/articles/reality-tv-the-circle-netflix (providing examples of popular made-for-streaming reality shows such as *The Circle*, *Too Hot to Handle*, and *Love is Blind*).

[15] *See* Shevenock, *supra* note 14 (describing how streamed reality shows tend to be easily forgotten).

[16] *See* Berman, *supra* note 9 (noting a meta episode of *The Real World* that showed the cast "breaking into the production room set up in their loft and discovering that they weren't documentary subjects so much as characters in an unscripted soap opera").

[17] *See* OUELLETTE, *supra* note 7, at 461; *see also* Mirrlees, *supra* note 3, at 192 ("The non-scripted label, however, obscures how reality TV is quite similar to scripted TV in terms of its labour process.").

[18] Mirrlees, *supra* note 3, at 193.

[19] Meredith Blake & Yvonne Villarreal, *In Past Strikes, Networks Turned to Reality TV. Now It's More Complicated*, L.A. TIMES (Apr. 10, 2023, 5:00 AM), https://www.latimes.com/entertainment-arts/business/story/2023-04-10/writers-strike-reality-tv-unions.

security.[20] Harrowing accounts from reality workers of twelve to eighteen-hour days are common.[21] Further, most story producers and other reality professionals are freelancers and therefore excluded from employee benefits including, usually, insurance.[22] Thus, these workers, despite performing similar and often more demanding duties than scripted television writers, are left exploited and unprotected.

B. THE WRITERS GUILD OF AMERICA

The Writers Guild of America ("WGA") describes itself as "a labor union representing the thousands of creators who write scripted series, features, news programs, and other content."[23] This section briefly details first the history of the WGA, then the mechanics of its private intellectual property rights system.

1. WGA History

The WGA has its roots in several early writers' unions, but its primary precursor was the Screen Writers Guild, formed on April 6, 1933.[24] Although screenwriters had long acted in solidarity, the Screen Writers Guild marked their first step towards true organization.[25]

WGA archivist Hilary Swett explains that "[t]he Guild's 1933 founding is often contextualized in terms of larger American narratives such as . . . screenwriting's relationship to copyright, authorship and ownership."[26] This theory informs the Screen Writers Guild's early victories, including control of screen credit, minimum compensation, residuals, and separated rights.[27]

After the passage of the National Labor Relations Act, the Screen Writers Guild petitioned for a representation election and was met with fierce resistance from production companies.[28] The companies contended that the writers were independent contractors rather than employees and thus outside of the National

[20] *Id.*; *see also* OUELLETTE, *supra* note 7, at 21 (tying the exploitation of nonunion labor on reality television to efforts both to contain creative costs and avoid strike action).

[21] *See* Lagana, *supra* note 6 ("I have been up for 18 hours straight, six days a week, for the past three months, working on an unscripted TV show."); Kilkenny, *supra* note 2 ("I can remember sobbing on my way to work . . . because I had worked 24 hours at that point and there was just not enough Adderall to stay awake.").

[22] Hogan, *supra* note 13.

[23] *Guide to the Guild*, WRITERS GUILD AM. W., https://www.wga.org/the-guild/about-us/guide-to-the-guild (last visited Sept. 25, 2023).

[24] Hilary Swett, *The Screen Writers' Guild: An Early History of the Writers Guild of America*, WRITERS GUILD FOUND. (2020), https://www.wgfoundation.org/screenwritersguild-history.

[25] *Id.*

[26] *Id.*

[27] *A History of WGA Contract Negotiations and Gains*, WRITERS GUILD AM. W., https://www.wga.org/the-guild/about-us/history/a-history-of-wga-contract-negotiations-and-gains (last visited Mar. 15, 2024).

[28] Metro-Goldwyn-Mayer Studios, 7 N.L.R.B. 662, 663-64 (1938).

Labor Relation Board's jurisdiction.[29] The Board disagreed, citing producer direction and control over writers' work to conclude that the writers were employees and eligible to unionize.[30]

Thus, after the Board directed an election,[31] the Screen Writers Guild received a majority of votes and was certified as the writers' exclusive bargaining representative in 1938.[32] In 1954, after merging with several television and radio writer unions, the Screen Writers Guild became the Writers Guild of America as we know it today, composed of East and West divisions.[33]

Today, the WGA represents roughly 11,500 film and television writers.[34] Its members can only work with production companies that are signatory to its Minimum Basic Agreement ("MBA"), and its signatories, in turn, may only employ its members.[35] This agreement has made the WGA a massive and almost unavoidable force in the entertainment industry today.[36]

2. WGA Mechanics

While the WGA has secured many weighty and significant rights for its members, this Note focuses on those related to intellectual property.[37] Namely, this section explains the WGA's systems of registration, residuals, and separated rights.

The script registry was created in 1927 to prevent conflicts over which writer originated an idea without involving logistically complicated copyright registration.[38] Although the logistical difficulties of federal registration have

[29] *Id.* at 686.

[30] *Id.* at 689–90.

[31] *Id.* at 701.

[32] *Screen Guild Wins Labor Board Vote*, N.Y. TIMES (Aug. 10, 1938), https://www.nytimes.com/1938/08/10/archives/screen-guild-wins-labor-board-vote-receives-exclusive-bargaining.html.

[33] *A History of WGA Contract Negotiations and Gains*, *supra* note 27.

[34] Dawn Chmielewski et al., *Striking Hollywood Writers Reach Tentative Deal with Studios*, REUTERS (Sept. 25, 2023, 3:35 PM), https://www.reuters.com/world/us/writers-reach-tentative-labor-agreement-with-hollywood-studios-2023-09-25/.

[35] WRITERS GUILD AM., 2020 THEATRICAL AND TELEVISION BASIC AGREEMENT 36–37 (2020), https://www.wga.org/uploadedfiles/contracts/mba20.pdf.

[36] *See* Hamilton Nolan, *The Historic Writers' Strike Matters for Everyone – Not Just Hollywood*, GUARDIAN (May 6, 2023, 6:00 AM), https://www.theguardian.com/commentisfree/2023/may/06/writers-strike-historic-importance-ai.

[37] *See generally*, *A History of WGA Contract Negotiations and Gains*, *supra* note 27 (detailing the rights and privileges the WGA has secured for its members since 1941).

[38] Catherine 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, 269 (2011).

largely been resolved by the advent of the online registration, the WGA registration system remains prevalent today.[39]

The WGA registration system remains relevant for two main reasons. First, it allows for the registration of ideas, which are valuable in the industry, whereas federal registration strictly excludes ideas.[40] Second, it has become the industry standard for proof of authorship and created an industry norm expecting and respecting WGA registration.[41]

Residuals are private intellectual property rights which were established by the WGA in 1953.[42] The WGA defines residuals as "compensation paid for the reuse of a credited writer's work."[43] They are a contractual foil to copyright's royalty system.[44] Royalties are paid to the copyright owner, and residuals are paid to the copyright owner's qualifying employees.[45] The difference between the two can be explained as such:

> Residuals are wages, are payments to employees from their employer, and are clearly defined as such by the collective bargaining agreements that created them and provide for their ongoing existence. Royalties, on the other hand, may be nonwage payments originating from or paid by third-party users of content pursuant to a statutory requirement or a contractual obligation with the rightsholder, or may refer to wage or wage-like payments from an employer.[46]

Thus, residual payments, which compensate employees where the copyright's work-for hire doctrine will not, are a result of collective bargaining that redistributes copyright law's statutory benefits.[47]

---

[39] *See id.* (explaining how early federal copyright registration required mailing a script to Washington D.C.).

[40] *Id.* at 270.

[41] *See id.* (explaining that non-legally trained production personnel's "assumption that registration has protective meaning deters them from infringing and thereby actually confers meaning on registration").

[42] *See A History of WGA Contract Negotiations and Gains*, *supra* note 27 (tracing the first WGA residuals to 1953 for reuse of made-for-TV projects for up to five reruns, along with subsequent expansions of residual eligibility).

[43] *Residuals Survival Guide*, WRITERS GUILD AM. W. (Mar. 2022), https://www.wga.org/members/finances/residuals/residuals-survival-guide.

[44] Fisk, *supra* note 38, at 262.

[45] *Id.*

[46] Duncan Crabtree-Ireland, *Labor Law in the Entertainment Industry*, 31 ENT. & SPORTS LAW. 4, 5 (2015).

[47] The work-for-hire doctrine states that "[i]n the case of a work made for hire, the employer . . . is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright." 17 U.S.C. § 201(b).

Alongside residuals, the WGA modifies statutory copyright law's effects through its system of separated rights.[48] Separated rights are a group of rights that the WGA secures to certain writers.[49] For television, these include the right to produce dramatic stage, theatrical, publication, merchandising, radio, live television, and interactive programs based on the material.[50]

The right to receive separated rights and residual payments depends on a writer being awarded screen credit.[51] Writers have determined credit since 1941, and the process has changed little since then.[52] If a writer objects to a studio's determination of credit, the WGA arbitrates, looking to plot, characters, scenes, and dialogue to determine credits.[53]

Thus, the WGA has created its own private intellectual property system including registration, residuals, and separated rights to protect and provide for writers where copyright law does not.

3. The 2023 Strike and Its Effects on Reality TV

On May 2, 2023, the WGA went on strike after failing to reach an agreement with the Alliance of Motion Picture and Television Producers.[54] Disagreements in negotiations focused around working conditions, compensation structure, and artificial intelligence.[55]

SAG-AFTRA announced its own strike on July 13, 2023.[56] This walkout marked the writers' and actors' first concurrent strike against studios since 1960, as a result of which both unions were able to make massive contractual gains.[57] In the wake of the concurrent strikes, television networks formed "strike-proof" fall schedules that relied heavily on unscripted content to mitigate the strikes' impacts.[58] Networks responded similarly during past writers' strikes, including

[48] Fisk, *supra* note 38, at 219.

[49] WRITERS GUILD AM. W., UNDERSTANDING SEPARATED RIGHTS 7, https://www.wga.org/uploadedfiles/know_your_rights/SeparatedRights.pdf (last visited Sept. 28, 2023).

[50] *Id.* at 30–31; *see also id.* at 23–30 (explaining TV's more complicated separated rights).

[51] Fisk, *supra* note 38, at 258, 263 ("[S]creen credit determines the writer's share of the copyright's value in the form of separated rights and residual payments.").

[52] *A History of WGA Contract Negotiations and Gains*, *supra* note 27; *see also* Fisk, *supra* note 38, at 229 ("The credit determination process has changed remarkably little since 1942.").

[53] Fisk, *supra* note 38, at 230.

[54] Megan McCluskey, *What Happened the Last Time SAG and the WGA Went on Strike Together*, TIME (July 4, 2024, 4:10 PM), https://time.com/6294777/sag-wga-strike-1960/.

[55] *Id.*

[56] *Id.*

[57] *See id.* (describing such union victories as actor residuals for new films, writer pension funds and health insurance, and residuals for writers for television reruns).

[58] Ree Hines, *Reality TV to The Rescue? Amid Writers' Strike, ABC and Fox Lean on Unscripted Shows*, FORBES (May 17, 2023, 6:18 PM), https://www.forbes.com/sites/reehines/2023/05/17/reality-tv-to-the-rescue-amid-writers-strike-abc-and-fox-lean-on-unscripted-shows/?sh=74ce83b17916.

those in 1988 and 2007, and the reality shows which gained popularity during those strikes were hugely successful.[59]

Despite this estimated eighty-one percent increase in unscripted content, jobs in the reality industry remained scarce, demanding, and unrewarding as ever.[60] Even certain reality shows themselves were hit by the strikes, with many SAG-AFTRA members refusing to appear as celebrity contestants on unscripted shows.[61] Further, media attention on the dual strikes and the increase in reality programming brought increased attention to the working conditions on reality shows.[62]

Calls for reality unionization are certainly not new to the 2023 strike. One of the top WGA demands during its 2007 strike was to include reality producers in the guild shop provisions, but it was ultimately conceded in negotiation.[63] Although membership is thus neither guaranteed to nor required of story producers, reality workers on some shows have successfully voted to join the WGA.[64]

The crews of individual reality shows such as *Masterchef*, *Survivor*, and *Swamp People* have also secured union contracts through the International Alliance of Theatrical and Stage Employees ("IATSE").[65] Still, however, there is no overarching union for reality workers, specifically story producers, comparable in size or operation to the WGA or SAG-AFTRA.[66] Although doubts about the feasibility of such a union pervade the industry, growing awareness for reality workers' labor issues feeds hope for change.[67]

[59] Hogan, *supra* note 13 (noting that increased production of reality television during strikes has not led to increased compensation for its workers).

[60] *See* Brianna Wellen, *No, Reality TV Isn't Thriving During Industry Strikes*, PRIMETIMER (Aug. 1, 2023, 2:00 PM), https://www.primetimer.com/news/reality-tv-workers-union-wga-sag-aftra-strike (describing how, three weeks into SAG-AFTRA joining the WGA on strike, opportunities for reality workers had not abounded as speculated).

[61] *See id.* (describing how the only confirmed cast member on *Dancing with the Stars* as of August 1, 2023 was Ariana Madix, a non-union reality star herself).

[62] *Id.*; *see also* Marc Malkin, *Bethenny Frankel Calls for Reality Stars Union: 'Networks and Streamers Have Been Exploiting People for Too Long' (Exclusive)*, VARIETY (July 20, 2023, 7:59 AM), https://variety.com/2023/tv/news/bethenny-frankel-reality-union-strike-1235674531/ (describing a prominent reality star's calls for unionization).

[63] Wellen, *supra* note 60.

[64] Mirrlees, *supra* note 3, at 202 (describing how reality workers at two production companies joined the WGA and won a 2012 contract that included weekly compensation minimums, health benefits, a grievance and arbitration process, and vacation time).

[65] Wellen, *supra* note 60.

[66] *Id.*

[67] *See* Lagana, *supra* note 6 ("I'm not certain if I'll ever see story producers unionizing . . . . [T]he only way for permanent change to happen is to speak up and initiate change.").

III. ANALYSIS

This section examines how courts have analyzed copyright in the reality television context. Part A describes limits of current copyright law that prevent copyrights from vesting in reality television creators, including the work-for-hire doctrine and the lack of copyright in acting performances.

Part B then analyzes how substantial similarity analyses of reality television have a two-fold effect: they both limit the protection copyright affords reality television and emphasize the obscured labor that goes into creating the copyrightable elements of the end product.

Finally, Part C explains and analyzes the labor law doctrine of accretion in the context of nonunion reality workers.

A. COPYRIGHT LIMITS FOR CREATORS

1. Work-for-Hire

The Copyright Act provides that:

> In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.[68]

The Act defines a "work made for hire" in two ways. The first—the traditional employee route—is "a work prepared by an employee within the scope of his or her employment."[69] The second is a bit more tricky: "a work specially ordered or commissioned for use . . . as a part of a motion picture or other audiovisual work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."[70]

The latter definition of a work made for hire is typically applied to independent contractors who contribute to one of the enumerated kinds of works in the statute.[71] These distinct categories of worker—the employee whose rights automatically vest in her employer and the independent contractor whose rights only vest in her employer by contract—make distinguishing between employees and independent contractors crucial to copyright analyses.[72] Courts accordingly analyze employee status with great care.[73]

[68] 17 U.S.C. § 201(b).
[69] 17 U.S.C. § 101.
[70] *Id.*
[71] *See* 2 ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS § 9.03 (2023) (explaining when work for hire applies to independent contractors).
[72] *Id.*
[73] *Id.*

Many reality creators are deemed freelancers or independent contractors.[74] Thus, it becomes tempting to argue that according to the statute on its face, the rights to their work should vest in the creators absent a contract to the contrary. Yet there are several problems with this argument.

First, a creator's job title is not determinative of her employee status.[75] Rather, courts use common law of agency principles to determine the creator's status in copyright cases.[76] The critical analysis is "the hiring party's right to control the manner and means by which the product is accomplished."[77] Factors in this analysis include:

> 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.[78]

Reality television's story producers clearly do not exercise sufficient control over the manner and means by which the show is created to qualify as independent contractors under this analysis.

Second, assuming *arguendo* that reality story producers could be independent contractors under the common law of agency, they still significantly lack bargaining power.[79] As such, production companies would not likely employ an independent contractor on a reality television show absent an agreement that the product is a work made for hire under the statute.

Even if a reality creator were an independent contractor and did not contract to create a work made for hire, she could not likely achieve joint author status to enjoy rights in the show. According to the statute, "a 'joint work' is 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."[80]

---

[74] *See* Lagana, *supra* note 6.

[75] *See* Sharkey v. Ultramar Energy, 70 F.3d 226, 232 (2d Cir. 1995) (describing how the common law of agency principles do not give controlling weight to the contractual labels attached to the parties).

[76] *Id.*

[77] Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989).

[78] *Id.* at 751–52 (footnotes and citations omitted).

[79] *See supra* Section II(a)(2) (describing the working conditions and reality workers that result from an inability to bargain collectively).

[80] 17 U.S.C. § 101.

It is unlikely that production companies and story producers have the requisite intent to be joint authors. Many courts require objective manifestations of intent to co-author, considering such factors as who has decision-making authority, how the parties bill themselves, and contractual agreements between the parties.[81] It is doubtful that production companies or even story producers themselves, at the time of fixation, would consider themselves joint authors and intend to share equally in the show's copyright. Courts would be unlikely to find that intent, too, based on the relevant factors.[82]

Thus, the work-for-hire doctrine provides neither compensation nor bargaining power for reality television's story producers.

2. Copyright in Performance

Copyright protection exists "in original works of authorship fixed in any tangible medium of expression."[83] The Copyright Act enumerates eight non-exhaustive categories of works of authorship that illustrate the breadth of that statutory language.[84] A performance is notably absent from that list.[85]

In 2015, the Ninth Circuit considered the issue of whether a performer can have a copyright interest in her performance in a motion picture.[86] The *Garcia v. Google* court held that the performer had no such right.[87]

In *Garcia*, an actor sought copyright protection for her five-second performance in an inflammatory anti-Islamic film trailer, a performance she had given without knowledge of the end-product's message.[88] The court reasoned that granting rights in her performance "would enable any contributor from a costume designer down to an extra or best boy to claim copyright in random bits and pieces of a unitary motion picture."[89]

The court also based its decision in part on the U.S. Copyright Office's longstanding practice of not allowing a copyright claim by an individual actor in

[81] Aalmuhammed v. Lee, 202 F.3d 1227, 1234–35 (9th Cir. 2000); *see also* Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991) (explaining the requisite intent for joint authorship by distinguishing a literary writer-editor relationship from a true joint authorial relationship due to lack of intent).

[82] *See Aalmuhammed*, 202 F.3d at 1234–35 (enumerating the factors in a joint authorship analysis and highlighting the importance of objective intent).

[83] 17 U.S.C. § 102(a).

[84] *See id.* ("Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; (8) and architectural works.")

[85] *Id.*

[86] Garcia v. Google, 786 F.3d 733, 736 (9th Cir. 2015).

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

[88] *Id.* at 736–37.

[89] *Id.*

her performance contained within a motion picture.[90] This practice, according to the *Garcia* court, prevents splintering a work into many smaller works to make a copyright meaningful.[91] The court further held that the actor never fixed her performance in a tangible medium, a statutory requirement for copyright; the director and his crew did.[92]

The copyright interest of performers is outside the scope of this Note. However, the splintering theory in *Garcia* is troublesome for any potential copyright interests of story producers. Although it is tempting to argue that story producers' role in fixation should beget a copyright interest, story producers are only a few of many workers who contribute meaningfully to such fixation. The splintering theory outlined in *Garcia* likely prevents individual story producers from claiming a copyright in the specific plot or character arcs they create. Such claims would splinter the copyright in a reality program into too many pieces to be meaningful.

B. SUBSTANTIAL SIMILARITY ANALYSES

Although copyright law neither protects nor affords substantial bargaining power to reality story producers, courts deciding copyright infringement cases often implicitly highlight story producers' labor. To find copyright infringement, a court must find that the defendant copied constituent elements of a plaintiff's work that are original.[93] The defendant's work must be substantially similar to the original elements of the plaintiff's work for an infringement claim to be successful.[94]

This section describes how courts in the Second and Ninth Circuits have unobscured the labor of reality television's story producers through their careful substantial similarity analyses in copyright cases.

1. The Second Circuit

Although the Second Circuit Court of Appeals has yet to rule on copyright infringement of a reality television program, New York's district courts have performed such analyses in *Castorina v. Spike Cable Networks* and *A&E TV Networks, LLC v. Big Fish Entertainment, LLC*.[95]

The Second Circuit's substantial similarity test is whether an ordinary observer would regard the aesthetic appeal of the two works as the same unless he set out

[90] *Id.* at 741.
[91] *Id.* at 742.
[92] *Id.* at 743–44.
[93] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).
[94] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 512 (2023).
[95] Castorina v. Spike Cable Networks, Inc., 784 F. Supp. 2d 107, 110 (E.D.N.Y 2011); A&E TV Networks, LLC v. Big Fish Ent., LLC, No. 22 Civ. 7411, 2023 U.S. Dist. LEXIS 105348 (S.D.N.Y. 2023).

to detect the disparities.[96] Although the Second Circuit directs courts to extract unprotectable elements of a work from its substantial similarity analysis, it also directs them to focus on the total concept and overall feel of the two works.[97] The Eastern District of New York explained how those two seemingly conflicting directions function together:

> Accordingly, although stock concepts and scènes à faire are unprotectable in and of themselves, their select[ion], coordinat[ion], and arrange[ment] can be protectable, to the extent that it reflects a particular expression of ideas. And if a work copies the original way in which the author has selected, coordinated, and arranged these unprotectable elements to such an extent that the copying work is substantially similar to the expression of ideas and total concept and overall feel of the copied work, infringement can occur.[98]

The *Castorina* court used this framework to analyze a claim that a sports-themed reality show infringed upon the plaintiffs' treatment for a similarly premised sports-themed reality show.[99] Finding that the treatment consisted largely of scènes à faire, the court held that its protectability could only flow from any unique way the authors arranged the stock concepts.[100]

As to the plaintiff's treatment, the court found that the author's choices in selecting, coordinating, and arranging scènes à faire of a sports reality show were mostly not original.[101] The court did find some protected selection and arrangement, including the treatment's description of comic relief elements and the unique dynamic between its imagined hosts.[102] These elements, however, were not found substantially similar to the alleged infringing work.[103]

The Southern District of New York also had the opportunity to consider a copyright infringement case for a reality television show in *A&E TV Networks,*

[96] *Castorina*, 784 F. Supp. 2d at 110 (quoting Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 66 (2d Cir. 2010)).

[97] *Id.*

[98] *Id.* at 111 (internal quotation marks and citations omitted). For an explanation of the scènes à faire doctrine, see generally 12 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 313.4(I).

[99] *Castorina*, 784 F. Supp. 2d at 108. A treatment is a document that summarizes major scenes of a proposed show, including descriptions of characters and other relevant details. NIMMER, *supra* note 98, § 808.4(G)(3).

[100] *Castorina*, 784 F. Supp. 2d at 111.

[101] *See id.* at 112 (explaining that selecting such stock elements of short bios of athletes, footage of sudden and intense movement, popular sports, and scenes of panic, tension, relief, or failure is not original, creative, and nonfunctional for a sports reality show).

[102] *Id.* at 112–13.

[103] *Id.* at 113.

LLC v. Big Fish Entertainment, LLC.[104] Notably, while the plaintiff in *Castorina* sought protection for a mere reality show treatment, the plaintiff in in *A&E* sought protection for a complete reality television program that had aired for four years, *Live PD*.[105]

The *A&E* court found that plaintiff's *Live PD* was comprised of original expressions of non-protectable elements.[106] The defendants in that case argued that the idea of an unscripted police show was unprotectable and that the show's constituent elements were all unprotectable scènes à faire.[107] While the court agreed that neither the idea of an unscripted police show nor its scènes à faire themselves were protectable, the particular arrangement of those elements in *Live PD* was sufficiently creative to state a claim.[108]

After finding this requisite protectability in the "creative ordering of the segments, guests, colors, music, hosts, angles, camera toggling, and other elements" of plaintiff's show,[109] the *A&E* court found substantial similarity between the plaintiff's and defendant's works.[110]

By focusing almost entirely on the selection and arrangement of stock elements, the *A&E* court recognizes the labor of the story producers performing that selection and arrangement.[111] This focus on story producers' output is implicit; the court refers only to the "author" in a copyright sense and never to the workers who perform the selection and arrangement.

Further, Second Circuit courts were much more prepared to find the finished reality show in *A&E* protectable than the mere treatment in *Castorina*. This

[104] *See generally* A&E TV Networks, LLC v. Big Fish Ent., LLC, No. 22 Civ. 7411, 2023 U.S. Dist. LEXIS 105348 (S.D.N.Y. 2023).

[105] *Compare Castorina*, 784 F.Supp. 2d at 108 ("[P]laintiffs . . . pitched a treatment for a sports-themed reality show . . . which they successfully copyrighted.") *with A&E*, 2023 U.S. Dist. LEXIS 105348 at *1 ("Plaintiff . . . owns the trademark and registered copyrights of the hit television show '*Live PD*' . . . .").

[106] *A&E*, 2023 U.S. Dist. LEXIS 105348, at *23–24.

[107] *Id.*

[108] *See id.* at *26 (listing the selections and arrangements the court found creative when taken as a whole, including "the mix of live police footage and in-studio commentary; the black screen displaying a message regarding a suspect's innocence in white text each time the show begins or returns from a break; the red and blue lights to mirror police cars" and more).

[109] *Id.* at *30.

[110] *See id.* at *34 ("Because [defendant's show] copies nearly every single element in the same manner, coordination, and arrangement as [plaintiff's], the Court does not hesitate to find that the works are substantially similar.").

[111] *Live PD*, despite its name, did not show live, unedited, or at least unselected police footage. Cary Aspinwall & Sachi McClendon, *Did "Live PD" Let Police Censor Footage?*, MARSHALL PROJECT (July 6, 2020, 5:00 AM), https://www.themarshallproject.org/2020/07/01/did-live-pd-let-police-censor-footage. Even that footage which does air closest to being filmed was carefully selected and reviewed by *Live PD* workers, and often also by police departments. *Id.*

difference, too, implicitly highlights the labor of story producers. The selection and arrangement of stock elements in a treatment, usually done by a producer or a screenwriter, is less likely to be awarded copyright protection than that done by story editors in an episode of a reality television show.

2. The Ninth Circuit

The Ninth Circuit, like the Second, has not had a chance to consider reality infringement at the appellate level. California's district courts, though, have had ample opportunity to analyze that issue.[112]

In 2005, the Central District of California decided *Bethea v. Burnett*.[113] In that case, the court considered on a motion for summary judgment whether defendant's reality television show *The Apprentice* infringed upon plaintiff's treatment for a reality television show called *C.E.O.*[114]

The court applied the Ninth Circuit's two-pronged substantial similarity analysis, an extrinsic and intrinsic similarity test.[115] The extrinsic test objectively compares specific expressive elements and focuses on their articulable similarities.[116] The intrinsic test subjectively focuses on how an ordinary observer would perceive the two works.[117] Although a jury must find both extrinsic and intrinsic similarity to find substantial similarity, a finding of no extrinsic similarity in summary judgement necessarily defeats an infringement claim.[118]

The Ninth Circuit's substantial similarity test further requires courts to filter out unprotectable elements of the two works.[119] Thus, the *Bethea* court, while recognizing that the ideas of *C.E.O.* and *The Apprentice* were similar, did not find similarity in the expressions of those ideas.[120] The court specifically focused on a number of unprotectable staples of the reality television genre, including all contestants living together, the lack of scripted dialogue, and the editing of a week of action into one episode.[121]

---

[112] *See, e.g.*, Bethea v. Burnett, No. CV 04-7690-JFW, 2005 U.S. Dist. LEXIS 46944 (C.D. Cal. 2005).

[113] *Id.* at *7.

[114] *Id.*

[115] *Id.* at *21.

[116] *Id.*

[117] *Id.* at *22.

[118] *Id.*

[119] These unprotectable elements include ideas, as distinguished from the expression of those ideas, instances in which a particular expression at issue merges with the idea being expressed, and expressions so standard in the treatment of a given idea that they constitute scènes à faire. *Id.* at *31.

[120] Plaintiff identified the similar elements of business challenges, promotions and benefits, the boardroom setting, and the character of Donald Trump. *Id.* at *33. The court, comparing the *C.E.O.* treatment with two seasons of *The Apprentice*, distinguished between the particular expressions of each of those elements in the two works. *Id.* at *33–42.

[121] *Id.* at *42–43.

The court finally rejected the plaintiff's argument that the combination of unprotectable elements in the two works was protectable based on the particular sequence in which they were strung together.[122] The court found no concrete pattern or sequence in common between the unprotectable elements of *C.E.O.* and those of *The Apprentice*.[123]

As compared to the Second Circuit's focus on selection and arrangement, the Ninth Circuit's extrinsic similarity test is more discerning of those elements of reality television that are unprotectable when standing alone. Under the extrinsic test, those stock elements so common to reality television are more likely to be wholly excluded from the court's substantial similarity test, regardless of their selection or arrangement.

The Central District of California again heard an infringement claim in the reality context in *Zella v. E.W. Scripps Co.*[124] In that case, the plaintiff sought protection for her treatment for a reality cooking show called *Showbiz Chefs* against defendant's show *Rachael Ray*.[125] Applying the same extrinsic test as used in *Bethea*, the *Zella* court compared only the actual concrete elements of the works.[126]

The court held that "any similarities from Plaintiffs' *Showbiz Chefs* and the CBS Defendants' *Rachael Ray* are [scènes à faire] that naturally flow from the interview and talk-show format."[127] In the context of a talk show, the court found that there were only a finite number of ways to express the idea the show sought to express.[128]

Interestingly, the court then went on to examine any substantial similarity between protectable elements in "plot, themes, dialogue, mood, setting, pace, characters, and sequence of events . . . ."[129] On each of these elements, the court looked not only to the concrete elements themselves but also to their sequencing and ordering.[130]

[122] *Id.* at *44.

[123] *Id.*

[124] Zella v. E.W. Scripps Co., 529 F. Supp. 2d 1124 (C.D. Cal. 2007).

[125] *Id.* at 1127.

[126] *Id.* at 1133.

[127] *Id.* at 1135.

[128] *See id.* (listing, as examples of scènes à faire for a cooking talk show, placing the host in a studio, inviting celebrity guests into the studio, discussing current projects, and presenting segments in which the host and celebrities cook in the studio).

[129] *Id.* at 1133. Note that the *Zella* court cites this list of categories to a Ninth Circuit copyright case comparing a screenplay and a scripted mini-series, Funky Films, Inc. v. Time Warner Ent. Co., L.P., 462 F.3d 1097 (9th Cir. 2006). The factors, designed for a scripted work structured by writers, do not change for an unscripted work structured by story producers.

[130] *Zella*, 529 F. Supp. 2d at 1135–36.

Finally, the *Zella* court declined to find that the particular way *Showbiz Chefs* sequenced its unprotectable elements was, itself, a protectable element.[131] The claimed similarities in this case, according to the court, were no more than "randomly selected similarities of generic elements" which appear at different points in the two works.[132]

Notably, the *Zella* court had little interest in finding protection for the plaintiffs' treatment's scènes à faire on a selection/arrangement theory, which carried the day in the Second Circuit cases.[133] It is indeed interesting that the Second Circuit, presented with a finished reality show, was much more open to that theory than courts presented with only a written treatment untouched by story producers.

In *Milano v. NBC Universal, Inc.*, the Central District of California yet again considered a copyright infringement claim in the reality television context.[134] The court considered whether *The Biggest Loser* infringed upon a treatment for a weight loss reality show entitled *From Fat to Phat*.[135]

Using the same factors as in *Zella*,[136] the court began its analysis by noting that "the treatment [for *From Fat to Phat*] is largely conceptual and describes what is essentially an idea, which is not protected under copyright."[137] Failing to find substantial similarity between the treatment and the show, the court engaged most deeply with the categories of plot and character.[138]

In the plot analysis, the court emphasized that the plot of *The Biggest Loser* could be boiled down to only the structure of the show plus those extemporaneous developments which occur during filming.[139] The court did, however, note that a plot of sorts emerges "as the participants, through the dynamic of the game, reveal their character and begin to assume specific roles."[140]

---

[131] *See id.* at 1137–38 (explaining that only "'striking' similarities between the plaintiffs' and defendants' works" give rise to copyright protection (citing Metcalf v. Bochco, 294 F.3d 1069 (9th Cir. 2002))).

[132] *Zella*, 529 F. Supp. 2d at 1138–39.

[133] *See supra* Section III(b)(1) (analyzing several Second Circuit copyright cases that focused on selection and arrangement of generic scenes).

[134] Milano v. NBC Universal, Inc., 584 F. Supp. 2d 1288 (C.D. Cal 2008).

[135] *Id.* at 1290.

[136] *Id.* at 1294.

[137] *Id.* at 1295. Note that, while ideas are unprotectable under copyright, privatized systems like the WGA script registry allow for at least some protection for ideas. *See* Fisk, *supra* note 38, at 270 ("Also, the item registered need not be copyrightable, so one can register an idea, whereas copyright registration requires the person registering to claim that the work registered is eligible for copyright, which ideas are not.").

[138] Milano, 584 F. Supp. 2d at 1296–97.

[139] *Id.* at 1296.

[140] *Id.*

In a similar vein, the court's discussion of the character element pulls in two directions. It finds the descriptions of stock characters in the treatment unprotectable, but it notes that:

> [c]haracter is developed entirely through the dynamic interaction of the contestants over the course of the program. Some are revealed as weak, some strong, some honest and ethical, others completely lacking in integrity, some are motivated and eager participants, others are lazy. The character of the 'characters' is revealed as they are placed under physical and psychological stress throughout the competition.[141]

Keeping in mind, again, story producers' role in creating reality television, a critique of the *Milano* court's analysis of the plot and character elements becomes evident. The court recognizes plots and characters in *The Biggest Loser* as distinct from the show's structure and real-life contestants.[142] The court fails, though, to identify what turns real people and scènes à faire into protectable characters and plots: the labor of story producers.[143]

Finally, in *Dillon v. NBC Universal Media, LLC*, the Central District of California undertook a substantial similarity analysis comparing the reality military competition show *Stars Earn Stripes* to a treatment for a similar show entitled *Celebrity SEALS*.[144]

The court focused on the same categories of articulable similarities as it did in *Zella* and *Milano*.[145] Taking each category in turn, the court found substantial similarity between the theme, plot, and characters of *Stars Earn Stripes* and *Celebrity SEALS*.[146] In its plot analysis, the court notably mentioned that panels of experts and voting systems are stock elements of the reality genre that cannot be included in its substantial similarity analysis.[147] It thus focused entirely on the protectable plot elements actually expressed in both *Celebrity SEALS* and *Stars Earn Stripes*, mainly the expressions of "missions" like sniper duels and ambush scenarios.[148]

---

[141] *Id.* at 1297.

[142] *Id.*

[143] *See* Mirrlees, *supra* note 3, at 193 (explaining how story producers create "narratives with a beginning, middle and end, protagonists (heroes) and antagonists (villains) and conflict-driven action—all typical of scripted TV").

[144] Dillon v. NBC Universal Media, LLC, No. CV-12-09728, 2013 U.S. Dist. LEXIS 100733, at *13 (C.D. Cal. June 18, 2013).

[145] *See id.* at *12 ("[T]he Court 'focuses on articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events in the two works.'") (citation omitted).

[146] *Id.* at *14–19 (finding substantial similarity in each element except for setting, which was not determinative, and dialogue, which was excluded from the court's analysis).

[147] *Id.* at *16.

[148] *Id.*

The *Dillon* court, viewing these protectable elements as a whole, found enough proof of substantial similarity between the *Celebrity SEALS* treatment and the *Stars Earn Stripes* show.[149] Like in *Milano* above, the elements that the *Dillon* court found protectable were the product of story producer labor. The expressions of the "missions" in each show is the exact kind of product a story producer is responsible for stringing together into a narrative.

C. THE ACCRETION DOCTRINE

Courts considering claims of reality television copyright infringement focus on story producer labor, whether they are aware of that focus or, more likely, not. Either by centering their analyses on selection and arrangement like the Second Circuit or on nonstructural elements of a reality show like the Ninth Circuit, courts look carefully for story producers' creativity and narrative ordering.

With these court analyses in mind, it is useful to again consider communications scholar Tanner Mirrlees's description of story producers' work:

> Reality TV is supposedly non-scripted, yet, writers, though not recognized as writers, shape what viewers see or don't see. These 'story producers,' 'story editors' and 'segment producers' turn hundreds sometimes thousands of hours of source material into compelling twenty-two to forty-four minute narratives with a beginning, middle and end, protagonists (heroes) and antagonists (villains) and conflict-driven action—all typical of scripted TV.[150]

Mirrlees explicitly asks the question that courts implicitly answer in their copyright analyses: what are story producers, if not writers? True, story producers work on the back end of filming whereas scripted writers work on the front end. This distinction, though, is clearly not material to courts' discussions of "authorship" of reality television, as analyzed above.[151]

Accepting a categorization of story producers as writers, especially for copyright purposes, begets another, more important question. Given the breadth and prevalence of scripted writers' unionization through the WGA, why are story producers still largely nonunion? Considering the all-too-common exploitation of story producer labor, the WGA's previous efforts to include reality workers in their bargaining unit, and the writing-like copyright value story

[149] *Id.* at *18–19 (noting that a lower degree of substantial similarity is required where, as in this case, the defendant had a high degree of access to the plaintiff's work).

[150] Mirrlees, *supra* note 3, at 193.

[151] *See supra* Section III(b) (discussing copyright analyses of reality television authorship without reference to whether that authorship occurs before or after filming).

producers create for production companies, WGA unionization seems like the obvious answer.[152]

The WGA ceded its 2007 efforts to unionize reality story producers shortly before negotiations began.[153] WGA leadership explained this concession as an effort to "make absolutely clear [their] commitment to bringing a speedy conclusion to negotiations" but assured its members that WGA organizing efforts in the genre would continue.[154] The WGA, though, has not resumed its reality organizing efforts with the same vigor as in 2007.[155]

In light of the WGA's willingness, if timidity, to gain jurisdiction over story producers, the labor law doctrine of accretion could prove a promising, if creative, route.

1. What is Accretion?

An accretion occurs when new employees are added to a pre-existing bargaining unit.[156] Accretions claims most often arise out of an employer's acquisition or construction of an additional operation or facility after the execution of a collective bargaining agreement.[157]

If the additional operation is an accretion to the existing one, the preexisting collective bargaining agreement may be extended to cover employees at the additional operation without an election.[158] The dispositive issue in an accretion inquiry is whether the new facility is sufficiently integrated into the existing operation to justify applying the existing collective bargaining agreement.[159] The following factors bear on that issue:

---

[152] *See supra* Sections II(a)(2), (b)(3) (discussing story producers' labor issues and the WGA's attempts to unionize the reality sector).

[153] Andy Dehnart, *Why It's Finally Time to Unionize All Reality TV Cast and Crew, and What's Happening Now*, REALITY BLURRED (Aug. 25, 2023), https://www.realityblurred.com/realitytv/2023/08/reality-tv-crew-cast-need-to-unionize/.

[154] Nikki Finke, *Hollywood CEOs Finally Get Serious? Moguls Return for Informal WGA Talks; Writers Abandon Reality & Animation; Grammys Won't Be Picketed; Can Oscars Be Saved? Tick-Tock...*, DEADLINE (Jan. 22, 2008, 3:40 PM) https://deadline.com/2008/01/now-it-gets-serious-informal-writers-moguls-talks-begin-wga-takes-reality-grammys-wont-be-picketed-can-the-oscars-be-saved-4752/.

[155] This is not to say the WGA has not made any continued effort to unionize reality writers. As recently as September of 2023, reality writers on MTV's *Ridiculousness* unanimously won an election to join the WGA West. Katie Kilkenny, *'Ridiculousness' Workers Vote to Unionize with Writers Guild West*, HOLLYWOOD REP. (Sept. 12, 2023, 10:38 AM), https://www.hollywoodreporter.com/business/business-news/ridiculousness-workers-vote-unionize-writers-guild-1235584646/.

[156] Int'l Ass'n of Machinists & Aerospace Workers, Local Lodge No. 1414 v. NLRB, 759 F.2d 1477, 1482 (9th Cir. 1985) (citing NLRB v. Sunset House, 415 F.2d 545, 547 (9th Cir. 1969)).

[157] 1 THE DEVELOPING LABOR LAW 404 (Patrick Hardin ed., 3d ed. 1992).

[158] *Id.*

[159] *Id.* at 405.

> (1) The degree of interchange among employees; (2) geographical proximity; (3) integration of operations; (4) integration of machinery and product lines; (5) centralized administrative control; (6) similarity of working conditions, skills, and functions; (7) common control over labor relations; (8) collective bargaining history; and (9) the number of employees at the facility proposed for accretion as compared with the existing operation.[160]

The NLRB allows accretion only sparingly. It "'will not, under the guise of accretion, compel a group of employees who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity to express their preference in a secret election.'"[161] Accordingly, the absence of the critical factors of employee interchange and day-to-day supervision ordinarily defeats an accretion claim.[162]

2. Accreting Reality into the WGA

Television production is not entirely analogous to the factory labor situation for which accretion was traditionally intended. Consider, however, a television production company as the employer in an accretion scenario. If scripted television is its longstanding operation, and reality television is its additional, newer operation, an accretion argument begins to take shape.[163]

Compared with scripted television writers, reality story producers share similar working conditions, similar skills and functions, are supervised in much the same way and share, at least in some shows, a collective bargaining history. While these factors support an accretion, the remaining factors do not.[164] Employee interchange, most dauntingly, is a critical factor without which the Board is extremely hesitant to allow an accretion.[165]

When analyzing interchange and contact among employees, the Board gives no weight to the fact that interchange is feasible or theoretically possible if there is no actual interchange between employees.[166] Thus, although story producers' similar function to their scripted counterparts theoretically allows significant interchange, a lack of actual interchange likely tilts this factor against accretion.

---

[160] *Id.*

[161] Akron Gen. Med. Ctr., 08-UC-287785 N.L.R.B., at *17 (Dec. 23, 2022), https://apps.nlrb.gov/link/document.aspx/09031d458394cb2e.

[162] *Id.* at *18.

[163] Note that accretion applies not only to brand new operations, but also to consolidations of existing facilities and maturing operations. *See* Pub. Serv. Co., 190 N.L.R.B. 350 (1967).

[164] *Id.*

[165] *Id.*

[166] *Id.*

In the absence of this critical factor, the Board would not likely extend the narrow accretion doctrine to accrete story producers into the WGA's unit without a formal election, similar as the positions may be.

IV. CONCLUSION

The burning labor question for reality story producers, then, remains that of the most appropriate and realistically successful route to unionization.

The demanding and competitive job conditions for reality story producers explain why individual shows' successful unionization has been few and far between. Industry-wide unionization is necessary to ensure that story producers on an individual show will not simply be replaced with nonunion workers at the first hint of organization. Thus, a demonstration of industry-wide solidarity and intent to unionize would protect individual story producers from sticking their necks out, so to speak, in the name of collective action. The WGA initiating an accretion proceeding could prove to be such a demonstration.

Therefore, although the accretion argument certainly stands on shaky ground, even initiating an accretion proceeding would help fulfil the WGA's 2007 promise to unionize reality television. The mere publicity of this move could have enough effect on industry culture to mobilize story producers to petition for election within their own shows, which, of course, is the simplest path towards WGA membership.

Regardless of the method, though, unionizing reality's story producers is desirable, necessary, and supported by courts' assessments of their work in the copyright context. In light of the current flurry of labor activity and an at least arguably labor-friendly Board, the time is ripe for collective action. With this action, America's guilty pleasure need not be so guilty.