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Can Copyright Law Protect People from Sexual Harassment?

Edward Lee

CAN COPYRIGHT LAW PROTECT PEOPLE FROM SEXUAL HARASSMENT?

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ABSTRACT

The scandals stemming from the sexual harassment allegedly committed by Harvey Weinstein, Roger Ailes, Les Moonves, Matt Lauer, Bill O'Reilly, Charlie Rose, Bryan Singer, Kevin Spacey, and many other prominent figures in the creative industries show the ineffectiveness of Title VII of the Civil Rights Act of 1964, which prohibits sexual harassment in the workplace, in protecting artists and others in the creative industries. Among other deficiencies, Title VII does not protect independent contractors and limits recovery to, at most, $300,000 in compensatory and punitive damages. Since many people who work in the creative industries, including the top actors, do so as independent contractors, Title VII offers them no protection at all. Even for employees, Title VII's cap on damages diminishes, to a virtual null, the law's deterrence of powerful figures in the creative industries—some of whom earned $300,000 in less than a week. Not surprisingly, many of the accused harassers in Hollywood had no shortage of funds to pay "hush money" to their accusers, yet allegedly continued to sexually harass people for years. In an original survey of over 670 alleged incidents of sexual harassment, this Article analyzes the problem of sexual harassment in the creative industries—and the insidious role copyrighted works often played in facilitating a harasser's ability to carry out and continue the harassment or retaliation. This Article proposes a new way to address sexual harassment in the creative industries: enact federal legislation that prohibits sexual harassment in the development of works of authorship that receive federal copyrights. The proposed legislation is modeled on Title IX's prohibition of sex discrimination in educational institutions that receive federal funding—which carries, potentially, the ultimate penalty of the loss of federal funding for educational institutions that violate Title IX. Similarly, the proposed federal

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legislation authorizes a court to order the forfeiture of copyright for any work that has the requisite nexus to the sexual harassment or retaliation, if the violation was willful or wanton. A court-appointed trustee will oversee the copyright in the best interests of the public and the innocent individuals who participated in the development of the underlying work. The work would remain copyrighted for the remainder of the term, but the copyright would no longer be owned by the harasser or any entity complicit in the harassment.

INTRODUCTION

On October 5, 2017, Ashley Judd alleged in a *New York Times* ("*NYT*") article that Harvey Weinstein, the powerful Hollywood movie producer with a litany of successful movies to his name, had sexually harassed her in the late 1990s.[1] For the first time, Judd publicly identified the Hollywood mogul whom she had accused of sexual harassment, without naming, in a *Variety* interview two years earlier.[2] During the alleged incident, which occurred when Judd was an aspiring actress, Weinstein invited her to his hotel room under the pretense of discussing future starring roles in his movies in order to sexually harass her.[3] Eight other women hoping to break into Hollywood alleged, in the same *NYT* report, that Weinstein sexually harassed them in a period spanning three decades; Weinstein allegedly used the same false pretense of inviting each woman to meet in his hotel room for work-related reasons to discuss roles in movies or future productions, which was merely a pretext he used to sexually harass them.[4] On the same day of the *NYT* article, Weinstein issued a public apology, acknowledging that his past conduct "has caused a lot pain," but he said he grew up "in the '60s and '70s, when all the rules about behavior and workplaces were different."[5] The Weinstein Company fired Weinstein three days later.[6]

Within a week of the report, thirteen additional women made similar allegations of sexual harassment against Weinstein in *The New Yorker*.[7] Eventually, more than ninety women in the entertainment industry accused Weinstein of sexual harassment or, in some cases, sexual assault.[8] In February

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[1] Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html.

[2] Ramin Setoodeh, *Ashley Judd Reveals Sexual Harassment by Studio Mogul*, VARIETY (Oct. 6, 2015, 9:30 AM), https://variety.com/2015/film/news/ashley-judd-sexual-harassment-studio-mogul-shower-1201610666/.

[3] *Id.*

[4] Kantor & Twohey, *supra* note 1; *see Harvey Weinstein Scandal: Who Has Accused Him of What?*, BBC NEWS (Jan. 10, 2019), https://www.bbc.com/news/entertainment-arts-41580010 [hereinafter *Weinstein List*].

[5] *Harvey Weinstein Scandal: Read His Full Apology*, USA TODAY (Oct. 5, 2017, 8:05 PM), https://www.usatoday.com/story/life/movies/2017/10/05/harvey-weinstein-scandal-read-his-full-apology/738093001/.

[6] Natalie Robehmed, *Harvey Weinstein Fired from the Weinstein Company*, FORBES (Oct. 8, 2017, 7:33 PM), https://www.forbes.com/sites/natalierobehmed/2017/10/08/harvey-weinstein-fired-from-the-weinstein-company/#7838533b6681.

[7] Ronan Farrow, *Abuses of Power*, NEW YORKER, Oct. 23, 2017, at 42.

[8] *See All the Women Who Have Accused Harvey Weinstein of Sexual Misconduct*, YAHOO! (Feb. 8, 2019), https://www.yahoo.com/entertainment/one-year-later-long-list-harvey-weinsteins-accusers-165106548.

2020, a jury in New York state court found Weinstein guilty of criminal sexual assault of Miriam Haley, a former production assistant, and of third degree rape of Jessica Mann, a former aspiring actress, but acquitted him of predatory sexual assault.[9] Weinstein still faces another criminal case in California state court for rape and sexual assault involving two other women.[10] Beyond these lawsuits, dozens of women have accused Weinstein of sexual harassment, sexual assault, or other inappropriate advances. The list includes prominent actresses reaching the highest echelon of Hollywood (e.g., Angelina Jolie, Heather Graham, Salma Hayek, Rose McGowan, Gwyneth Paltrow, Annabella Sciorra, Mira Sorvino, and Uma Thurman), some whose careers, along with Judd's, allegedly suffered due to Weinstein's retaliation after they rebuffed him.[11]

Ten days after the *NYT* article, actress and activist Alyssa Milano tweeted a plea—or rallying cry—to other women: "If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet."[12] The tweet contained an image stating: "Suggested by a friend: if all the women who have been sexually harassed or assaulted wrote 'me too' as a status, we might give people a sense of the magnitude of the problem."[13] The tweet used the phrase "Me Too" that Tarana Burke, an advocate for survivors of sexual violence, had coined in 2007 to raise awareness of the issue.[14] By the next morning, Milano's tweet went viral, generating 53,000 replies, with thousands of women sharing their experiences of being sexually harassed, assaulted, and even raped.[15] By the end of 2017, the hashtag #MeToo had been used in eighty-five countries on Twitter and in over

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[9] *See Full Coverage: Harvey Weinstein Is Found Guilty of Rape*, N.Y. TIMES (Feb. 24, 2020) https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-verdict.html [hereinafter *Guilty*]; *See also* Jan Ransom, *With a Warning, a Judge Approves a New Legal Team for Weinstein*, N.Y. TIMES, Jan. 26, 2019, at A20; Megan Garber, *The Necessary Chaos of Harvey Weinstein's Ongoing Court Case*, ATLANTIC (Dec. 20, 2018), https://www.theatlantic.com/entertainment/archive/2018/12/criminal-case-against-harvey-weinstein-continues/578707/.

[10] See *Guilty*, *supra* note 9.

[11] *See Weinstein List*, *supra* note 4.

[12] Nadja Sayej, *Alyssa Milano on the #MeToo Movement: 'We're not Going to Stand for It Any More'* , GUARDIAN (Dec. 1, 2017, 7:00 AM), https://www.theguardian.com/culture/2017/dec/01/alyssa-milano-mee-too-sexual-harassment-abuse.

[13] Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), https://twitter.com/alyssa_milano/status/919659438700670976?lang=en.

[14] *See* Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html.

[15] Joyce Chen, *Alyssa Milano Wants Her 'Me Too' Campaign to Elevate Harvey Weinstein Discussion*, ROLLING STONE (Oct. 17, 2017, 5:05 PM), https://www.rollingstone.com/movies/movie-news/alyssa-milano-wants-her-me-too-campaign-to-elevate-harvey-weinstein-discussion-123610/.

85 million posts on Facebook.[16] #MeToo had become an international movement.[17]

Numerous women, men, and transgender individuals from all walks of life shared their experiences in being sexually harassed or assaulted. For the arts, entertainment, modeling, music, TV, and other creative industries (collectively, "creative industries"),[18] Judd's allegations against Weinstein opened the floodgates. Scores of people came forward to allege they were sexually harassed, not just by Weinstein, but also by many other well-known people in the creative industries. By one tally through December 2018, 158 prominent figures in these industries had been accused of sexual harassment—some of the alleged perpetrators harassed numerous people over many years in patterns that were predatory.[19] Each of the major broadcast networks had one of its top commentators or talk show hosts leave in complete disgrace after allegations they had engaged in repeated acts of sexual harassment: Mark Halperin of ABC, Matt Lauer of NBC, Bill O'Reilly of Fox, and Charlie Rose of CBS.[20] CBS even fired its highly successful CEO Les Moonves due to sexual harassment claims by at least twelve women.[21] Fox News CEO Roger Ailes met a similar fate after former Fox News anchor Gretchen Carlson filed a sexual harassment lawsuit against Ailes (which, due to his contract, exposed Fox to liability);[22] at least twenty other women at Fox, including Megyn Kelly, also alleged that Ailes had sexually harassed them.[23] These men were among the most powerful in the TV industry—and among the most egregious alleged sexual harassers.

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[16] *See* Sayej, *supra* note 12.

[17] The #MeToo Movement and TIME'S UP are two non-profit organizations formed to address sexual harassment. *See* Tarana Burke, *The Inception*, METOOMVMT, https://metoomvmt.org/the-inception/ (last visited Jan. 24, 2019); *About TIME'S UP*, TIMES UP NOW, https://www.timesupnow.com/about_times_up (last visited Jan. 24, 2019).

[18] In this Article, "creative industries" refers to industries that concentrate on the production of copyrighted works or works of authorship.

[19] *See 263 Celebrities, Politicians, CEOs, and Others Who Have Been Accused of Sexual Misconduct Since April 2017*, VOX, https://www.vox.com/a/sexual-harassment-assault-allegations-list [hereinafter Vox List] (last updated Jan. 9, 2019).

[20] *See infra* notes 184–94 and accompanying text.

[21] Ronan Farrow, Trouble at the Top, NEW YORKER, Aug. 6, 2018, at 46; *see also* Elahe Izadi & Travis M. Andrews, *Former CBS Chairman Les Moonves Fired for Cause, Will Not Receive Severance in Wake of Sexual Misconduct Allegations*, WASH. POST (Dec. 17, 2018, 6:02 PM), https://www.washingtonpost.com/arts-entertainment/2018/12/17/former-cbs-chairman-les-moonves-fired-cause-will-not-receive-severance-wake-sexual-misconduct-allegations/?noredirect=on.

[22] *See* Sarah Ellison, *Fox Settles with Gretchen Carlson for $20 Million—and Offers an Unprecedented Apology*, VANITY FAIR (Sept. 6, 2016), https://www.vanityfair.com/news/2016/09/fox-news-settles-with-gretchen-carlson-for-20-million.

[23] *See* Emily Crockett, *Here are the Women Who Have Publicly Accused Roger Ailes of Sexual Harassment*, VOX (Aug. 15, 2016, 1:00 PM), https://www.vox.com/2016/8/15/12416662/roger-ailes-fox-

Often, the alleged sexual harassment was accompanied by retaliation against the victims that stunted their careers. For example, in Judd's lawsuit against Weinstein,[24] a federal court ruled that her claims of defamation and unfair business practice were allowed to proceed[25] based on director Peter Jackson's revelation that Miramax (then controlled by Weinstein) had told Jackson not to cast Judd in *The Lord of the Rings*, produced by Weinstein, because she was "a nightmare to work with and we should avoid [her] at all costs."[26] Jackson, who was not aware of Weinstein's alleged sexual harassment of Judd at the time, took Miramax's negative recommendation and removed Judd from the casting list of *The Lord of the Rings*,[27] which went on to win seventeen Oscars and earn $970 million at the box office in each of its trilogy of movies.[28] After Judd's revelation to the *NYT*, Jackson said he believed Weinstein gave him "false information" about Judd in a smear campaign.[29] By every measure, not being cast in *The Lord of the Rings* was a colossal loss for Judd's career.

The disturbing revelations in the Weinstein scandal, along with the allegations of sexual harassment against many other prominent individuals in the #MeToo era, have raised urgent calls for "real change" to address sexual harassment.[30] Some of the proposed reforms include: (1) invalidating confidentiality or non-disclosure agreements, negotiated as a part of a settlement

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sexual-harassment-women-list. Fox settled Carlson's claim for $20 million and issued a public apology to her. *See* Michelle Castillo & Katie Little, *Fox Settles with Gretchen Carlson for $20 Million, Offers Apology*, CNBC (Sept. 6, 2016, 2:19 PM), https://www.cnbc.com/2016/09/06/fox-settles-with-gretchen-carlson-for-20m-and-is-expected-to-offer-apology-report.html.

[24] The district court dismissed the sexual harassment claim as not cognizable under the then-applicable Section 51.9 of the California Civil Code, which the court interpreted to apply to "business, service, or professional relationships" *unrelated* to work or employment; the court held that a 2019 amendment to Section 51.9, which expressly applied to "directors and producers," did not apply retroactively. Judd v. Weinstein, No. CV 18-5724 PSG (FFMx) 2019 WL 926343, at *3–6 (C.D. Cal. Jan. 9, 2019).

[25] Bill Chappell, *Judge Dismisses Ashley Judd's Sexual Harassment Claim Against Harvey Weinstein*, NPR (Jan. 10, 2019, 12:54 PM), https://www. https://www.npr.org/2019/01/10/683993516/judge-dismisses-ashley-judds-sexual-harassment-claim-against-harvey-weinstein.

[26] Dani McDonald, *Sir Peter Jackson: Harvey Weinstein Made Me Blacklist Stars*, STUFF (Dec. 16, 2017, 9:10 AM), https://www.stuff.co.nz/entertainment/99921399/sir-peter-jackson-harvey-weinstein-made-me-blacklist-stars.

[27] *See id.*

[28] *See How Many Oscars Did Lord of the Rings Win?*, QUORA (May 15, 2014), https://www.quora.com/How-many-Oscars-did-Lord-of-the-Rings-win; *The Lord of the Rings*, BOX OFFICE MOJO, https://www.boxofficemojo.com/franchises/chart/?id=lordoftherings.htm (last visited Feb. 1, 2019) (including total grosses in Worldwide chart (unadjusted)); *see also* Dorothy Pomerantz, *Can 'The Hobbit' Make 'Lord of the Rings' the Top Film Franchise of All Time?*, FORBES (Dec. 13, 2012, 10:00 AM), https://www.forbes.com/sites/dorothypomerantz/2012/12/13/can-the-hobbit-make-lord-of-the-rings-the-top-franchise-ever/#d061c5912834.

[29] *See* McDonald, *supra* note 26.

[30] Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 24 (2018).

of a potential lawsuit, that prohibit a person who claims to have been sexually harassed from revealing it,[31] as well as reforms requiring corporations to disclose such settlements;[32] (2) companies voluntarily adopting broader policies and definitions of sexual harassment than the exceedingly narrow standard set by federal law;[33] (3) allowing shareholder actions against corporate fiduciaries for breach of their fiduciary duty and violations of federal securities law for failing to address widespread sexual harassment in a corporation;[34] (4) invalidating the exclusivity of arbitration to handle sexual harassment claims required by many employment contracts;[35] and (5) expanding sexual harassment protections for employees to independent contractors.[36]

These proposals are worthy of consideration. California and a few states have enacted some of these reforms.[37] Yet most of the reforms have three major shortcomings. First, most are not industry-specific,[38] and thus fail to address

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[31] *See Ian Ayres, Targeting Repeated Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 79 (2018); Vasundhara Prasad, *If Anyone Is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2509, 2538 (2018).

[32] See Elizabeth A. Aronson, *The First Amendment and Regulatory Responses to Workplace Sexual Misconduct: Clarifying the Treatment of Compelled Disclosure Regimes*, 93 N.Y.U. L. REV. 1201, 1203 (2018).

[33] *See* Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 292 (2018).

[34] *See* Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1628 (2018).

[35] *See* Erin M. Morrisey, *#MeToo Spells Trouble for Them Too: Sexual Harassment Scandals and the Corporate Board*, 93 TENN. L. REV. 177, 194–95 (2018); Nicolette Sullivan, Note, *The Price Is (Not) Right: Mandatory Arbitration of Claims Arising out of Sexual Violence Should Not Be the Price of Earning a Living*, 21 VAND. J. ENT. & TECH. L. 339, 343 (2018).

[36] *See* Patricia Barnes, *Proposed Law Would Protect Independent Contractors from Employment Discrimination and Wage Theft*, FORBES (Nov. 13, 2019, 4:14 PM), https://www.forbes.com/sites/patriciagbarnes/2019/11/13/proposed-federal-law-would-extend-protection-from-discrimination-to-independent-contractors/#27033edb44a5.

[37] *See, e.g.*, Gena B. Ushenheimer, Anne R. Dana & Vlada Feldman, *#MeToo Inspires Legislative Changes Across the United States*, SEYFARTH SHAW LLP (Mar. 28, 2019), https://www.seyfarth.com/publications/MA032819-LE; Anthony Zaller, *Limits on Confidentiality Clauses Involving Harassment Claims*, CAL. EMP. L. REP. (Mar. 1, 2019), https://www.californiaemploymentlawreport.com/2019/03/limits-on-confidentiality-clauses-involving-harassment-claims/.

[38] A notable exception includes California's Talent Protections Act, which requires talent agencies in California to make available "educational materials regarding sexual harassment prevention, retaliation, and reporting resources to an adult artist within 90 days of agreeing to representation by the licensee or agency procurement of an engagement, meeting, or interview, whichever comes first." A.B. 2338, 2017–2018 Gen. Assemb. (Cal. 2018) (enacted). The nonprofit Model Alliance proposed the Models' Harassment Protection Act in New York to protect models who are independent contractors from sexual harassment. *See* Sara Ziff, *Model Alliance and Assemblywoman Nily Rozic Announce the Models' Harassment Protection Act*, MODELS ALLIANCE, https://modelalliance.org/2017/models-harrasment-protection-act/models-harrasment-protection-act (last visited Nov. 18, 2019). The latter proposal may have been made unnecessary by New York's expansion of sexual harassment protection for independent contractors generally. *See* Jeremy Mittman & Gregory J.

idiosyncratic features of the creative industries—such as the pervasiveness of independent contractor relationships in many creative sectors[39] and the role that copyrighted works may play in facilitating a sexual harasser's ability to create an opportunity for harassment and to amass financial rewards to enable repeated harassment, such as by entrenching the harasser as a power broker in the industry or by supplying the harasser with hush money to silence his accusers.[40] Second, the proposed reforms do not add any additional remedies or penalties, but instead rely on the existing remedies available under current law.[41] These remedies—whether monetary or injunctive relief—have had little, if any, deterrence on sexual harassment in the creative industries.[42] Third, the reforms are largely predicated on enforcement of sexual harassment laws by private actors (e.g., the people who are sexually harassed) in civil lawsuits or complaints—even though few actors have dared to bring a lawsuit or complaint for sexual harassment in Hollywood lest they risk retaliation and jeopardizing their careers.[43] Although the #MeToo movement has raised greater awareness of the problem, it is unclear whether awareness will translate into lasting legal protections from sexual harassment and retaliation in the creative industries.[44]

This Article proposes a new kind of reform—one that is tailored to sexual harassment in the creative industries and that includes a new set of remedies to deter such harassment, including the ultimate penalty of the forfeiture of the copyright for a work with a requisite nexus to the sexual harassment or any subsequent retaliation (e.g., blacklisting an artist or harming an artist's career). The proposal authorizes a federal agency to investigate and undertake enforcement actions to stop sexual harassment in the creative industries, similar to how the Department of Education enforces Title IX in educational institutions that receive federal funding. Although the proposal will not be applied retroactively, if this proposal had been in force at the time of the alleged offenses, the copyright owner to the movies Weinstein produced could have been subject to the ultimate penalty of the loss of its copyrights for any movies proven to have the requisite nexus to Weinstein's sexual harassment or

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Hessinger, *New York State Enacts Broad New Sexual Harassment & Discrimination Legislation*, NAT'L L. REV. (Nov. 18, 2019), https://www.natlawreview.com/article/new-york-state-enacts-broad-new-sexual-harassment-discrimination-legislation.

[39] *See, e.g.*, Colin Campbell, *The Game Industry's Disposable Workers*, POLYGON (Dec. 19, 2016), https://www.polygon.com/features/2016/12/19/13878484/game-industry-worker-misclassification.

[40] *See infra* notes 191, 283, 336–41 and accompanying text.

[41] *See supra* notes 31–32, 36 and accompanying text.

[42] *See infra* Part I.B and C.

[43] *See infra* notes 51–52, 110 and accompanying text.

[44] *See supra* notes 14–17 and accompanying text.

retaliation against actresses, if the copyright owner was willful or wanton in allowing it.[45]

Part I explains the problem of sexual harassment in the creative industries, tracing its lineage back to the notorious "casting couch." The discussion includes this Article's original survey of over 670 allegations of sexual harassment or misconduct in the creative industries, along with a qualitative study of the allegations against several high-profile figures in the creative industries. While not conclusive, the review reveals disturbing findings about sexual harassment in the creative industries. Part II details the ineffectiveness of Title VII, the main federal law that prohibits sexual harassment in employment, in addressing this problem. Among other deficiencies, Title VII does not protect independent contractors and limits recovery to, at most, $300,000 in damages.[46] Since many people who work in the creative industries, including the top actors, do so as independent contractors, Title VII offers them no protection at all. Moreover, even for employees, Title VII's cap on damages diminishes, to a virtual null, the law's deterrence of powerful figures in the creative industries—some of whom earned $300,000 in less than a week.[47] Although state laws sometimes provide greater coverage and potential damages, they are still not enough.

Part III sets forth the theory of *linkages* to explain how one area of law can be designed to serve or mutually reinforce the purposes of another area of law. Although it is typical to view a statute as a self-contained area of law, careful examination of different laws shows that it is not uncommon for linkages between two areas of law to exist, not only in the common law, but also in statutes. Building on this theory of linkages, Part IV proposes to amend the Copyright Act to incorporate provisions that aim to deter sexual harassment in the creative industries that produce copyrighted works—similar to how Title IX prohibits sexual harassment in educational institutions that receive federal funding. For willful or wanton violations, the amendment authorizes federal courts to award the additional remedies of disgorgement of profits and potential suspension or outright forfeiture of copyright for works with the requisite nexus to the sexual harassment or retaliation. This reform is based on the recognition of the insidious role that copyrighted works may play in facilitating a sexual harasser who uses participation in the creation of copyrighted works as a lure to prey on aspiring artists and who uses income generated from copyrighted works

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[45] The proposal does not apply retroactively to past conduct. The example is used for illustrative purposes and assumes that the proposed law was in effect at the time of Weinstein's conduct. *See infra* Part IV.D.

[46] *See* 42 U.S.C. §§ 1981a(b)(3), 2000e-2 (2012).

[47] *See infra* note 267 and accompanying text.

to pay "hush money" to silence his victims. Part V addresses concerns with the proposal.

I. SEXUAL HARASSMENT IN HOLLYWOOD AND THE CREATIVE INDUSTRIES

This Part discusses the problem of sexual harassment in the creative industries, dating back to Hollywood's notorious "casting couch." The many recent allegations of sexual harassment in the creative industries summarized below indicates a disturbing problem potentially across many sectors.

A. The Casting Couch, Then and Now

The notorious "casting couch" has a long history dating back perhaps to Hollywood's inception, with the likes of Louis Mayer, who co-founded Metro-Goldwyn-Mayer in 1924 and allegedly used the casting couch to sexually harass young women.[48] The casting couch describes the practice in show business in which male producers seek or outright demand sexual favors from women, and even child actors, who want to be cast in starring roles.[49] Famous actors throughout Hollywood's storied history—Shirley Temple, Judy Garland, Marilyn Monroe, and others—have alleged being subject to sexual harassment, some when they were minors.[50] The casting couch was often accompanied by something just as pernicious: the blacklist or retaliation. As one book on Hollywood described, "if any actress should file a claim—or even complain about her treatment—she would be labeled a 'trouble maker,' have her availability 'flagged' in casting offices and seldom work again."[51] As one producer known for his "casting couch conquests" put it, "[i]n Hollywood, you sue—you're through."[52]

Nearly a century later, not much has changed. As detailed below, the revelations of alleged sexual harassment in the creative industries, starting with Ashley Judd's accusations against Harvey Weinstein in October 2017, have

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[48] *See, e.g.*, Thelma Adams, *Casting-Couch Tactics Plagued Hollywood Long Before Harvey Weinstein*, VARIETY, https://variety.com/2017/film/features/casting-couch-hollywood-sexual-harassment-harvey-weinstein-1202589895/ (last visited Aug. 21, 2019); Matthew Dessem, *In 1956, a Fan Magazine Published a Four-Part Casting Couch Expos... It Didn't Go Well*, SLATE (Oct. 13, 2017, 5:45 AM), https://slate.com/culture/2017/10/1956-casting-couch-expose-shows-little-has-changed.html.

[49] *See supra* note 48.

[50] *See* Marie Solis, *Five Old-Hollywood Starlets Who Endured Sexual Harassment Long Before 'Weinstein Effect'*, NEWSWEEK (Nov. 14, 2017, 1:14 PM), https://www.newsweek.com/old-hollywood-starlets-endured-sexual-harassment-weinstein-effect-710885.

[51] JOHN AUSTIN, TALES OF HOLLYWOOD THE BIZARRE 133 (1992).

[52] *Id.* at 132.

exposed a troubling pattern of predatory conduct in the creative industries: Prominent figures (primarily men) whose work directly related to the creation of works of authorship allegedly sexually harassed people (primarily women) who hoped to participate in the creation of those works. Many of the allegations were subject to internal investigations; the ones that were investigated (such as by CBS regarding the claims against its CEO Les Moonves, by Fox News regarding its CEO Roger Ailes, and by NBC regarding the claims against Matt Lauer) often resulted in a finding of sufficient evidence or information to support the accusers' claims of sexual harassment and to justify termination of the alleged harasser.[53] The sheer number of people who have alleged they were harassed, along with the prominent positions of their alleged harassers in the creative industries, presents at least a prima facie case of the existence of a problem with sexual harassment in the creative industries warranting further attention.

B. Survey of Alleged Sexual Harassment in Creative Industries

1. Survey Design and Limitations

To get a sense of the potential magnitude of the problem, a survey of alleged sexual harassment in the creative industries was conducted. The alleged incidents were drawn from a comprehensive list of alleged harassers compiled by the Internet news site *Vox* from April 2017 through 2018, in the categories of Arts & Entertainment and of Media,[54] as well as from other online sources reporting incidents of alleged sexual harassment in the creative industries through November 2019.[55]

The survey analyzed incidents involving a total of 163 individuals who allegedly sexually harassed, assaulted, or retaliated against more than 671 individuals.[56] Where a group alleged being sexually harassed by the same person without further differentiation, the group was counted as only one person for the purposes of the survey, even if the article indicated the group's size. Thus, the total number of incidents of alleged sexual harassment reviewed in the study was greater than the figure reported in this Article's survey. This approach was not meant to minimize the incidents of alleged sexual harassment that were reported by a group, but instead was intended to adjust for the lack of individualized

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[53] *See infra* note 74 and accompanying text.

[54] *See* Vox List, *supra* note 19.

[55] MeToo Survey of Alleged Sexual Harassment in the Creative Industries (updated December 2019) (on file with author) [hereinafter MeToo Survey].

[56] *Id.*

information available. Most of the incidents (85% or 570) surveyed were first publicly reported starting in 2017 during the #MeToo movement.[57]

Before discussing the results of the survey, it is important to recognize its limitations. The study does not claim to be a representative sample of the creative industries. The survey was limited to reviewing the available public reports of the incidents; no independent investigation was undertaken as a part of the survey. Moreover, the survey did not seek to determine if the alleged sexual harassment would satisfy the Title VII standards of sexual harassment; Part II below criticizes those standards and Title VII more generally as wholly inadequate. This survey's purpose was not to test whether the allegations of sexual harassment were actionable under federal law; instead, it was to identify and categorize the nature of allegations of sexual harassment made by artists and others in the creative industries.

Approximately 30% of the incidents involved an accuser who was anonymous, used an alias or was not identified by a full name, or was identified as a group of complainants (such as the cast of a show); as long as there was sufficient information to analyze the basic nature of the claims, the alleged incidents were included in the survey. These incidents were included in the survey based on the recognition that people typically do not report sexual harassment in the workplace for fear of retaliation and harming their careers.[58] That fear was prominent for actors and other artists, as discussed later in Section C.

2. Findings

The first major finding of the study is no surprise: The vast majority of alleged sexual harassment in the creative industries involved instances of males sexually harassing females. More than 670 individuals—including at least 580 females, 84 males, and 1 transgender person—alleged they were sexually harassed, assaulted, or otherwise mistreated.[59] The alleged harassers totaled 163 individuals: 159 of the alleged harassers (98%) were males while only 4 (2%)

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[57] *Id.*

[58] Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace: Report of the Co-Chairs Chai R. Feldblum & Victoria A. Lipnic*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_Toc453686297; Claire Cain Miller, *It's Not Just Fox: Why Women Don't Report Sexual Harassment*, N.Y. TIMES (April 10, 2017), https://www.nytimes.com/2017/04/10/upshot/its-not-just-fox-why-women-dont-report-sexual-harassment.html.

[59] MeToo Survey, *supra* note 55.

were females.[60] Thus, as the two sets of numbers suggest, it was typical for an alleged harasser to be a repeat offender harassing more than one person, if not many people. The pattern of sexual harassment typically involved a male harassing a female. Nearly all of the 580 females were allegedly harassed by men, except in two instances involving a female allegedly harassing another female.[61] Similarly, when a male was the alleged victim, nearly all of the males were allegedly harassed by men (except in one instance involving a female allegedly harassing a male).[62] Approximately eighty-one of the alleged victims were minors at the time of the incident.[63]

The alleged sexual misconduct involved a range of conduct as summarized in Table 1. Typically, the alleged incidents involved more than one form of conduct, but for simplicity, the aggregate numbers by each conduct are reported (instead of by combinations of conduct that allegedly occurred). Using this approach allows an incident involving multiple forms of misconduct to be counted in more than one category below.

Lewd or inappropriate comments were the most common type of alleged sexual harassment; however, it is noteworthy that, in 77% of these 215 incidents of verbal harassment, the accuser also alleged being subjected to one or more of the other forms of sexual harassment or misconduct listed below.[64] Only 50 incidents involved lewd comments alone.[65] Some of the other forms of alleged sexual harassment that were often raised: 201 incidents of unconsented to touching, 171 incidents of demands for sex, 104 incidents of rape, and 75 incidents of the harasser's masturbating or exposing of genitals in front of the victim. In addition, 121 incidents involved retaliation against the accuser after the incident (e.g., threats, disfavor, blacklisting).[66]

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[60] *Id.*

[61] *Id.* This male-on-female sexual harassment should not be surprising given the gender disparity in Hollywood with men dominating positions of power. *See* MARTHA M. LAUZEN, THE CELLULOID CEILING: BEHIND THE SCENES EMPLOYMENT OF WOMEN ON THE TOP 100, 250, AND 500 FILMS OF 2018 (2019).

[62] MeToo Survey, *supra* note 55.

[63] *Id.*

[64] *Id.* The category of lewd or inappropriate comments includes unwelcome sexual advances, remarks of a sexual nature (e.g., comments about a person's body or genitalia, physical attractiveness, sexuality), remarks about a person's sexual orientation, or other inappropriate communications for a work setting.

[65] *Id.*

[66] *Id.*

Table 1. Incidents of Alleged Misconduct in the Creative Industries by Conduct

Number of Incidents	Alleged Sexual Harassment or Misconduct in the Creative Industries
215	Lewd or inappropriate comments 50 incidents of lewd or inappropriate comments alone, 165 incidents with lewd or inappropriate comments plus other misconduct
201	Unconsented to touching
171	Demand for sex
104	Rape
75	Harasser exposed genitals or masturbated
42	Sexual intercourse
117	Other unwelcome sexual harassment or misconduct
121	Retaliation

The second major finding is that the allegations of sexual harassment were in many cases supported by corroboration, an internal investigation, or other indicia supporting the allegations. As shown in Table 2, approximately 78 individuals disclosed the harassment to a third party on the same day of incident, 29 did so within a week of the incident; and 47 within a year of the incident.[67] An additional 38 people disclosed the incident to a third party more than a year after the incident.[68] At least 34 incidents had third parties who witnessed some of the harassment.[69] For approximately 173 of the incidents, an internal investigation of some kind was reported, with 146 investigations finding sufficient support for the allegations (this figure excludes the outside investigations conducted by journalists, such as in the cases of Weinstein, Moonves, Singer, and others).[70] Only 28 internal investigations conducted found insufficient support.[71]

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[67] *Id.*

[68] *Id.* The one-year mark is an arbitrary figure, but has a basis in some state law approaches to proof of sexual assault. *See, e.g.*, TEX. CODE. CRIM. PROC. ANN. art. 38.07 (West Supp. 2017) (allowing proof of sexual assault "on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred").

[69] MeToo Survey, *supra* note 55.

[70] *Id.*

[71] *Id.*

Table 2. Support for and Investigations of Alleged Sexual Harassment

Number of Incidents	Support for and Investigations of Alleged Sexual Harassment
78	Disclosure to third party on same day
29	Disclosure to third pary within one week
47	Disclosure to a third party made between one week and one year
38	Disclosure to a third party more than one year
34	Third party witness(es)
146	Internal investigations find sufficient support for the allegations
28	Internal investigations find insufficient support for the allegations

The alleged harassers offered varied responses to the allegations as Table 3 indicates. The majority of incidents (362 of 671) surveyed elicited no specific response.[72] The alleged harasser issued a flat or blanket denial to the allegations for 174 incidents.[73] The alleged harasser admitted to some wrongdoing for at least 53 incidents, or to some facts but not to sexual harassment in 79 incidents.[74] The alleged harasser issued an apology related to at least 94 incidents.[75]

Table 3. Responses by Alleged Harassers

Number of Incidents	Alleged Harasser's Responses
332	No specific response to alleged incident
174	Blanket or flat denial
94	Issued an apology
79	Admission of some facts but not to sexual harassment
53	Admission of wrongdoing or misconduct
16	Claimed no memory of incident

The third major finding is that a majority of the alleged incidents of sexual harassment (approximately 59% or 393 incidents) related in some way to a copyrighted work, either a specific work or the contemplation of unspecified

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.* This figure excludes Harvey Weinstein, who did issue a public apology after the disclosure by Ashley Judd, but who has since adopted a more combative approach. *See supra* notes 5, 9 and accompanying text.

future works.[76] For example, approximately 110 individuals alleged experiencing such mistreatment in the casting of individuals in the creation of a copyrighted work.[77] Additionally, 202 individuals alleged such mistreatment in the creation or production of a work, while 13 individuals claimed to have been mistreated during the promotion of a work.[78] Moreover, 105 people claimed to have lost job opportunities in the creative industries due to the harassment or retaliation they suffered.[79]

Table 4. Relationship of Alleged Sexual Harassment to Copyrighted Works

Number of Incidents	Relationship of Alleged Sexual Harassment to Copyrighted Works
110	During casting for copyrighted work's future production
202	During creation or production of copyrighted work
13	During promotion of copyrighted work
105	Lost job opportunities in the creative industries

In sum, these findings strongly suggest the existence of a problem of sexual harassment in the creative industries—especially with men, often as repeat offenders, sexually harassing women—warranting greater public attention. When internal investigations were reported, the vast majority (84%) found sufficient support for the allegations.[80] Moreover, copyrighted works were not innocuous features of many incidents of sexual harassment. In a majority of the incidents of alleged sexual harassment, a work of authorship, in contemplation, creation, or production, was a substantial factor in giving the harasser the opportunity to sexually harass an artist, whether in the work's casting, creation, or promotion.[81] The artists who were harassed were often seeking an opportunity to be a part of the creation or performance of a copyrighted work, but the harasser exploited his power to take advantage of the artists. This major finding, which identifies a relationship between copyrighted works and the alleged sexual harassment, supports the proposal set forth in Part IV to use copyright law as a new way to deter sexual harassment in the creative industries.

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[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*

C. Specific Sectors with Alleged Sexual Harassment

In addition to the above survey, a qualitative review of the allegations against some of the prominent figures was conducted. The summary below provides an overview of some of the main sectors implicated by the allegations of sexual harassment and focuses on incidents that were related to the development of copyrighted works.

1. CEOs and Other Executives

Harvey Weinstein is the most notorious example of an alleged sexual harasser in the creative industries. Weinstein was the co-founder (with his brother) and CEO of two highly successful film production companies: Miramax, founded in 1979[82] (sold to Disney for $70 million in 1993, with another $140 million going to the Weinsteins after they left in 2005)[83] and The Weinstein Company, founded in 2005.[84] In 2012, *Time* named Weinstein as "the most powerful man in Hollywood."[85] At least ninety-three women have accused Weinstein of sexual harassment or sexual assault.[86] According to the allegations, Weinstein engaged in a pattern of sexual harassment for many years using, for many of his victims, the same *modus operandi* as he used with Ashley Judd: Weinstein lured women to meet with him based on the false pretense of his interest in discussing casting them in movies or other work, or holding a final "audition."[87] As Romola Garai described an encounter with Weinstein: "Like every other woman in the industry, I've had an 'audition' with Harvey Weinstein, where I'd actually already had the audition but you had to be personally approved by him …. So I had to go to his hotel room in the Savoy, and he answered the door in his bathrobe. I was only 18. I felt violated by it."[88]

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[82] *See* Bob Weinstein, *All Thanks to Max*, VANITY FAIR (Feb. 7, 2011), https://www.vanityfair.com/news/2003/04/max-weinstein-200304.

[83] *See* Jane Martinson, *Disney Gets Miramax, Weinsteins Get £75m*, GUARDIAN (Mar. 30, 2005, 7:03 PM), https://www.theguardian.com/business/2005/mar/31/media.film.

[84] See Anna Menta, *What Is the Weinstein Company Worth? Studio Declares Bankruptcy After $500 Million Deal Collapses*, NEWSWEEK (Feb. 26, 2018, 1:51 PM), https://www.newsweek.com/weinstein-company-net-worth-declares-bankruptcy-820270.

[85] *See* Stephanie Abrahams, *Time 100 Confirms the Most Powerful Man in Hollywood*, TIME (Apr. 18, 2012), http://entertainment.time.com/2012/04/18/the-most-powerful-man-in-hollywood/.

[86] *See* Weinstein List, *supra* note 4.

[87] *See, e.g.*, Hannah Ellis-Petersen, *Actor Romola Garai Felt 'Violated' After Harvey Weinstein Encounter*, GUARDIAN (Oct. 10, 2017 2:56 PM), https://www.theguardian.com/film/2017/oct/09/actor-romola-garai-felt-violated-after-harvey-weinstein-encounter.

[88] *Id.*

Weinstein allegedly indicated or implied to actresses that he would cast them in his movies if they had sex with him.[89]

Some actresses allege that they were sexually harassed not in the casting, but in the creation, production, or promotion of a movie by Weinstein. For example, Gwyneth Paltrow told the *NYT* that when she received her first major role in *Emma*, produced by Miramax, Weinstein allegedly asked her to come to his hotel room for a meeting and then "tried to massage her and invited her into the bedroom."[90] French actress Judith Godreche alleged that at the Cannes Film Festival in 1996, Weinstein called her to his hotel room to discuss the marketing of her film, *Ridicule*, which Miramax had acquired.[91] Instead, Weinstein asked her for a massage and then allegedly attempted to pull off her top.[92] Florence Darel, another French actress, said she had a similar encounter with Weinstein in a movie he had acquired in which she had a starring role.[93]

Lauren O'Connor, a former Weinstein Company employee who helped to set up some of these meetings for Weinstein, wrote an internal complaint to Weinstein's executives in 2015 to make them aware of the problem: Weinstein was using employees, including her, to "facilitate liaisons with 'vulnerable women who hope he will get them work.'"[94] Former Miramax employees said that Weinstein's misconduct also occurred in the 1990s at Miramax and was an "open secret" within the company.[95] Records of Weinstein's employment contract with The Weinstein Company reveal the Company's apparent knowledge of his sexual misconduct. A provision in the contract set forth a sliding scale of payments that Weinstein would be required to pay the company if it had to settle misconduct claims against him: Weinstein agreed to pay to the

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[89] *See* Jacy Fortin, *The Women Who Have Accused Harvey Weinstein*, N.Y. TIMES (Oct. 10, 2017), https://www.nytimes.com/2017/10/10/us/harvey-weinstein-accusations.html (Dawn Dunning claimed that Weinstein offered three contracts for acting roles if she engaged in a threesome sexual encounter with him and his assistant); Heather Graham, *Heather Graham: Harvey Weinstein Implied I Had to Have Sex with Him for Movie Role*, VARIETY (Oct. 10, 2017, 1:53 PM), https://variety.com/2017/film/columns/heather-graham-harvey-weinstein-sex-for-movie-role-1202586113/).

[90] *See* Jodi Kantor & Rachel Abrams, *Gwyneth Paltrow, Angelina Jolie and Others Say Weinstein Harassed Them*, N.Y. TIMES, (Oct. 10, 2017), https://www.nytimes.com/2017/10/10/us/gwyneth-paltrow-angelina-jolie-harvey-weinstein.html.

[91] *See id.*; Fortin, *supra* note 89; Kantor & Abrams, *supra* note 90.

[92] *Id.*

[93] *See* Weinstein List, *supra* note 4; Peter Mikelbank, *French Actress Florence Darel Says Harvey Weinstein Propositioned Her While His Wife Was Next Door*, PEOPLE (Oct. 12, 2017, 11:51 AM), https://people.com/movies/florence-darel-says-harvey-weinstein-propositioned-her-in-hotel/.

[94] Aja Romano, *The Harvey Weinstein Sexual Harassment Allegations: All the Key Players*, VOX (Oct. 6, 2017, 10:40 AM), https://www.vox.com/culture/2017/10/6/16432526/harvey-weinstein-allegations-whos-involved.

[95] *Id.*

company "$250,000 for the first 'person damaged by such misconduct,' $500,000 for the second, $750,000 for the third, and a million for each additional woman."[96] This "escalator clause" for misconduct in Weinstein's contract appears to have had no effect in stopping his sexual harassment of women.

Weinstein's alleged misconduct even included sexual assault and rape. Rose McGowan recounts in her memoir *Brave* how Weinstein allegedly raped her in 1997 after he saw the screening of her film *Going All the Way* at the Sundance Film Festival.[97] Weinstein's pretext for his invitation to meet her was the same: discussing her acting career and future opportunities.[98] Other women, including actresses Asia Argento and Lucia Evans, similarly claim Weinstein raped or sexually assaulted them.[99] The criminal case in New York also involves one woman's charge of rape by Weinstein.[100]

Weinstein also allegedly retaliated against women who rebuffed him by thwarting their opportunities to be cast in movies. Similar to Ashley Judd, Mira Sorvino, who won the Oscar for Best Supporting Actress in 1996, had her promising acting career allegedly stunted due to apparent blacklisting by Harvey Weinstein, whose sexual advances in 1995 she rebuffed and reported to Miramax, the studio Weinstein ran at the time.[101] Weinstein allegedly discouraged at least two directors, Peter Jackson and Terry Zwigoff, from casting Sorvino in *The Lord of the Rings* trilogy and *Bad Santa*, respectively, on the false accusation that she was "difficult" to work with—an unsubstantiated rap on Sorvino that trickled into media reports of the actress.[102] Sorvino, who was in her late twenties at the time, may have lost opportunities for acting in leading roles. Sorvino was and still is devastated.[103] Nothing can make up for

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[96] Eric Sullivan, *Power of Attorney*, ESQUIRE, March 2019, at 104.

[97] *See* Sian Cain, *Rose McGowan's Memoir Brave Details Alleged Rape by Harvey Weinstein*, GUARDIAN (Jan. 29, 2018 7:01 PM), https://www.theguardian.com/film/2018/jan/30/brave-rose-mcgowans-memoir-details-by-harvey-weinstein.

[98] *Id.*

[99] *See* Weinstein List, *supra* note 4; *see also* Farrow, *supra* note 7 ("Three of the women—among them [Asia] Argento and a former aspiring actress named Lucia Evans—told me that Weinstein had raped them, forcibly performing or receiving oral sex or forcing vaginal sex. Four women said that they had experience unwanted touching that could be classified as an assault.").

[100] *See supra* note 9 and accompanying text.

[101] *See* Meredith Blake, *'It's Been a Hard Year, Not Going to Lie': Mira Sorvino on 'Startup' and the Cost of Saying #MeToo*, L.A. TIMES (Nov. 9, 2018, 3:00 AM), https://www.latimes.com/entertainment/tv/la-ca-st-mira-sorvino-me-too-20181109-story.html.

[102] *Id.*

[103] *Id.* To understand how severely the retaliation harmed Sorvino's career, it is worth quoting her in full:

> The idea that there was this malevolent hand that actually had changed the course of my professional life was devastating to me, … I was like, that's why I've had a bad downturn in my

her lost acting opportunities. Other actresses allege similar accounts of how they lost acting roles and opportunities due to Weinstein's retaliation.[104]

Weinstein employed an arsenal of attorneys, including high-powered attorney David Boies and Rudy Giuliani's law firm, along with private-investigation firms to respond to legal complaints against him.[105] Indeed, the first person who publicly accused Weinstein of sexual assault—model Ambra Battilana, who said that Weinstein grabbed her breasts and tried to touch her under her skirt in a 2015 meeting he set up to discuss her portfolio—was subjected to a smear campaign by the "dirt" dug up by K2 Intelligence, a private investigation firm.[106] K2 and Weinstein's lawyers allegedly presented the information—or innuendo—about Battilana to the Manhattan district attorney's office investigating her claims; the information reportedly indicated that she was a prostitute in the past and "that, as a young contestant in the Miss Italy beauty pageant, in 2010, she had attended a 'Bunga Bunga' party hosted by Silvio Berlusconi, who was then the Italian Prime Minister, where he was accused of having sex with prostitutes."[107] Even though the DA had a tape-recorded conversation between Battilana and Weinstein from a police wire she wore, in

> career. Why I couldn't be in any studio movies for a decade and a half. I won an Oscar. My work hasn't changed. My performances are still comparable to my old performances. Just the access was denied, … I just felt iced out, but I didn't know that it went anywhere beyond just [Weinstein's] particular films. So to feel like it was his broad-reaching thing that affected my entire career was really, really hard to handle. Because that's when I had the biggest potential to solidify my career as a leading lady, and to make the kind of economic strides that would have secured my family forever. And we've had some lean years over the last ten years. I have four kids. And to not always be able to provide for them in the way that we would like to is really awful.

Id. (alteration in original); *see* Mira Sorvino (@MiraSorvino), TWITTER (Dec. 15, 2017, 10:20 AM), https://twitter.com/MiraSorvino/status/941689525960556544 ("Just seeing this after I awoke, I burst out crying. There it is, confirmation that Harvey Weinstein derailed my career, something I suspected but was unsure. Thank you Peter Jackson for being honest. I'm just heartsick.").

[104] *See, e.g.*, Neal Baker, *Spaced Star Jessica Hynes Claims She Lost an Acting Job Aged 19 by Refusing Harvey Weinstein's Demand She Audition in a Bikini*, SUN (Oct. 6, 2017, 7:14 PM), https://www.thesun.co.uk/news/4628205/jessica-hynes-w1a-spaced-harvey-weinstein-sexism/; Rebecca Rubin, *Actress Tara Subkoff Says Harvey Weinstein Sexually Harassed Her*, VARIETY (Oct. 12, 2017, 6:52 PM) ("Subkoff said after denying Weinstein's advances that night, she was stripped of the informally offered part and blacklisted from acting in Hollywood."). In their book, Jodi Kantor and Megan Twohey, the investigative reporters who broke the story, found a chilling pattern in Weinstein's preying on actresses and female employees through a pretext of work. See JODI KANTOR & MEGAN TWOHEY, SHE SAID 73 (2019) ("They had all wanted what young Laura Madden had wanted: their own equivalent of that job in the London office, the chance to work, participate, and succeed.").

[105] *See* Andrew Rice, *The Bad, Good Lawyer: Was David Boies Just Doing Right by Harvey Weinstein? Or Did He Cross an Ethical Line?*, N.Y. MAG. (Sept. 30, 2018), http://nymag.com/intelligencer/2018/09/david-boies-harvey-weinstein-lawyer.html.

[106] *See* Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 21, 2017), https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements.

[107] *Id.*

which he basically confessed to fondling her, the DA decided not to bring charges against Weinstein.[108] Battilana was shattered and her career suffered.[109]

Mia Kirshner, another actress who claims Weinstein harassed her, describes the toxic culture in Hollywood that allowed Weinstein to do what he did and get away with it for many years:

> People in Mr. Weinstein's position have the power to make or break careers, to blacklist someone who protests against their advances. In turn, my own representatives at the time did nothing. Their silence spoke volumes about power and fear within the film industry. And I was far too quiet myself. All I did was tell my peers what happened to me and warn them about this dangerous man. In turn, both my unions—the Screen Actors' Guild (SAG) and the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA)—offered inadequate protection should I have launched a complaint. In a business climate like this, what recourse does an actor have if they experience sexual harassment or abuse? Very little. This goes to the heart of why so many actors probably remained silent.[110]

In short, many feared speaking out because Weinstein had "the power to make or break careers."[111]

If Harvey Weinstein were the only prominent figure in the creative industries to be accused of sexual harassment by many people, that alone might provide reason enough to consider the need for reforms. But Weinstein is just one of many prominent figures in the creative industries accused of sexual harassment.

Les Moonves, the CEO of CBS for fifteen years, is the most prominent TV executive to be accused of sexual harassment by multiple women—charges supported by an independent investigation conducted by two law firms hired by CBS.[112] Known for his savvy in hiring talent and in selecting scripts and shows (including *Survivor*, *Big Bang Theory*, *CSI*, *How I Met Your Mother*, and, prior to CBS, *Friends* and *ER*[113]), Moonves was one of the highest-paid corporate

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[108] *Id.*

[109] *Id.*

[110] Mia Kirshner, *I Was Not Protected from Harvey Weinstein. It's Time for Institutional Change*, GLOBE & MAIL (Dec. 26, 2017), https://beta.theglobeandmail.com/opinion/i-was-a-victim-of-harvey-weinstein-but-we-have-to-focus-on-the-future/article36584019/?click=sf_globe.

[111] *Id.*

[112] *See* Rachel Abrams & Edmund Lee, *Les Moonves Obstructed Investigation Into Misconduct Claims, Report Says*, N.Y. TIMES, https://www.nytimes.com/2018/12/04/business/media/les-moonves-cbs-report.html (last updated Dec. 26, 2017).

[113] *See id.*

executives, earning roughly $70 million in 2017.[114] The *Wall Street Journal* described Moonves as a "TV programming wizard" and "the consummate Hollywood insider," but one who "has a quick temper and has been known to hold grudges with those who have crossed him …."[115] In two reports by *The New Yorker*, twelve women who worked with Moonves between 1980 and 2000 accused him of sexual harassment.[116] CBS soon fired Moonves with cause and without a lucrative $120 million severance package in his contract.[117] According to a report by the *NYT*, CBS hired two law firms, Covington & Burling and Debevoise & Plimpton, to conduct internal investigations of the allegations against Moonves.[118] The firms interviewed eleven of seventeen women who accused Moonves of sexual misconduct; according to the *NYT*, which reviewed a copy of the report, the investigators concluded that Moonves "engaged in multiple acts of serious nonconsensual misconduct in and outside of the workplace, both before and after he came to CBS in 1995."[119] Moonves also "received oral sex from at least 4 CBS employees under circumstances that sound transactional and improper to the extent that there was no hint of any relationship, romance, or reciprocity (especially when given what we know about his history of more or less forced oral sex with women with whom he has no ongoing relationship)."[120]

Some of Moonves's alleged sexual misconduct sounds eerily similar to Harvey Weinstein's stratagem in luring women. Actress Illeana Douglas said Moonves called her into his office to discuss his concern with her "attitude" while starring in the CBS pilot *Queens*; but, instead of discussing the show, Moonves allegedly asked inappropriate questions about her personal life and then proceeded to "jump[] on top of me and put[] his tongue down my throat and pin[] me down on the coach."[121] Douglas was terrified: "What it feels like to have someone hold you down—you can't breathe, you can't move …. The

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114 *See* Farrow, *supra* note 21.

115 Keach Hagey & Joe Flint, *Once Allies, Two Media Chiefs Go to War Over the Future of CBS*, WALL ST. J. (May 28, 2018, 2:03 PM), https://www.wsj.com/articles/once-allies-two-media-chiefs-go-to-war-over-the-future-of-cbs-1527530599.

116 *See* Ronan Farrow, *As Leslie Moonves Negotiates His Exit from CBS, Six Women Raise New Assault and Harassment Claims*, NEW YORKER (Sept. 9, 2018), https://www.newyorker.com/news/news-desk/as-leslie-moonves-negotiates-his-exit-from-cbs-women-raise-new-assault-and-harassment-claims.

117 *See* Aric Jenkins, *CBS Fires Les Moonves for Cause and Will Not Provide $120 Million Severance Payout*, FORTUNE (Dec. 17, 2018), http://fortune.com/2018/12/17/les-moonves-fired-cbs-severance/.

118 *See* Abrams & Lee, *supra* note 112.

119 *Id.*

120 *Id.*

121 Maeve McDermott, *Illeana Douglas: Les Moonves Called my Sexual Assault 'A Lot of Fun,'* USA TODAY (Oct. 2, 2018, 1:38 PM), https://www.usatoday.com/story/life/people/2018/10/02/illeana-douglas-les-moonves-called-my-assault-lot-fun/1498309002/.

physicality of it was horrendous."[122] According to Douglas, Moonves "pulled up her skirt and began to thrust against her …."[123]

Douglas rebuffed Moonves, who relented when she did not reciprocate, and then he allegedly instructed her not to tell anyone what happened.[124] A week later, Moonves allegedly dropped in at the rehearsals of *Queens* and scrutinized and criticized Douglas's performance, in what Douglas understood to be intimidation and retaliation for her rebuffing of Moonves.[125] Douglas was soon fired by Moonves, according to Douglas.[126] Shortly thereafter, Douglas's agent from the Creative Artists Agency terminated representation of Douglas.[127] Douglas retained an attorney, who informed CBS of Douglas's charges and negotiated with CBS payment of lost wages from *Queens* and the offer of a new role for Douglas in the show *Bella Mafia*.[128] Douglas had a successful career on other TV networks, but believes her career at CBS was "derailed" by Moonves.[129] Writer Janet Jones recounted how Moonves subjected her to a similar incident of sexual harassment when he was vice-president of Twentieth Century Fox.[130] Moonves denied all the sexual harassment allegations, but a draft of CBS's internal investigation reportedly found Moonves to be "evasive and untruthful at times and to have deliberately lied about and minimized the extent of his sexual misconduct …."[131]

The allegations against Moonves evince a *modus operandi* similar to Weinstein's, what might be called the "power broker" ploy. The "power broker" ploy consists of: (1) setting up meetings with women under the false pretense of discussing their starring or other involvement in the production of creative works; (2) sexually harassing or assaulting them during meetings; and (3) if the women resisted, retaliating against them by denying them roles in future works or describing them as troublemakers. These examples show how power brokers in the creative industries, who can "make or break careers," can use their power

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122 *See* Farrow, *supra* note 21.

123 *See id.*

124 *See id*.; McDermott, *supra* note 121.

125 *See* Farrow, *supra* note 21.

126 *See id.*

127 *Id*.

128 *Id.*

129 *Id.*

130 *Id.*

131 Cydney Henderson, *Les Moonves: New Allegation Follows Report Saying Ex-CBS Boss Destroyed Evidence*, USA TODAY (Dec. 5, 2018, 12:10 AM), https://www.usatoday.com/story/life/tv/2018/12/05/les-moonves-allegedly-destroyed-evidence-sexual-misconduct-inquiry/2210456002/.

to sexually harass people at work and retaliate against them if they do not submit to their sexual demands.

Allegations of sexual harassment have also rocked the high-tech industry. Some of the allegations involve people who developed works of authorship, including computer programs, which are treated as literary works under the Copyright Act of 1976.[132] For example, Andy Rubin created and developed the Android software at his startup, which was acquired in 2005 by Google for its use in smartphones.[133] Given the huge success of Android (80% adoption in smartphones around the world), Rubin was compensated lavishly by Google and was allegedly given "more latitude than most Google executives."[134] Rubin married his wife Rie Rubin, a fellow Google employee, in 2009, but he reportedly had other romantic or sexual relationships with other Google employees.[135] One of the female employees worked in Rubin's Android division; the relationship started in 2012, but in March 2013, when she wanted to break off the relationship, she said that Rubin asked her to meet at a hotel, where he allegedly forced her to perform oral sex.[136] The woman ended the relationship, but waited until 2014 to file an internal complaint with Google; Rubin denied the allegation but, according to the *NYT*, Google's investigation found the female employee's complaint "credible."[137] Then-Google CEO Larry Page, who had authorized a $150 million stock bonus to Rubin for his Android work, "decided Mr. Rubin should leave."[138] Possibly to avoid a lawsuit by Rubin, Google paid $90 million to Rubin as part of his severance and did not disclose the details of his alleged misconduct to others at Google.[139] After the allegations became public in the *NYT*, Google employees around the world staged a walkout in protest of the company's handling of sexual harassment

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132 *See* Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1234 (3d Cir. 1986).

133 *See* Daisuke Wakabayashi & Katie Benner, *How Google Protected Andy Rubin, the 'Father of Android'*, N.Y. TIMES (Oct. 25, 2018), https://www.nytimes.com/2018/10/25/technology/google-sexual-harassment-andy-rubin.html.

134 *Id.*

135 *Id.*; *see also* Glenn Fleishman, *Google Paid Android Inventor Andy Rubin $90 Million to Keep Quiet After He Was Credibly Accused of Sexual Misconduct, Report Says*, FORTUNE (Oct. 25, 2018), http://fortune.com/2018/10/25/google-paid-andy-rubin-millions-to-keep-quiet-on-sexual-accuation/.

136 *See* Wakabayashi & Benner, *supra* note 133.

137 *Id*.

138 *Id.*

139 *Id.*

claims.[140] Shareholders of Google later sued Google's Board of Directors for authorizing the exit payment to Rubin.[141]

Other female employees of Google, Loretta Lee and Kelly Ellis, have alleged that they were harassed by male co-workers and supervisors, and later had their computer codes disapproved or suffered adverse consequences in retaliation for complaining about the harassment and so-called "bro culture" pervasive at Google.[142] Ellis is part of a class-action lawsuit against Google for allegedly paying qualified women less than male counterparts[143]—following a damning report by the Department of Labor, which had found "compelling evidence of very significant discrimination against women in the most common positions at Google headquarters."[144]

2. Creatives in Movies and TV Shows

Given the scandals involving Weinstein and Moonves, it should not be surprising that the movie and TV industries are rife with many other examples

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[140] *See* Matthew Weaver et al., *Google Walkout: Global Protests After Sexual Misconduct Allegations*, GUARDIAN (Nov. 1, 2018, 4:20 PM), https://www.theguardian.com/technology/2018/nov/01/google-walkout-global-protests-employees-sexual-harassment-scandals.

[141] *See* Bloomberg, *Google Board Sued by Shareholder for Allegedly Covering Up Sexual Harassment by Android Creator Andy Rubin*, FORTUNE (Jan. 20, 2019), http://fortune.com/2019/01/10/google-android-lawsuit-shareholder-sexual-harassment-sex-trafficking-andy-rubin-la/.

[142] *See* Shweta Ganjoo, *Not Just Andy Rubin Saga, Controversies About Alleged Sexual Misconduct at Google Are Far Too Many*, INDIA TODAY, https://www.indiatoday.in/technology/features/story/not-just-andy-rubin-saga-controversies-about-alleged-sexual-misconduct-at-google-are-far-too-many-1376203-2018-10-26 (last updated Oct. 29, 2018, 8:33 AM); Julia Carrie Wong, *Google's 'Bro-Culture' Meant Routine Sexual Harassment of Women, Suit Says*, GUARDIAN (Feb. 28, 2018, 8:52 PM), https://www.theguardian.com/technology/2018/feb/28/google-lawsuit-sexual-harassment-bro-culture; *see also* Joe Fitzgerald Rodriguez, *Former Google Engineer Claims She Was Sexually Harassed and "Google Did Nothing About It,"* S.F. WEEKLY (Mar. 7, 2015, 12:56 PM), https://archives.sfweekly.com/thesnitch/2015/03/07/former-google-engineer-claims-she-was-sexually-harassed-google-did-nothing-about-it.

[143] *See* Sam Levin, *Google 'Segregates' Women into Lower-Paying Jobs, Stifling Careers, Lawsuit Says*, GUARDIAN (Sept. 14, 2017, 2:00 PM), https://www.theguardian.com/technology/2017/sep/14/google-women-promotions-lower-paying-jobs-lawsuit.

[144] *See* Sam Levin, *Google Accused of 'Extreme' Gender Pay Discrimination by US Labor Department*, GUARDIAN (April 7, 2017, 6:48 PM), https://www.theguardian.com/technology/2017/apr/07/google-pay-disparities-women-labor-department-lawsuit. The allegations against Google bear some differences from the harassment alleged against Weinstein and Moonves. One key difference is that, thus far, not one powerful figure at Google has been accused of committing flagrant sexual harassment against many women. Also absent is the use of the "lure" of participating in the development of a work of authorship as a pretext to a meeting that led to the sexual harassment. Yet, the lawsuits of Lee and Ellis suggest that sexual harassment adversely affected the female programmers' work in creating computer programs at Google, just as the allegations by Judd, Sorvino, and other actresses showed how the sexual harassment and retaliation they suffered hurt their work and chances of acting in movies.

of alleged sexual harassment exposed in the #MeToo moment. Below is a summary of some of the main areas involved.

Bryan Singer is one of the most successful directors and producers in Hollywood, with an impressive list of both acclaimed and blockbuster movies, including four *X-Men* movies, *Superman Returns*, *The Usual Suspects*, and *Bohemian Rhapsody*.[145] Yet, starting in 2014, Singer has been accused of engaging in rape and sexual abuse of teenage boys.[146] In 2000, Michael Egan, a teen actor, reportedly told the FBI and Los Angeles Police Department that he was sexually abused in an underage sex ring; later, in 2014, Egan filed a civil suit against Singer alleging that he "used his influence as a Hollywood insider as well as a range of drugs and alcohol to force anal and oral sex on Egan while promising him film roles."[147] Singer's lawyer denied the charges,[148] and, in an unrelated case involving a Ponzi scheme, Egan pled guilty to fraud and later withdrew his civil case against Singer.[149] But, later in January 2019, *The Atlantic* came out with an explosive investigative report (after a year-long investigation and interviews with fifty people) detailing many other allegations of rape and sexual abuse of underage boys by Singer.[150] The article corroborated some of the details alleged by Egan.[151]

The allegations against Singer indicate a pattern of sexual abuse. Singer allegedly preyed on underage male teenagers at a lavish Encino mansion that was owned by Digital Entertainment Network (DEN), a company in which Singer was a major investor that was ostensibly used "to produce TV shows and movies for 14-to-24-year-olds, with an emphasis on stories for gay teens," but it operated as a front to lure teenage boys to "a party house where [they] were allegedly given alcohol and drugs, encouraged to have sex with older men, and in some cases raped."[152] Singer also allegedly lured teenage boys with the prospect of casting them in his movies. Victor Valdovinos alleges that, when he

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[145] *See* Elizabeth A. Harris, *Popular Director Keeps Job Despite Misconduct Reports*, N.Y. TIMES, Jan. 25, 2019, at B6; *Bryan Singer*, IMDb, https://www.imdb.com/name/nm0001741/ (last visited Nov. 17, 2019).

[146] *See* Dana Feldman & Eric Kelsey, *Update 3-'X-Men' Director Hit by Sex Abuse Lawsuit Weeks Before Premiere*, REUTERS (Apr. 17, 2014, 8:50 PM), https://www.reuters.com/article/usa-singer-abuse-idUSL2N0N919E20140418.

[147] *Id.*

[148] *Id.*

[149] *See* Alex French & Maximillian Potter, *'Nobody Is Going to Believe You*,' ATLANTIC (Mar. 2019), https://www.theatlantic.com/magazine/archive/2019/03/bryan-singers-accusers-speak-out/580462/.

[150] *Id.*; *see also* Abid Rahman & Evan Real, *Bryan Singer Hit with Fresh Allegations of Sex with Underage Boys in Atlantic Expos…*, HOLLYWOOD REPORTER (Jan. 23, 2019, 4:19 AM), https://www.hollywoodreporter.com/news/bryan-singer-hit-fresh-allegations-sex-underage-boys-atlantic-expose-1178261.

[151] French & Potter, *supra* note 149.

[152] *Id.*

was thirteen years old and in the seventh grade, Singer approached him in a men's room near his middle school and said, "You're so good-looking. What are you doing tomorrow? Maybe I could have somebody contact you about putting you in this movie."[153] Singer was filming *Apt Pupil* nearby.[154] Valdovinos agreed and later showed up to the set for the filming of the movie, which had a scene involving a character showering in a school locker room.[155] A crew member allegedly told Valdovinos to undress and only wear a towel, and then wait on a locker room bench during the filming.[156] Valdovinos said he waited for hours in just a towel, but periodically Singer came by to chat with him, touching him on the chest and then eventually, at one point, masturbating him, according to Valdovinos.[157] Valdovinos never ended up in the final cut for the movie, and he said his life was shattered due to the molestation.[158] Five other men (then teenagers) who were extras for the shower scene have sued Singer and the production company for alleged mistreatment in being instructed to be naked in the scene.[159]

Singer is alleged to have used his ability to cast actors in his movies to prey upon teenagers and keep them silent. Aspiring actor Bret Tyler Skopek alleged that, when he was eighteen years old, he had a sexual relationship with Singer, who "dangled the lure of a minor role in an *X-Men* movie, but the promised audition never happened."[160] Singer denied making such a promise.[161] Likewise, a John Doe plaintiff filed a lawsuit against Singer and Gary Goddard, a Hollywood producer, for alleged sexual abuse: Goddard allegedly lured the boy with the chance of being an actor and introduced him to Singer, who, along with Goddard, invited the boy to a party for the screening of *Superman Returns*.[162] After the party, Singer and Goddard allegedly got the boy drunk and then proceeded to molest him in a hotel room.[163] Both men denied the allegations; the John Doe case was later voluntarily dismissed, possibly due to a settlement.[164] Cesar Sanchez-Guzman, who sued Singer for allegedly raping him when he was

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153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.*

160 Dawn C. Chmielewski & Dominic Patten, *Sex, Drugs, Glamour, Emptiness: Bryan Singer's Teen Ex-Lover Bares All About Life in Director's Orbit*, DEADLINE (Dec. 8, 2017, 2:55 PM), https://deadline.com/2017/12/bryan-singer-teen-ex-lover-hollywood-sex-drugs-party-life-1202216936/.

161 *See* French & Potter, *supra* note 149.

162 *Id.*

163 *Id.*

164 *Id.*

seventeen years old, claimed that, after raping him, Singer told him not to tell anyone and that "he was working on the next *X-Men* movie and he could help him get into the business."[165]

These allegations fit the "power broker" *modus operandi* outlined above: Singer allegedly used the lure of participating in a movie event, such as the filming or the screening of a movie, along with the prospect of acting opportunities in movies, to meet and interact with the boys he molested.

Prominent actors have also been accused of sexual harassment, assault, or abuse, including Bill Cosby, James Franco, Morgan Freeman, and Kevin Spacey, who were among the most prominent and egregious alleged offenders. All of them are alleged to have engaged in sexual misconduct during or related to the performance or production of works of authorship. For example, Cosby, who drugged the drinks of some of the victims he raped, allegedly used the filming or production of *The Cosby Show* to meet some of the actresses he sexually harassed or assaulted, including Lili Bernard, Helen Gumpel, Beverly Johnson, Lisa Jones, and Eden Tirl.[166] In a criminal prosecution unrelated to *The Cosby Show*, Cosby was convicted of sexual assault of Andrea Constand and sentenced to three to ten years in prison.[167]

James Franco allegedly sexually harassed several of his female students at the acting school where he taught. Franco allegedly asked the students if they would take off their tops for a video in what they considered was an "unprofessional" request—and certainly not the "art film" they were led to believe he was filming.[168] As one student described, "[h]e just took advantage of our eagerness to work and be a part of something bigger …. We were all these up-and-coming actors who were so hopeful."[169] Other aspiring actresses who studied at Franco's Studio 4, which touted the prospect of "cast[ing them in] roles directly from his classes," shared similar experiences of alleged sexual harassment.[170] Sarah Tither-Kaplan, a student at the school, alleged that Franco

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165 *Id.*

166 *See* Carly Mallenbaum et al., *A Complete List of the 60 Bill Cosby Accusers and Their Reactions to His Prison Sentence*, USA TODAY (Apr. 27, 2018, 4:32 PM), https://www.usatoday.com/story/life/people/2018/04/27/bill-cosby-full-list-accusers/555144002/.

167 *See* Eric Levenson & Aaron Cooper, *Bill Cosby Sentenced to 3 to 10 Years in Prison for Sexual Assault*, CNN, https://www.cnn.com/2018/09/25/us/bill-cosby-sentence-assault/index.html (last updated Sept. 26, 2018, 10:03 AM).

168 *See* Daniel Miller & Amy Kaufman, *Five Women Accuse Actor James Franco of Inappropriate or Sexually Exploitative Behavior*, L.A. TIMES (Jan. 11, 2018, 3:00 AM), https://www.latimes.com/business/hollywood/la-fi-ct-james-franco-allegations-20180111-htmlstory.html.

169 *Id.*

170 *Id.*

cast her to play a prostitute in his movie *The Long Home*, but that, during the filming, a producer added a new "orgy scene" involving Franco and several women, including Tither-Kaplan.[171] Although she had agreed by contract to perform a nude scene for the movie, the added orgy scene was not a part of the plan.[172] During the filming of the scene, Franco allegedly removed the plastic coverings over the genitalia of Tither-Kaplan and of the other women, which they had wished to use during the scene.[173]

Similarly, sixteen women have accused Morgan Freemen of a "pattern of inappropriate behavior by Freeman on set, while promoting his movies and at his production company Revelations Entertainment."[174] During the filming of *Going in Style*, Freeman allegedly sexually harassed a young production assistant for months, repeatedly touching her, making sexually suggestive comments, and trying to lift up her skirt.[175] A production staff member for the movie *Now You See Me* said that Morgan repeatedly made inappropriate comments about the female staff's bodies while on set.[176] None of the women complained because they feared losing their jobs, and, in any event, Revelations Entertainment lacked a human resources department to receive such complaints.[177] Six former employees said they witnessed Freeman's inappropriate behavior with women that allegedly included lewd comments, leering at women's bodies, and, at times, touching.[178]

Over thirty men have alleged that Kevin Spacey sexually harassed or assaulted them, including, for some, when they were minors.[179] In some of the alleged incidents, Spacey targeted teenage boys who were in theater or acting classes.[180] Twenty young actors alleged that Spacey sexually harassed or

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171 Dave Itzkoff, *2 Women Say James Franco's Acting School Sexually Exploited Them*, N.Y. TIMES (Oct. 3, 2019), https://www.nytimes.com/2019/10/03/movies/james-franco-nudity-lawsuit.html.

172 Miller & Kaufman, *supra* note 168.

173 *Id.*

174 *See* An Phung & Chloe Melas, *Women Accuse Morgan Freeman of Inappropriate Behavior, Harassment*, CNN, https://www.cnn.com/2018/05/24/entertainment/morgan-freeman-accusations/index.html (last updated May 28, 2018, 11:56 PM).

175 *Id*.

176 *Id.*

177 *Id.*

178 *Id.*

179 *See* Aja Romano, *The Sexual Assault Allegations Against Kevin Spacey Span Decades. Here's What We Know.*, VOX, https://www.vox.com/culture/2017/11/3/16602628/kevin-spacey-sexual-assault-allegations-house-of-cards (last updated Dec. 24, 2018, 5:30 PM).

180 *See, e.g.*, *id.* (accounts of Anthony Rapp, a fourteen-year-old boy, a sixteen-year-old-boy, and Justin Dawes); E. Alex Jung, *Man Comes Forward to Describe an Alleged Extended Sexual Relationship He Had at Age 14 with Kevin Spacey*, VULTURE (Nov. 2, 2017), https://www.vulture.com/2017/11/kevin-spacey-alleged-sexual-relationship.html; *'I Woke Up with Kevin Spacey Lying on Me,'* BBC NEWS (Nov. 1, 2017),

assaulted them while they worked at the Old Vic Theatre in London, where Spacey worked from 1995–2015, including as artistic director from 2004.[181] Thus far, Spacey was indicted for felony sexual assault that allegedly took place at a restaurant in Nantucket,[182] but the case was later dismissed due to the accuser's unavailability and pleading of the Fifth Amendment privilege after exculpatory text messages may have been deleted from the accuser's phone.[183]

The major TV networks all had one of their top news anchors or talk show hosts—Mark Halperin of ABC, Matt Lauer of NBC, Bill O'Reilly of Fox, and Charlie Rose of CBS—leave in complete disgrace after numerous allegations of sexual harassment surfaced. Five employees of ABC alleged that news director Mark Halperin sexually harassed them at work, including, for three of the women, by "pressing an erection against their bodies while he was clothed."[184] Multiple female employees of NBC alleged that that they were sexually harassed at work by *Today Show* host Matt Lauer, who allegedly used a button installed under his desk to lock the door to his office to carry out some of his sexual assaults or harassment.[185] One employee who filed an internal complaint at NBC said that Lauer had committed "egregious acts of sexual harassment and misconduct" while covering the Sochi Olympics in 2014.[186] According to reporting by Ronan Farrow, Matt Lauer allegedly anally raped NBC producer

https://www.bbc.com/news/uk-41828874.

[181] *See* Romano, *supra* note 179; Anita Singh & Danny Boyle, *Kevin Spacey: Old Vic Theatre Finds 20 Allegations of 'Inappropriate Behaviour,'* TELEGRAPH (Nov. 16, 2017, 4:15 PM), https://www.telegraph.co.uk/news/2017/11/16/kevin-spacey-old-vic-investigation-finds-20-allegations-inappropriate/.

[182] *See* Maane Khatchatourian & Cynthia Littleton, *Kevin Spacey Faces Felony Sexual Assault Charge, Posts Bizarre Video*, VARIETY (Dec. 24, 2018, 11:25 AM), https://variety.com/2018/tv/news/kevin-spacey-sexual-assault-charge-1203095488/.

[183] *See* Laura Bradley, *Kevin Spacey's Criminal Case Has Been Dismissed*, VANITY FAIR (July 17, 2019), https://www.vanityfair.com/hollywood/2019/07/kevin-spacey-criminal-case-dismissed; Jean Casarez & Eric Levenson, *Charge Against Kevin Spacey Dropped After Alleged Victim Pleads the 5th*, CNN (July 17, 2019, 6:46 PM), https://www.cnn.com/2019/07/17/us/kevin-spacey-charge-dropped/index.html.

[184] *See* Oliver Darcy, *Five Women Accuse Journalist and 'Game Change' Co-author Mark Halperin of Sexual Harassment*, CNN (Oct. 26, 2017, 3:27 PM), https://money.cnn.com/2017/10/25/media/mark-halperin-sexual-harassment-allegations/index.html.

[185] *See* Jessica Simeone & David Mack, *Matt Lauer Says He's "Embarrassed and Ashamed" in His First Statement Since Being Fired from NBC News*, BUZZFEED NEWS (Nov. 30, 2017, 7:27 AM), https://www.buzzfeednews.com/article/jessicasimeone/matt-lauer-has-been-fired-from-nbc-news-amid-report-of#.smoOjYO5Z; Ramin Setoodeh & Elizabeth Wagmeister, *Matt Lauer Accused of Sexual Harassment by Multiple Women (Exclusive)*, VARIETY (Nov. 29, 2017, 12:34 PM), https://variety.com/2017/biz/news/matt-lauer-accused-sexual-harassment-multiple-women-1202625959/.

[186] *See* Emily Smith & Yaron Steinbuch, *Matt Lauer Allegedly Sexually Harassed Staffer During Olympics*, PAGE SIX (Nov. 29, 2017, 8:02 AM), https://pagesix.com/2017/11/29/matt-lauer-allegedly-sexually-assaulted-female-staffer-during-olympics/. For further information about Lauer's desk button, see Erik Wemple, *Just How Did Matt Lauer's amous Desk Button Work?*, WASH. POST (May 11, 2018, 1:13 PM), https://www.washingtonpost.com/blogs/erik-wemple/wp/2018/05/11/just-how-did-matt-lauers-famous-desk-button-work/.

Brook Nevils in Sochi while she was drunk.[187] Lauer denied the charge and asserted he had a consensual relationship with Nevils, who admitted that, after her alleged rape, she had consensual sex with Lauer on other occasions that she regrets.[188] After NBC investigated Nevils's complaint, NBC immediately fired Lauer for a "clear violation of [NBC's] standards."[189] However, according to Farrow, Nevils was later shunned by NBC co-workers so she left the network after agreeing to a seven-figure settlement that required her to never speak about NBC or the incident involving Lauer.[190]

Fox News host Bill O'Reilly suffered a fate similar to Lauer after the *NYT* published an investigative report detailing how Fox paid huge settlements to six female employees who alleged that O'Reilly sexually harassed them, as well as retaliated against them after they rebuffed his advances.[191] Eight females who worked or hoped to work with Charlie Rose on the "Charlie Rose" show alleged that he sexually harassed them—through unwanted touching, groping, and sexual advances, his repeated exposure of himself naked on business trips with them, and other inappropriate behavior—from the 1990s to 2011.[192] Rose preferred hiring young female interns and had a "ritual" of summoning them to work at his apartment, where he allegedly sexually harassed them, often while he was naked.[193] Several women complained to the show's executive producer Yvette Vega, who later acknowledged that she didn't do enough to protect the female staff.[194]

3. Creatives in Other Areas

From the above examples, one might mistakenly conclude that sexual harassment is confined to Hollywood and large corporations like Google. While

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[187] *See* EJ Dickson, *Matt Lauer Accused of Rape According to New Ronan Farrow Book*, ROLLING STONE (Oct. 9, 2019, 11:48 AM), https://www.rollingstone.com/culture/culture-news/matt-lauer-ronan-farrow-book-rape-allegation-sochi-brooke-nevils-896853/.

[188] *Id.*

[189] *See* Smith & Steinbuch, *supra* note 186.

[190] *See* RONAN FARROW, CATCH AND KILL 389–91 (2019).

[191] *See* Emily Steel & Michael S. Schmidt, *Bill O'Reilly Settled New Harassment Claim, Then Fox Renewed His Contract*, N.Y. TIMES (Oct. 21, 2017), https://www.nytimes.com/2017/10/21/business/media/bill-oreilly-sexual-harassment.html; Emily Steel & Michael S. Schmidt, *Fox News Settled Sexual Harassment Allegations Against Bill O'Reilly, Documents Show*, N.Y. TIMES (Jan. 10, 2017), https://www.nytimes.com/2017/01/10/business/media/bill-oreilly-sexual-harassment-fox-news-juliet-huddy.html?module=inline.

[192] *See* Irin Carmon & Amy Brittain, *Eight Women Say Charlie Rose Sexually Harassed Them—With Nudity, Groping and Lewd Calls*, WASH. POST (Nov. 20, 2017), https://www.washingtonpost.com/investigations/eight-women-say-charlie-rose-sexually-harassed-them—with-nudity-groping-and-lewd-calls/2017/11/20/9b168de8-caec-11e7-8321-481fd63f174d_story.html?noredirect=on&utm_term=.42ad6e325471.

[193] *Id.*

[194] *Id.*

the above examples are among the most high-profile incidents of sexual harassment, they are just the tip of the iceberg. Artists in numerous other fields in the creative industries have come forward, during the #MeToo moment, to share their experiences in being sexually harassed.[195] It goes beyond the scope of this Article to canvas every sector of the creative industries, but a few other sectors are discussed below for illustrative purposes.

Photographers have been accused of sexual harassment of models. In October 2017, *Marie Claire* reported the allegations of fifteen female models or assistants who said that fashion photographer Terry Richardson sexually harassed or assaulted them during shoots.[196] In January 2018, an anonymous model started an Instagram account, inviting other models to share their stories of being sexually harassed on photo shoots.[197] Her request generated numerous responses from other models; in total, the models named approximately 300 photographers and other individuals who allegedly sexually harassed them.[198] In that same month, more than a dozen male models publicly accused prominent fashion photographers Bruce Weber and Mario Testino of sexual harassment in an article by the *NYT*.[199] Soon, other models came forward. *The Boston Globe* published a report in February 2018 detailing the allegations of models who claim they were sexually harassed by photographers Patrick Demarchelier, David Bellemere, Andre Passos, and Seth Sabal.[200] In July 2018, four prominent male models accused photographer Rick Day of sexually assaulting them.[201] In 2019, models accused celebrity photographer Marcus Hyde, who is known for his photographs of Kim Kardashian and Ariana Grande, of sexual harassment

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195 *See* Vox List, *supra* note 19.

196 *See* Harriet Sim, *The Disturbing List of Sexual Assault and Harassment Allegations Against Terry Richardson*, MARIE CLAIRE (Oct. 25, 2017), https://www.marieclaire.com.au/terry-richardson-every-sexual-harassment-and-assault-allegation.

197 Emilia Petrarca, *Fashion's #MeToo Movement Is Loudest on Instagram: Models are Sharing Devastating Stories of Abuse in DMs*, CUT, https://www.thecut.com/2018/04/fashions-me-too-movement-instagram-sexual-harassment.html (last visited Jan. 31, 2020).

198 *Id*.

199 *See* Jacob Bernstein et al., *Male Models Say Mario Testino and Bruce Weber Sexually Exploited Them*, N.Y. TIMES (Jan. 13, 2018, 3:55 AM) https://www.nytimes.com/2018/01/13/style/mario-testino-bruce-weber-harassment.html?smid=pl-share&_r=0.

200 *See* Jenn Abelson & Sacha Pfeiffer, *Modeling's Glamour Hides Web of Abuse*, BOSTON GLOBE (Feb. 16, 2018, 1:34 PM), https://www.bostonglobe.com/metro/2018/02/16/beauty-and-ugly-truth/c7r0WVsF5cib1pLWXJe9dP/story.html.

201 *See* David Artavia, *Exclusive: Top Male Models Accuse Photographer Rick Day of Sexual Assault*, ADVOCATE (July 19, 2018, 4:00 AM), https://www.advocate.com/people/2018/7/19/exclusive-male-models-accuse-photographer-rick-day-sexual-assault; Daniel Villarreal, *Four Male Models Have Accused New York-Based Photographer Rick Day of Sexual Assault*, HORNET (July 24, 2018), https://hornet.com/stories/rick-day-sexual-assault/.

and assault; Kardashian and Grande both sided with the models and expressed outrage at Hyde's alleged mistreatment of models.[202]

In some of the above incidents, the models (some minors at the time) retell a harrowing experience that might be all too common: A photographer turns a photo shoot into his opportunity to instruct a model to get naked, to touch them during poses, and, in some cases, to sexually assault them and pressure them to perform sexual acts.[203] Models are particularly vulnerable to abuse and harassment from photographers. First, models are typically independent contractors as are the photographers in a shoot.[204] Such settings go beyond the reach of federal law's protections from sexual harassment, as explained below. In addition, models, even ones who have agents, commonly show up to a photo shoot alone, so often a photo shoot is one-on-one with a photographer. Third, fashion shoots often strive for "sex appeal" and pushing the boundary of provocativeness, so a photographer is given a convenient pretext to ask for poses involving skin and to touch a model for a pose. Moreover, an established photographer holds enormous power over models, especially young models who are trying to break into the industry. For example, fashion model Barrett Pall, who was nineteen years old when Day allegedly sexually assaulted him during a photo shoot in Day's apartment, explained that he allowed Day to continue to touch him, even though he felt increasingly uncomfortable, because he needed to build his portfolio and was worried that Day would not give him photos from the shoot.[205] Twin models Michael and Zach Zakar recount a similar incident of alleged sexual harassment with Day in 2016 when they just started modeling.[206] The twins endured Day allegedly inappropriately touching them and exposing his penis because they wanted the photos for their portfolios; as Michael explained, "I tried to joke my way out because Rick is a great photographer and

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[202] *See* Alaina Demopoulos, *Models Claim Alleged Assault and Harassment by Kardashian Photographer Marcus Hyde: 'He's a Complete Predator,'* DAILY BEAST (July 27, 2019, 5:39 AM), https://www.thedailybeast.com/models-claim-alleged-assault-and-harassment-by-kardashian-photographer-marcus-hyde-hes-a-complete-predator.

[203] *See* Bernstein, *supra* note 199; Artavia, *supra* note 201.

[204] *See* Artavia, *supra* note 201 ("Because most models are independent contractors, they are unable to unionize, which means on top of paying agent fees (roughly 20 percent) they usually foot the bill for their travel expenses, housing, and federal taxes. Due to the absence of regulation and labor protections, on top of a multilevel construct of hiring workers (most photographers and stylists are also freelancers), pinpointing legal liability for sexual harassment and assault is challenging.").

[205] *Id.*

[206] *See* James Besanvalle, *Gay Twin Models Accuse Top Photographer Rick Day of Sexual Assault*, GAY STAR NEWS (July 24, 2018, 11:14 AM), https://www.gaystarnews.com/article/gay-twin-models-accuse-top-photographer-rick-day-sexual-assault/#gs.VfNaZRGT.

I wanted the shots back."[207] But they never received the photos from Day, despite their repeated requests.[208]

Professional dancers also face situations that make them vulnerable to sexual harassment and abuse. Dancers must display their bodies during performances that may involve physical contact or touching with other dancers.[209] Dancers are often independent contractors who lack protection from sexual harassment under federal law and who typically do not have human resources departments to lodge complaints of sexual harassment.[210] Similar to the power dynamics with producers and directors in Hollywood and photographers in the fashion industry, powerful choreographers "can single-handedly decide a dancer's fate and … can get away with inappropriate behavior."[211] Fewer dancers have come forward to allege sexual harassment compared to the modeling world, but ballerina Alexandra Waterbury filed a lawsuit against the New York City Ballet for allowing a hostile work environment and sexual harassment by two males dancers, who allegedly circulated nude photos of her and other women dancers.[212] Several former dancers also alleged that the former head of the ballet, Peter Martins, sexually harassed and physically abused them.[213] Martins retired and denied the charges; the Ballet hired an attorney to conduct an investigation, which ultimately did not find enough support for the allegations against Martin, who has since retired.[214] The Ballet also denied that they condoned any sexual harassment towards Waterbury.[215] Dancers in the Belgian Troubleyn troupe directed by Jan Fabre have alleged that he sexually harassed them, including demanding sex from them if they wanted to receive a solo performance.[216]

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[207] *Id.*

[208] *Id.*; *see also Model Snaps at Fashion Fotog*, PAGE SIX (March 12, 2010, 5:00 AM), https://pagesix.com/2010/03/12/model-snaps-at-fashion-fotog/ (model Rie Masmussen rebuking Terry Richardson, who, according to Masmussen, "takes girls who are young, manipulates them to take their clothes off and takes pictures of them they will be ashamed of. They are too afraid to say no because their agency booked them on the job and are too young to stand up for themselves").

[209] *See* Lauren Wingenroth, *#DancersToo: Is the Dance World Ready to Address Sexual Harassment?*, DANCE MAG. (May 21, 2018, 9:05 AM), https://www.dancemagazine.com/metoo-dance-2569127206.html/.

[210] *See id.*

[211] *Id.*

[212] *See* Adam Lusher, *Twenty-Year-Old Ballerina's Allegations Against New York City Ballet Threaten to Unleash Dance's Own #MeToo Movement*, INDEPENDENT (Sept. 9, 2018, 4:30 PM), https://www.independent.co.uk/news/world/americas/metoo-alexandra-waterbury-new-york-city-ballet-chase-finlay-nude-photos-sexual-harassment-abuse-a8530006.html.

[213] *See* Robin Pogrebin, *Abuse Allegations Against Peter Martins Are Not Corroborated, Inquiry Says*, N.Y. TIMES (Feb. 15, 2018), https://www.nytimes.com/2018/02/15/arts/dance/peter-martins-ballet-investigation.html.

[214] *Id.*

[215] *See* Lusher, *supra* note 212.

[216] *See* Shirine Saad, *Belgian Artist Jan Fabre Is Accused of Sexual Harassment by 20 Former Members of His Troupe*, HYPERALLERGIC (Sept. 20, 2018), https://hyperallergic.com/461224/jan-fabre-metoo-

The music sector has also faced numerous allegations of sexual harassment. In the world of classical music, nine male artists and musicians alleged that James Levine sexually harassed and assaulted them while he was director of the Metropolitan Opera, including unwanted touching and sexual demands of underage performers.[217] Levine, who denied the charges, was fired by the Met; Levine and the Met have sued each other over the controversy.[218] Likewise, ten women have alleged that conductor Charles Dutoit sexually harassed and assaulted them; the Boston Symphony Orchestra investigated the one incident alleged to have occurred between Dutoit and an intern of the orchestra in Tanglewood and found the allegation credible.[219] Violinist Zeneba Bowers alleged that William Preucil, the Cleveland Orchestra's renowned concertmaster, sexually assaulted her in his hotel room and then afterwards threatened to blacklist her if she reported it.[220] Music professor Bradley Garner was fired by the University of Cincinnati after a university investigation concluded that he engaged in sexual harassment of students for over two decades: The investigation found "evidence of 'unwanted sexual advances and verbal or physical conduct of a sexual nature,' a 'hostile environment' and conduct that was 'severe, persistent or pervasive.'"[221] Garner, who denied the charges, reportedly engaged in touching of students, texting students sexually explicit messages and graphic photos, and even video recording himself having sex with students.[222] Because studying under Garner was a major stepping stone to a career in classic music, students were reluctant to complain.[223]

In 2019, twenty singers and a dancer alleged that the famed opera singer Placido Domingo sexually harassed them with unwanted touching, kissing, and

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accusations/.

[217] *See* Anastasia Tsioulcas, *James Levine Accused of Sexual Misconduct by 5 More Men*, NPR (May 19, 2018, 11:42 AM), https://www.npr.org/sections/therecord/2018/05/19/612621436/james-levine-accused-of-sexual-misconduct-by-5-more-men.

[218] *Id.*

[219] *See* Anastasia Tsioulcas, *Sexual Assault Claim Against Conductor Dutoit Is Credible, Boston Symphony Says*, NPR (Mar. 2, 2018, 9:44 PM), https://www.npr.org/sections/thetwo-way/2018/03/02/590496543/sexual-assault-claim-against-conductor-dutoit-is-credible-boston-symphony-says.

[220] *See* Anne Midgette & Peggy McGlone, *Assaults in Dressing Rooms. Groping During Lessons. Classical Musicians Reveal a Profession Rife with Harassment*, WASH. POST (July 26, 2018), https://www.washingtonpost.com/entertainment/music/assaults-in-dressing-rooms-groping-during-lessons-classical-musicians-reveal-a-profession-rife-with-harassment/2018/07/25/f47617d0-36c8-11e8-acd5-35eac230e514_story.html?utm_term=.7cb05c4684e4.

[221] *See* Kate Murphy, *Flute Students Accuse Ex-University of Cincinnati Professor of Sexual Misconduct over 2 Decades*, ENQUIRER (Feb. 8, 2018, 6:58 PM), https://www.cincinnati.com/story/news/2018/02/06/students-accuse-university-cincinnati-professor-musician-flutist-sex-harassment-having-sex-students/1057552001/.

[222] *Id.*

[223] *Id.*

inappropriate sexual advances over a period of three decades; the Los Angeles Opera, where Domingo was a conductor and director, hired a law firm to investigate the allegations; Domingo initially denied the allegations, but resigned in October 2019.[224] Most of the women alleged retaliation by Domingo as well: "Seven of Domingo's nine accusers told the *Associated Press* they feel their careers were adversely impacted after rejecting his advances, with some saying that roles he promised never materialized and several noting that while they went on to work with other companies, they were never hired to work with him again."[225] In February 2020, Domingo issued a stunning apology to the women after the U.S. Opera Union hired a law firm to investigate the allegations of 27 accusers and reportedly found "a clear pattern of sexual misconduct and abuse of power by Domingo spanning at least two decades."[226] Although the report has not been made public, according to the Associated Press, the report investigated Domingo's alleged "unsolicited physical touching that ranged from kisses on the mouth to groping, late-night phone calls in which Domingo asked women to come to his residence, and inviting women to go out with him socially with such persistence that some felt they were being stalked."[227]

In contemporary music, documentaries about R. Kelly and Michael Jackson have revived longstanding allegations of sexual assault of underage girls and boys, respectively, by the two musicians.[228] R. Kelly and Jackson allegedly used their celebrity brand and concerts or commercials to prey upon underage fans whom each later sexually assaulted.[229] These alleged incidents are different in

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[224] *See* Jocelyn Gecker, *AP: Women Accuse Opera Legend Domingo of Sexual Harassment*, AP NEWS (Aug. 13, 2019), https://www.apnews.com/c2d51d690d004992b8cfba3bad827ae9; Anastasia Tsioulcas, *Placido Domingo Resigns from LA Opera*, NPR, https://www.npr.org/2019/10/02/766513143/placido-domingo-resigns-from-la-opera (last updated Oct. 2, 2019, 3:43 PM).

[225] *See* Gecker, *supra* note 224.

[226] *See* Jenny Regan, *Placido Domingo Issues Apology After Abuse of Power Claims: 'I Am Truly Sorry,'* BILLBOARD (Feb. 26, 2020), https://www.billboard.com/articles/news/8551908/placido-domingo-apology; Associated Press, *Placido Domingo Amends His Apology: 'I Have Never Behaved Aggressively,'* BILLBOARD (Feb. 28, 2020), https://www.billboard.com/articles/news/9325168/placido-domingo-amends-his-apology-i-have-never-behaved-aggressively.

[227] Associated Press, *Placido Domingo Abused Power, U.S. Opera Union Probe Finds*, BILLBOARD (Feb. 25, 2020), https://www.billboard.com/articles/news/8551846/placido-domingo-abused-power-us-opera-union-probe.

[228] *See* Constance Grady, *Lifetime's* Surviving R. Kelly *and Its Explosive Reception, Explained*, VOX (Jan. 30, 2019, 1:00 PM), https://www.vox.com/culture/2019/1/30/18192932/lifetime-surviving-r-kelly-documentary-sexual-abuse; Michael Schneider, *How 'Leaving Neverland' Upended TV's Michael Jackson Anniversary Plans*, VARIETY (June 7, 2019, 12:06 PM), https://variety.com/2019/tv/news/leaving-neverland-michael-jackson-anniversary-1203235967/.

[229] *See* Jonathan Dienst et al., *R. Kelly Recruited Underage Girls and Took Them Across State Lines for Sex, Federal Indictments Say*, NBC NEWS (July 12, 2019, 8:37 PM), https://www.nbcnews.com/news/us-news/r-kelly-recruited-underage-girls-took-them-over-state-lines-n1029261; Will Gottsegan, *The Allegations Against*

that they typically did not occur with the enticement of future employment. Nonetheless, the incidents of alleged sexual assault or harassment sometimes contained a nexus to copyrighted works that were performed and that served as an attraction for the alleged victims to meet the musicians at concerts or events.

Many other examples of alleged sexual harassment involving scores of people in the creative industries can be discussed.[230] Although most of the alleged harassers are men, some prominent women are also alleged to have engaged in sexual harassment or assault.[231] The above summary of sexual harassment claims in the creative industries provides a sufficient basis to make a preliminary finding of the potential existence of a serious problem with sexual harassment in the creative industries that warrants public attention.

II. THE INEFFECTIVENESS OF TITLE VII TO ADDRESS SEXUAL HARASSMENT IN CREATIVE INDUSTRIES

Title VII, the main federal law that is meant to protect workers from sexual harassment in the workplace, offers little help to artists and others in the creative industries. The many shortcomings of Title VII, the federal law that prohibits discrimination in employment, including sexual harassment, have been well documented.[232] Although state laws may provide additional relief, at best they can only provide a patchwork of help. This Section outlines the major deficiencies of Title VII related to sexual harassment in the creative industries and explains why Title VII is wholly inadequate to address this problem.

Michael Jackson: A Complete Timeline, SPIN (Jan. 30, 2019), https://www.spin.com/2019/01/michael-jackson-child-sexual-abuse-allegations-timeline/.

230 *See* Vox List, *supra* note 19.

231 *See, e.g.*, Anna North, *The Sexual Assault Allegations Against #MeToo Advocate Asia Argento, Explained*, VOX (Aug. 23, 2018, 9:53 AM), https://www.vox.com/2018/8/20/17758714/asia-argento-jimmy-bennett-harvey-weinstein-me-too-movement-sexual-assault-allegations; Janice Williams, *Katy Perry Accused of Sexual Misconduct by 'Teenage Dream' Video Co-Star: 'I'm Not Helping Her BS Image Another Second,'* NEWSWEEK (Aug. 13, 2019, 1:10 PM), https://www.newsweek.com/katy-perry-sexual-misconduct-accusations-1454076.

232 See, e.g., Mark R. Bandsuch, *Ten Troubles with Title VII and Trait Discrimination Plus One Simple Solution (A Totality of the Circumstances Framework)*, 37 CAP. U. L. REV. 965, 965–66 (2009); Sharon T. Bradford, Note, *Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers*, 99 YALE. L.J. 1611, 1611 (1990); Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 7–8 (1999).

A. Title VII Does Not Protect Independent Contractors

Title VII's coverage applies only to employment relationships in which the employer has fifteen or more employees.[233] Title VII generally does not apply to persons who are independent contractors, although the label applied by the employer in a contract is not determinative.[234] Title VII's lack of coverage for independent contractors creates a gaping hole in protection of artists and creators who are subject to sexual harassment in the creative industries.

Indeed, many of the alleged incidents of sexual harassment above involved independent contractors. The most prominent actors in Hollywood are typically independent contractors. The issue depends, of course, on the precise type of arrangement for a specific movie. But a popular strategy today for the leading actors is to use a "Loan Out Company" as the legal entity that enters into contracts with a production company and that "loans out" the services of the actor; this arrangement may result in substantial tax savings on their income.[235] By using a Loan Out Company, the starring arrangement is treated as an independent contract, at least for tax purposes.[236] The IRS has, at times, scrutinized efforts to avoid treating performers as employees, but appears to accept the Loan Out Company arrangement if all corporate formalities are met.[237] Granted, the precise legal issue of whether actors are employees or independent contractors—with or without Loan Out Companies—does not appear to have been addressed under Title VII.[238] The IRS treatment of Loan Out Companies for actors suggests, however, that actors utilizing such

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[233] *See* 42 U.S.C. § 2000e(b) (2012) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person ….").

[234] *See* Sharma v. Wash. Metro. Area Transit Auth., 57 F. Supp. 3d 36, 45 (D.D.C. 2014).

[235] See Michael J. Zimmer et al., *Taking on an Industry: Women and Directing in Hollywood*, 20 EMP. RTS. & EMP. POL'Y 229, 239 (2016); Robert M. Jason, *Loan-Out Corporations After Tax Reform and CA Supreme Court Decision in 'Dynamex*,*'* LAW J. NEWSLS. (July 2018), http://www.lawjournalnewsletters.com/2018/07/01/loan-out-corporations-after-tax-reform-and-ca-supreme-court-decision-in-dynamex/?slreturn=20191016082647; Russ Alan Prince, *What Is a Celebrity Loan Out Corporation?*, FORBES (Oct. 27, 2014, 6:26 AM), https://www.forbes.com/sites/russalanprince/2014/10/27/what-is-a-celebrity-loan-out-corporation/#54a2ac1a335e ("[M]ost successful celebrities have loan out corporations.").

[236] *See* Tonya M. Evans, *Statutory Heirs Apparent?: Reclaiming Copyright in the Age of Author-Controlled, Author-Benefiting Transfer*s, 119 W. VA. L. REV. 297, 326 (2016) ("By utilizing the loan-out company, the artist also avoids an employer/employee relationship with the production or record label."); John Williams, *From Consultants to Actors, 'Loan Out' Companies Offer Advantages to Those in the 'Gig Economy,'* DEL. BUS. TIMES (Mar. 15, 2018), https://www.delawarebusinesstimes.com/loan-out-companies-offer-advantages/.

[237] *See* Robert C. Lind & Zeina Hamzeh, *Use of Loan-Out Corporations in the Entertainment Industry*, 17 ANDREWS ENT. INDUS. LITIG. REP. 1, 4 (2006).

[238] *See* Bryce Covert, *Actresses—and Millions of Other Workers—Have No Federal Sexual-Harassment Protections*, NATION (Oct. 19, 2017), https://www.thenation.com/article/actresses-and-millions-of-other-workers-have-no-federal-sexual-harassment-protections/.

companies for their acting roles would be treated as independent contractors under Title VII as well.

Actors who do not use the Loan Out Company approach—perhaps the less famous actors or actors in non-leading roles—would likely be treated as employees.[239] Most actors in Hollywood are members of the powerful union, the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA).[240] Formed in the 1930s to secure benefits and better working conditions, these unions, which have now combined, have negotiated collective bargaining agreements for their members for the movies they work on; thus, for health care and retirement benefits, SAG-AFTRA members are commonly treated as employees in productions.[241] But, even if some actors are employees in the movie production, the complex legal arrangement for movie productions raises questions about who would be considered the employer under Title VII. Typically, a production company creates a limited liability company (LLC) for each movie or show (a "project LLC") to minimize liability exposure.[242] Thus, under this approach, the project LLC is the legal employer of any employees working on the movie.[243] This arrangement could have profound consequences for limiting Title VII in movie productions. For example, assuming Weinstein relied on project LLCs for the movies his company produced, the arrangement could have afforded him a way out of Title VII exposure if he were not a manager, executive, or a part of the project LLC.

To be sure, some of the above alleged incidents of sexual harassment—such as those involving Google[244]—clearly fall within employment relationships

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[239] *But see id*. (quoting Maria Giese, a film director, for the view that actors are independent contractors); Simon Constable, *A Deep Look Inside the Gig Economy*, FORBES (Jun. 11, 2018, 11:03 AM), https://www.forbes.com/sites/simonconstable/2018/06/11/a-deep-look-inside-the-gig-economy/#caaefb6449f7 ("[A]lmost the entire Hollywood economy is based on moving from gig to gig for actors, directors, and crew.").

[240] Actors, screenwriters, and other artists in television and radio are represented by the powerful union SAG-AFTRA which "represents approximately 160,000 performers and media professionals across 25 locals in the United States who work in film and digital motion pictures, television programs, commercials, video games, corporate/educational and non-broadcast productions, new media, television and radio news outlets, as well as major label recording artists." *Membership & Benefits*, SAG-AFTRA, https://www.sagaftra.org/membership-benefits (last visited Jan. 31, 2019). SAG and AFTRA were unions formed in the 1930s to secure benefits—including health insurance, pensions, and residuals or royalties—for actors and other artists who commonly worked on short-term gigs. *See* Andrew Hanna, *How Movie Stars Conquered the 'Gig Economy,'* POLITICO (June 7, 2018, 5:04 AM), https://www.politico.com/agenda/story/2018/06/07/gig-economy-hollywood-unions-000664.

[241] *See, e.g.*, Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 38–39 (1998) (describing SAG and one of its agreements).

[242] *See* Zimmer et al., *supra* note 235, at 238.

[243] *Id.* at 240.

[244] *See* Fleishman, *supra* note 135.

subject to Title VII. But it is equally clear that many of the incidents do not—such as the incidents alleged by models during the photo shoots.[245] Professions that commonly have "gig" relationships based on independent contractors include modeling, dance, theater, and music.[246] The lack of Title VII protection for independent contractors leaves unaddressed under federal law the notorious "casting couch" problem in which a hirer can sexually harass a prospective actor as a part of hiring in a starring role.

B. Vindication of Rights Under Title VII Depends on Aggrieved Persons Filing Legal Claims in an Elaborate Process

Another major shortcoming of Title VII is that an aggrieved person's vindication of rights typically depends on the person's being willing to pass through an elaborate set of hurdles, starting with (i) lodging an internal complaint to the employer promptly after the incident(s);[247] (ii) filing a complaint with the Equal Employment Opportunity Commission (EEOC) within 180 days of the incident(s), a period that is extended to 300 days if a corresponding claim is filed with a state agency;[248] and, finally, after the EEOC investigation is completed, (iii) filing a lawsuit in court.[249] Not surprisingly, few employees who are subjected to sexual harassment ever complain. Based on EEOC statistics, approximately 85% of people who are sexually harassed at work do not ever file a legal charge, while 70% do not even file an internal complaint with their employer.[250] Although any of the five commissioners of the EEOC can initiate an investigation as well,[251] such *sua sponte* investigations are rare.[252]

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[245] *See* Artavia, *supra* note 201.

[246] Lerohl v. Friends of Minn. Sinfonia, 322 F.3d 486, 488 (8th Cir. 2003); Elisabeth Schiffbauer, *Walking a Fine Line: Classification of Models as Employees or Independent Contractors in the Fashion Industry*, FASHION INDUSTRY L. BLOG (May 28, 2015), http://www.fashionindustrylawblog.com/blog/2015/5/28/walking-a-fine-line-classification-of-models-as-employees-or-independent-contractors-in-the-fashion-industry ("Fashion models are generally regarded in the United States as independent contractors.").

[247] *See* 42 U.S.C. §2000e-5(b) (2012); Hemel & Lund, *supra* note 34, at 1604–05.

[248] § 2000e-5(e)(1).

[249] § 2000e-5(f).

[250] Michael Levenson & Cristela Guerra, *Sexual Harassment Allegations Lead Millions of Women to Say #MeToo*, BOSTON GLOBE (Oct. 16, 2017, 4:46 PM), https://www.bostonglobe.com/metro/2017/10/16/metoo-campaign-highlights-prevalence-harassment/NH4hDAFk6F7XXKgETSo0jI/story.html.

[251] *See* § 2000e-5(e).

[252] *See* U.S. EQUAL EMPL'T OPPORTUNITY COMM'N, 2018 PERFORMANCE AND ACCOUNTABILITY REPORT 86 (stating that there were only ten new Commissioner-initiated investigations in fiscal year 2018, which were a part of sixty-nine ongoing investigations from this type of investigation).

C. Standards for Title VII Liability Are Lenient to Employers

In addition to the elaborate procedural hurdles, aggrieved persons face even higher burdens in proving liability of an employer under Title VII. First, an employer is not liable for the sexual harassment by a nonsupervisory co-worker unless the employer was "negligent in controlling working conditions."[253] Second, although the employer is strictly liable for sexual harassment by a supervisor that "culminates in a tangible employment action,"[254] the Supreme Court has defined this term rather narrowly as "*a significant change in employment status*, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or *a decision causing a significant change in benefits*."[255] Courts have recognized that a supervisor's unwelcome demands for sexual acts from an employee as a condition of employment constitutes a tangible employment action, potentially giving rise to strict liability for the employer,[256] but if the supervisor doesn't condition a demand for sex on a tangible employment action, liability is harder to establish. Some courts have held that an employer cannot be held strictly liable under Title VII for a single incident of sexual harassment (even if by a supervisor) that did not involve a tangible employment action.[257]

If there's no "tangible employment action" by the employer, such as "only unfulfilled threats" by a supervisor or employer, then the Supreme Court has required the aggrieved party to prove a hostile work environment claim.[258] The burden of proof is very high. A hostile work environment must be "severe or pervasive" enough to create an "objectively hostile or abusive work environment"—an environment that "a reasonable person would find hostile or abusive."[259] The "conduct must be extreme to amount to a change in the terms and conditions of employment."[260] Courts consider "[i] the frequency of the discriminatory conduct; [ii] its severity; [iii] whether it is physically threatening

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253 Vance v. Ball State Univ., 570 U.S. 421, 424 (2013).

254 *Id.*

255 *Id.* at 429 (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)) (emphasis added).

256 *See* Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1169 (9th Cir. 2003); *see also* Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2018) ("Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.").

257 *See* McCurdy v. Ark. State Police, 375 F.3d 762, 771–72 (8th Cir. 2004).

258 Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 753–54 (1998).

259 Harris v. Forklift Sys., Inc., 510 U.S. 17, 17 (1993).

260 Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

or humiliating, or a mere offensive utterance; and [iv] whether it unreasonably interferes with an employee's work performance."[261] "Simple teasing," offhand comments, and isolated incidents (unless extremely serious) will *not* amount to discriminatory changes in the terms and conditions of employment.[262] Many circuit courts have brushed aside serious claims of hostile work environment as not severe or pervasive enough, despite involving egregious conduct at work.[263]

Moreover, even if a hostile work environment existed, the employer has a complete affirmative defense under the Supreme Court's decisions in *Burlington Industries Inc. v. Ellerth* and *Faragher v. City of Boca Raton* if the employer shows "(1) that it exercised reasonable care to prevent and promptly correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities that were provided."[264] Courts have imposed relatively short deadlines for aggrieved persons to report the first incident of harassment, even though the employee may not realize at that time whether to expect more sexual harassment sufficient to constitute a hostile work environment after the first incident.[265] An employee's reporting

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[261] *Harris*, 510 U.S. at 17.

[262] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998).

[263] *See, e.g.*, Duncan v. General Motors Corp., 300 F.3d 928, 934–35 (8th Cir. 2002). To justify its ruling, the Eighth Circuit cited and characterized the following cases as not involving hostile work environments:

> Numerous cases have rejected hostile work environment claims premised upon facts equally or more egregious than the conduct at issue here. *See, e.g.*, Shepherd v. Comptroller of Pub. Accounts, 168 F.3d 871, 872, 874 (5th Cir. 1999) (holding that several incidents over a two-year period, including the comment "your elbows are the same color as your nipples," another comment that plaintiff had big thighs, repeated touching of plaintiff's arm, and attempts to look down the plaintiff's dress, were insufficient to support hostile work environment claim), *cert. denied*, 528 U.S. 963 (1999); Adusumilli v. City of Chicago, 164 F.3d 353, 357, 361-62 (7th Cir. 1998) (holding conduct insufficient to support hostile environment claim when employee teased plaintiff, made sexual jokes aimed at her, told her not to wave at police officers "because people would think she was a prostitute," commented about low-necked tops, leered at her breasts, and touched her arm, fingers, or buttocks on four occasions), *cert. denied*, 528 U.S. 988 (1999); Black v. Zaring Homes, Inc., 104 F.3d 822, 823-24, 826 (6th Cir. 1997) (reversing jury verdict and holding behavior merely offensive and insufficient to support hostile environment claim when employee reached across plaintiff, stating "[n]othing I like more in the morning than "sticky buns" while staring at her suggestively; suggested to plaintiff that parcel of land be named "Hootersville," "Titsville," or "Twin Peaks"; and asked "weren't you there Saturday night dancing on the tables?" while discussing property near a biker bar), *cert. denied*, 522 U.S. 865 (1997); Weiss v. Coca-Cola Bottling Co., 990 F.2d 333, 337 (7th Cir.1993) (holding no sexual harassment when plaintiff's supervisor asked plaintiff for dates, asked about her personal life, called her a "dumb blond," put his hand on her shoulder several times, placed "I love you" signs at her work station, and attempted to kiss her twice at work and once in a bar).

Id.

[264] Vance v. Ball State Univ., 570 U.S. 421, 430 (2013).

[265] Terry v. Laurel Oaks Behavioral Health Ctr., Inc., 1 F. Supp. 3d 1250, 1275 (M.D. Ala. 2014)

even within one week of an incident has been found to be unreasonable, thus establishing an affirmative defense for the employer.[266]

D. Title VII Limits the Amount of Damages

Even beyond the high procedural and substantive hurdles aggrieved parties face under Title VII, the caps on damage awards under Title VII that Congress enacted in 1991 create an even greater disincentive for an aggrieved employee to pursue a Title VII claim. A prevailing party under Title VII can receive, at most, $300,000 in compensatory and punitive damages (in addition to backpay) from employers with more than 500 employees.[267] The cap decreases for employers with fewer employees: $50,000 for employers with 15–100 employees; $100,000 for employers with 101–200 employees; and $200,000 for employers with 201–500 employees.[268]

To put these damage caps into perspective, The Weinstein Company, which had 150 employees in 2018, would have been potentially exposed for only $100,000 in damages in a Title VII claim by one actress, such as Ashley Judd, assuming she was a prospective employee and putting aside all the other hurdles such a claim would face.[269] By comparison, the top five grossing movies that Weinstein produced grossed over $600 million at the box office.[270] Likewise, Les Moonves of CBS earned $70 million in salary in 2017 and Fox News CEO Roger Ailes an estimated $20 million—meaning they earned $300,000 in less than a week.[271] Similarly, the movies Bryan Singer directed have grossed $3 billion, while Singer's net worth is estimated to be $100 million.[272] The paltry

(aggrieved person's reporting in January 2011 of harassment she suffered from July 2010 to January 2011 was unreasonable delay).

266 *See* Hemel & Lund, *supra* note 34, at 1605.

267 42 U.S.C. § 1981a(b)(3)(D) (2012).

268 § 1981a(b)(3)(A)–(C).

269 *See* Brooks Barnes, *Weinstein Co. Will File for Bankruptcy After Deal Talks Collapse*, N.Y. TIMES (Feb. 26, 2018), https://www.nytimes.com/2018/02/26/business/weinstein-bankruptcy-deal.html. A class action is unlikely to be available under *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 (2011) (heightening the standards for certifying a class under Fed. R. Civ. Proc. Rule 23(a)).

270 *Box Office by Studio: Weinstein Company*, BOX OFFICE MOJO, https://www.boxofficemojo.com/studio/chart/?studio=weinsteincompany.htm (last visited Sept. 2, 2019).

271 *See* Farrow, *supra* note 21 (Moonves's salary); Greg Price, *Roger Ailes Net Worth: Fox News Head Amassed Massive Fortune Before Death*, NEWSWEEK (May 18, 2017, 9:21 AM), https://www.newsweek.com/roger-ailes-net-worth-fox-611422.

272 *See* Nick Bond, *Bryan Singer Sex Allegations: Unravelling of Hollywood's $3 Billion Man*, NEWS.COM.AU (Jan. 24, 2019, 4:08 pm), https://www.news.com.au/entertainment/celebrity-life/bryan-singer-sex-allegations-unravelling-of-hollywoods-3-billion-dollar-man/news-story/74e52b82e079519731a77f9dbdd8e14a; *Bryan Singer Net Worth*, CELEBRITY NET WORTH, https://www.celebritynetworth.com/richest-celebrities/directors/bryan-singer-net-worth/ (last visited Jan. 31, 2019).

damage awards allowed under Title VII render its deterrence on such powerful figures virtually null. Companies or power brokers, flush with money, can rationally calculate that potential Title VII liability is either nonexistent or merely a relatively low cost of doing business—or sexually harassing women. Indeed, Weinstein's employment contract included much larger amounts (than Title VII's cap on damages) for him to repay the company for settling sexual misconduct claims.[273] *NYT* investigative reporters Jodie Kantor and Megan Twohey, who broke the Weinstein scandal, even suggest that the inadequacies of Title VII operated to "enable[] the harassers instead of stopping them" by leaving the accusers little real legal protections, prompting them to settle their claims with restrictive confidentiality clauses so no one else could ever know about the sexual harassment.[274]

E. State Laws May Provide Greater Coverage But Are Also Inadequate

Following the #MeToo revelations, several states enacted reforms to provide greater protections against sexual harassment.[275] Among the reforms, California amended Section 51.9 of the California Civil Code to include expressly directors and producers as professionals whose sexual harassment is actionable by a person in "a business, service, or professional relationship" with the professional.[276] In addition, in 2000, the California Fair Employment and Housing Act was amended to protect independent contractors ("person[s] providing services pursuant to a contract")[277] who face sexual harassment, in addition to employees.[278] In 2018, California expanded the scope of liability for employers to include the liable acts of nonemployees "with respect to harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action."[279] Similarly, Illinois, New York, Pennsylvania, and Washington include independent contractors within their legal protection from sexual harassment in work situations.[280] Moreover,

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[273] *See supra* note 96 and accompanying text.

[274] *See* KANTOR & TWOHEY, *supra* note 104, at 54.

[275] Ushenheimer, Dana & Feldman, *supra* note 37.

[276] CAL. CIV. CODE § 51.9(a)(1)(H) (West 2019).

[277] *See, e.g.*, Fitzsimons v. Cal. Emergency Physicians Med. Group, 205 Cal. App. 4th 1423, 1430 (Ct. App. 2012) (discussing legislative history).

[278] See id.

[279] CAL. GOV'T CODE § 12940(j)(1) (2019); *see* Brittany J. Muirhead, *Why Independent Contractors Lack Protection Under Sexual Harassment Laws*, TALENTWAVE (Nov. 30, 2017), http://www.talentwave.com/why-independent-contractors-lack-protection-under-sexual-harassment-laws/.

[280] *See* Ryan Vann et al., *United States: #Metoo Legislation Set to Take Effect in Illinois*, MONDAQ (Aug.

California, New York, and ten other states have passed laws banning non-disclosure provisions in settlements of sexual harassment claims, although some of the states such as California and New York allow an exception if the complainant prefers confidentiality.[281]

These and other reforms are steps in the right direction. Yet, until all fifty states provide the same level of protection, there remains the possibility for employers or would-be harassers to engage in "forum shopping" by, for example, creating movies in states with the least protection—or none at all—for independent contractors. Even with the state reforms, Weinstein would be able to escape their coverage simply by engaging in sexual harassment in a different state or country. A bill was introduced in Congress to expand Title VII and other anti-discrimination statutes to cover independent contractors (some 10 million workers in the U.S.), but the bill has little, if any, chance of passing.[282] Even more problematic, scant attention has been given to the need to enhance the remedies available for sexual harassment. As recounted above, the worst alleged offenders continued in their sexual harassment in some cases simply by paying off their accusers as a part of settlements requiring non-disclosure from the accusers—the large monetary settlements, which were far greater than Title VII's cap on damages, did not act as a deterrent to future misconduct.[283]

III. THE THEORY OF LINKAGES IN LAW

Before outlining the proposed reform measures to address sexual harassment in the creative industries, it is important to understand the theoretical basis that

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14, 2019), Harassment/SHEPPARD MULLIN: LAB. & EMP. L. BLOG (June 24, 2019), https://www.laboremploymentlawblog.com/2019/06/articles/new-york-employment-legislation/private-employer-sexual-harassment/; Todd Lebowitz, *Can Independent Contractors Sue for Employment Discrimination?*, WHO IS MY EMPLOYEE? (Aug. 9, 2018), https://whoismyemployee.com/2018/08/09/can-independent-contractors-sue-for-employment-discrimination/ (discussing Washington and Pennsylvania law).

[281] *See* Anne R. Dana et al., *New York States Releases Final Anti-Sexual Harassment Materials*, SEYFARTH SHAW LLP (Oct. 4, 2018), https://www.laborandemploymentlawcounsel.com/2018/10/new-york-state-releases-final-anti-sexual-harassment-materials/; Elizabeth M. Levy, *California Responds to #MeToo: Three New Laws Limit Contractual Confidentiality*, SEYFARTH SHAW LLP (Dec. 19, 2018), https://www.calpeculiarities.com/2018/12/19/california-responds-to-metoo-three-new-laws-limit-contractual-confidentiality/; Elizabeth A. Harris, *Despite #MeToo Glare, Efforts to Ban Secret Settlements Stop Short*, N.Y. TIMES (June 14, 2019), https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html.

[282] *See* Barnes, *supra* note 36.

[283] *See, e.g.*, Amanda Arnold, *Bill O'Reilly's Confidential Sexual-Harassment Settlements Are Finally Public*, CUT (Apr. 4, 2018), https://www.thecut.com/2018/04/bill-oreillys-confidential-settlements-are-finally-public.html (discussing settlements totaling $45 million for alleged sexual harassment by Bill O'Reilly); Mike Snider, *Fox's Bill for Roger Ailes Settlements Is Now $45 Million*, USA TODAY (May 10, 2017, 8:08 PM), https://www.usatoday.com/story/money/business/2017/05/10/foxs-bill-roger-ailes-settlements-now-45-million/101515930/; *see also infra* note 339 (discussing Weinstein settlements).

underlies the proposed measures. Part III introduces below the concept of linkages in the law to explain the phenomenon of how two or more areas of law can be designed to serve mutually reinforcing goals or purposes.

A. Linkages

Areas of law can be viewed in two different ways: as self-contained units similar to silos or as interconnected units similar to buildings in a village. Adopting one view or the other may affect how a court or a legislature creates or develops an area of law. The conventional view in the United States probably is to view areas of law as silos, relatively self-contained units or regimes—antitrust law governs anticompetitive conduct, bankruptcy law governs bankruptcies, copyright law governs creative works of authorship, and so forth. An alternative view, however, is to view areas of law as interconnected by some common purpose, goal, or policy. For example, both the U.S. Supreme Court and the D.C. Circuit have recognized a line of cases that require agencies to undertake a cost-benefit analysis before issuing an agency regulation or decision related to a host of different areas, including environmental law,[284] laws related to lead paint,[285] disclosures under securities law, fuel economy standards,[286] and commodities regulations.[287] Here, disparate areas of law are linked by a common method or practice in considering the costs of regulation, along with their benefits. Linkages can go beyond methods to encompass a substantive goal (although a cost-benefit analysis itself typically implies a utilitarian goal). For example, as explained below, the legislature can enact laws that are designed to protect people from racial and other discrimination in education, employment, housing, and voting.[288] These two views of the law—as silos and as villages—are not mutually exclusive, and the law does—and should—incorporate both approaches as appropriate.

1. Law as Silos

The conventional view of the law in the United States is that each area of

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[284] *See* Michigan v. EPA, 135 S. Ct. 2699, 2706–07 (2015); Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1218–19 (5th Cir. 1991).

[285] *See* Bus. Roundtable v. SEC, 647 F.3d 1144, 1151 (D.C. Cir. 2011).

[286] *See* Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1194–98 (9th Cir. 2008).

[287] *See* Secs. Indus. & Fin. Mkts. Ass'n v. U.S. Commodity Futures Trading Comm'n, 67 F. Supp. 3d 373, 430 (D.D.C. 2014). *See generally* Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575 (2015); Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVT'L L. REV. 1 (2017).

[288] *See infra* notes 309–16 and accompanying text.

law is a self-contained regime, which can be likened to a silo. Areas of law are typically taught in separate courses in law schools, and law practice often involves specialties in certain areas of law—antitrust, bankruptcy, copyright, employment & labor, energy, environmental, insurance, international trade, licensing & transactional, mergers & acquisitions, patents, personal injury, privacy, real estate, telecommunications, securities, tax, and trusts & estates, to name a few.

Viewing each area of law as a silo is more than simply recognizing specialization in the law.[289] Instead, it is to posit that the *proper* way of conceptualizing or understanding an area of law is as a discrete system of regulation that is relatively self-contained. This view is often applied to statutes, based in part on the assumption that when the legislature has enacted a statute, the statute operates as a discrete, self-contained body of regulation.[290] For example, as one commentator described tax law, "the Tax Code is largely *self-contained* with highly specialized vocabulary."[291] To be sure, there is considerable force to this conventional view, particularly with statutes. Statutes are often drafted, enacted, and then codified to address a discrete subject matter, whether it be tax, environmental regulation, antitrust law, or other areas.

2. Law as a Village

An alternative view of the legal system is that different areas of law may be linked or interconnected, similar to how building or homes in a village are connected by electricity, telecommunications, or water lines or pipes. Each building may have a different design, but all the buildings can be joined or linked by certain common elements or threads. It is probably difficult to find a common element that ties every area of law, but perhaps at a general level, the many different areas of law are all meant to serve justice, security, and order in a society. Criminal law is one type of law that intersects with many other areas of law, ranging from antitrust violations, computer crimes, intellectual property violations such as counterfeiting and certain forms of copyright infringement, and tax evasion.[292] In these disparate areas of law, criminal law demarcates

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[289] See generally Michael Ariens, Know the Law: A History of Legal Specialization, 45 S.C. L. REV. 1003 (1994).

[290] *See* Richard A. Epstein, *Introduction: Baron Bramwell at the End of the Twentieth Century*, 38 AM. J.L. HIST. 241, 242 (1994) ("Codes and statutes are normally conceived of as self-contained bodies of law, and their sound explication depends only in part on the common law principles that these codes and statutes were designed to displace.").

[291] See Joana Que, Note, *The State of Treasury Regulatory Authority After Mayo Foundation: Arguing for an Intentionalist Approach to Chevron Step One*, 85 S. CAL. L. REV. 1413, 1426 (2012) (emphasis added).

[292] *See, e.g.*, 15 U.S.C. § 1 (2012) (antitrust violation); 17 U.S.C. § 506(a) (2012) (criminal copyright

conduct deemed objectionable to society and worthy of punishment. Likewise, different areas of law can try to promote the same policy or objective. For example, contrary to the earlier characterization, the Tax Code, in fact, contains many provisions (or IRS regulations) that are meant to serve "non-tax goals," including energy conservation, improving access to health care, and encouraging innovation.[293] In this way, the Tax Code furthers or reinforces the goals of other statutes related to energy, health care, and patents.[294]

In setting forth these two conceptions of law, the point is not to argue that one is better than the other. Instead, it is to recognize that the conventional view of areas of law as self-contained units is, at the very least, incomplete. Sometimes, two or more different areas of law are linked in a way to promote a common goal or objective. The next section catalogues several of these linkages to show their pervasiveness in the law.

B. Examples of Linkages

1. Common Law

The common law is replete with examples of linkages between two bodies of law, which work in tandem to effectuate the same or similar goals. To some extent, the existence of linkages in the common law is understandable given how individual courts can develop the law without the need for the passing of legislation. Moreover, common law doctrines evolve and develop over time, so it should not be surprising that the same courts that fashioned the common law in one area, might recognize connections or linkages with another area of the common law that courts also develop. The point of the below comparisons is not to endorse the particular substantive views taken by courts under the common law. As one might expect, over time, some of these doctrines have been modified, limited, or even rejected by some jurisdictions. Rather, the point is to underscore that the common law contains linkages between different areas of law.

For example, tort law accommodates the interests of real property owners in different doctrines. Under the common law, the duty of a landowner for accidents on the premises is determined by what status the visitor has in relation to the land—with a business invitee entitled to greater protection (under a general standard of reasonable care), but licensees or social guests and

infringement); 18 U.S.C. § 2320 (2012) (trademark counterfeiting); 26 U.S.C. § 7201 (2012) (tax evasion).

293 *See* Edward Lee, *Copyright, Death, and Taxes*, 47 WAKE FOREST L. REV. 1, 16 (2012).

294 *See id.* at 16–17

trespassers entitled to much less (if any) protection.[295] These common law status categories in tort law were based historically on English common law concepts that privileged and attempted to protect landowners.[296] Under this approach, landowners decided who can enter their land and what kind of license they had to enter (or not)—thereby enabling the landowners to limit their responsibilities and potential liability to visitors on their land.[297] As one court recognized, "[t]hese categories were developed in English common law at a time when the law attached supreme importance to a landowner's property interests."[298] The approach of premises liability was based historically on the "feudal conception that the landowner was a sovereign within his own boundaries …."[299] In sum, tort served property.

Another tort doctrine that gives special weight to premises and property owners is the castle doctrine. Under the common law, a person does not have any duty to retreat in his home before using deadly force in self-defense.[300] This common law doctrine was based on the view that "a man's home is his castle" and that people should feel secure to protect themselves in their homes from intruders.[301] These property-influenced tort doctrines are consistent with property law's general goal in protecting landowners' interests under the common law, such as the traditional doctrine that the landowner has exclusive dominion over the soil below, water on, and air above the land.[302] Indeed, at a general level, property law can be viewed as a way to facilitate landownership.

Another linkage in the common law occurs in contract law's implied warranties of merchantability and of fitness for intended use, and tort law's

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[295] *See* Eliot T. Tracz, *Holmes, Doctrinal Evolution, and Premises Liability: A Perspective on Abolishing the Invitee-Licensee Distinction*, 42 T. MARSHALL L. REV. 97, 103–05 (2017).

[296] See Tab H. Keener, *Can the Submission of a Premises Liability Case Be Simplifi*ed, 28 TEX. TECH. L. REV. 1161, 1163–64 (1997).

[297] *Id.*

[298] Mounsey v. Ellard, 297 N.E.2d 43, 45 (Mass. 1973).

[299] *Id.*

[300] *See* Beard v. United States, 158 U.S. 550, 564 (1895) ("The defendant was where he had the right to be, when the deceased advanced upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life, or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground, and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life, or to protect himself from great bodily injury.").

[301] *See* Benjamin Levin, Note, *A Defensible Defense?: Reexamining Castle Doctrine Statutes*, 47 HARV. J. LEGIS. 523, 530–31 (2010).

[302] See Andrea B. Carroll, *Examining a Comparative Law Myth: Two Hundred Years of Riparian Misconception*, 80 TUL. L. REV. 901, 908–09 (2006).

product liability for manufacturing and design defects. Product liability under tort law developed in response to the limitations of implied warranties under contract law, such as the requirement of privity of contract between the plaintiff and defendant.[303] The law evolved in both areas to protect consumers from harms related to products. There is considerable (although not complete) overlap between the two areas of law: A product that is defective under tort law often will also breach the warranty of merchantability.[304] Indeed, the approach to design defect adopted by Section 402A of the Restatement (Second) of Torts is based on consumer expectations, which is similar to the approach of implied warranty of merchantability in protecting the parties' expectations.[305] As one commentator described, "[t]his defect requirement was remarkably similar to the warranty law requirement that a product be 'merchantable'": "[T]he use of the consumer expectation test … to define 'defective condition' and 'unreasonably dangerous' reflected the warranty law principle that consumers should get the goods that they bargained for."[306] Although the Restatement (Third) of Torts abandons the consumer expectations test in favor of a risk-utility analysis, some jurisdictions still follow the Restatement (Second) approach.[307] Product liability and implied warranty of merchantability provide another example of a linkage between two areas of law that share a similar objective in addressing the same problem.

2. Statutes

One might not expect linkages to occur as frequently in statutes. When a legislature enacts a statute, one conventional view is that the legislature enacts one coherent body of law—fitting with the silo approach. For example, in 2011, Congress passed the Leahy-Smith America Invents Act (AIA), which was the first major revision of the Patent Act of 1952.[308] All of the changes in the AIA

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303 *See* Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 83–84 (N.J. 1960) (implied warranty); Baxter v. Ford Motor Co., 12 P.2d 409, 412 (Wash. 1932) (express warranty); MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916) (negligence). *See generally* William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) (discussing the disfavor of requiring privity in product-related injuries);

304 See Jay M. Feinman, *Implied Warranty, Products Liability, and the Boundary Between Contract and Tort*, 75 WASH. U. L.Q. 469, 469 (1997).

305 *Id.* at 475–76.

306 Richard C. Ausness, *Sailing Under False Colors: The Continuing Presence of Negligence Principles in "Strict" Product Liability Law*, 43 U. DAYTON L. REV. 265, 278 (2018).

307 See Sunghyo Kim, *Crashed Software: Assessing Product Liability for Software Defects in Automated Vehicles*, 16 DUKE L. & TECH. REV. 300, 305–06 (2018).

308 Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified as amended in scattered sections of 35 U.S.C.).

related to patent law and the patent system.[309] Just as the Patent Code itself is a coherent body of law, the AIA's amendments were confined to changes within that area of law—in other words, the AIA stayed within the patent law silo. Although the silo approach may perhaps explain the majority of statutory regimes in the United States, there are some notable areas in which linkages exist.

The various Civil Rights Acts Congress has enacted, along with the Education Amendments of 1972, provide a good example of linkages among several statutes, all aimed to provide equal protection under the law and to prohibit discrimination based on race, sex, and other protected classes. From 1866 to 1991, Congress has enacted eight Civil Rights Acts,[310] which established, in the 1964 Act, eleven different Titles to regulate different areas, including voting (Title I), public accommodations (Title II), public facilities (Title III), public schools (Title IV), entities receiving federally funding (Title VI, although sex discrimination was not covered), and employment (Title VII).[311] All of these statutes—linked together in organization, titles, and objective—are designed to protect individuals from discrimination based on race, sex, and other suspect classifications.

Congress also passed the Education Amendments of 1972, which amended the Higher Education Act of 1965, a comprehensive law that dealt with several aspects of higher education, including financial aid, student loans, and accreditation.[312] Title IX of the 1972 Education Amendments (which should not be confused with Title IX of the Civil Rights Acts mentioned above) broadly prohibited discrimination on the basis of sex in "any education program or activity receiving Federal financial assistance."[313] Title IX has had a profound impact on higher education, most notably by dramatically increasing athletic and sports opportunities for women in schools.[314] Courts have relied on Title IX's linkage to the analogous provision in Title VI of the Civil Rights Act (prohibiting race and other non-sex forms of discrimination by entities receiving

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309 Id.

310 See Koteles Alexander, Adarand*: Brute Political Force Concealed as a Constitutional Colorblind Principle*, 39 HOW. L.J. 367, 378 (1995).

311 *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.); Lisa Bornstein & Megan Bench, *Married on Sunday, Fired on Monday: Approaches to Federal LGBT Civil Rights Protections*, 22 WM. & MARY J. WOMEN & L. 31, 35 (2015).

312 Higher Education Act of 1965, Pub. L. No. 92-318, 86 Stat. 235. (1972) (codified at 20 U.S.C. §§ 1681–1688).

313 20 U.S.C. § 1681(a) (2012).

314 Lexi Kuznick & Megan Ryan, *Changing Social Norms? Title IX and Legal Activism Comments from the Spring 2007 Harvard Journal of Law & Gender Conference*, 31 HARV. J.L. & GENDER 367, 367 (2008).

federal funding) to imply a comparable private right of action under Title IX.[315] Most pertinent to this Article, Title IX plays a central role in requiring schools to protect students from sexual assault and sexual harassment, with the ultimate penalty of a school potentially losing federal funding if it does not adequately address sexual assault and sexual harassment of students.[316] This particular linkage between education and sexual harassment policy will be discussed further in Part III as a model for addressing sexual harassment through copyright law.

The Affordable Care Act of 2010 ("ACA")—often called "Obamacare"—is another example of a statute with linkages—indeed, many linkages.[317] The ACA is an example of omnibus legislation, a complex and increasingly controversial statutory enactment that involves many different subject areas in one piece of legislation.[318] The ACA had numerous provisions—which ran 900 pages long—that directly or, in some provisions, only loosely related to health or access to health care.[319] The most well-known provisions of the ACA are (1) the individual mandate requiring individuals to obtain health insurance, subject to a tax penalty if they do not, and (2) a ban on insurers from discriminating against people with preexisting conditions.[320] The ACA's individual mandate is an example of a linkage between tax and health care law. Indeed, the tax law linkage is what made the ACA's individual mandate constitutional. In a 5-4 decision, with Chief Justice Roberts writing the majority opinion, the Supreme

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315 *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 699 (1979).

316 Kuznick & Ryan, *supra* note 314, at 373–74.

317 Patient Protection and Affordable Care Act, Pub. L. No. 111-148; 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

318 *See* Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1804–05 (2015).

319 *See* NFIB v. Sebelius, 567 U.S. 519, 704 (2012) (Scalia, J., dissenting). As Justice Scalia noted in dissent:

> The ACA is over 900 pages long. Its regulations include requirements ranging from a break time and secluded place at work for nursing mothers, see 29 U.S.C. § 207(r)(1) (2006 ed., Supp. IV), to displays of nutritional content at chain restaurants, see 21 U.S.C. § 343(q)(5)(H) (2006 ed., Supp. IV). The Act raises billions of dollars in taxes and fees, including exactions imposed on high-income taxpayers, see ACA §§ 9015, 10906, 124 Stat. 870, 1020; HCERA § 1402, medical devices, see 26 U.S.C. § 4191 (2006 ed., Supp. IV), and tanning booths, see § 5000B. It spends government money on, among other things, the study of how to spend less government money. 42 U.S.C. § 1315a (2006 ed., Supp. IV). And it includes a number of provisions that provide benefits to the State of a particular legislator. For example, § 10323, 124 Stat. 954, extends Medicare coverage to individuals exposed to asbestos from a mine in Libby, Montana. Another provision, § 2006, *id.*, at 284, increases Medicaid payments only in Louisiana.

Id.

320 *See* 26 U.S.C. § 5000A (2012); 42 U.S.C. § 18091(2)(I) (2012).

Court upheld the individual mandate based on the principle that Congress's power to regulate indirectly via its power to tax and spend is greater than its power to regulate directly under the Commerce Clause.[321]

Intellectual property law also has linkages. For example, the doctrine of patent misuse—which, if found, bars a patent holder from enforcing the patent during the misuse—is used to address anti-competitive conduct of patent holders, similar to the concern of antitrust law: "[T]he patentee may exploit his patent but may not 'use it to acquire a monopoly not embraced in the patent.'"[322] Although the standards of antitrust and patent misuse are different, they share the common thread of prohibiting certain conduct deemed anticompetitive and harmful, the latter in the context of the enforcement of a patent.[323] Another linkage in intellectual property law can be found in copyright law. The Supreme Court has recognized that the limitations on copyright in the fair use doctrine and the idea-expression dichotomy serve as "First Amendment safeguards" designed to prevent copyright law from restricting speech.[324] The Court put so much stock in these "built-in" First Amendment safeguards that typically, copyright law is not subject to any further First Amendment review.[325] The Court has viewed copyright law as effectively incorporating its own First Amendment protections in a direct linkage.

IV. REFORMING COPYRIGHT LAW TO PROTECT PEOPLE FROM SEXUAL DISCRIMINATION

Building on the theory of linkages, this Part proposes an amendment to the Copyright Act that protects people from sexual harassment in the development of works of authorship. The amendment aims to discourage and prohibit the most egregious kinds of sexual discrimination and harassment in the creative industries. The proposal is modeled in part on Title IX's anti-discrimination-harassment protections in the education context, but also incorporates elements similar to current or prior copyright law (including statutory damages, vicarious liability, and forfeiture of copyright). The proposal is offered as a bill to Congress, with the expectation of further refinements during the legislative process, court decisions, and agency regulations.

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321 *Sebelius*, 567 U.S. at 588.

322 Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318, 1327 (Fed. Cir. 2010) (quoting Transparent-Wrap Mach. Corp. v. Stokes & Smith Co., 329 U.S. 637, 643 (1947)).

323 *See generally* Robin C. Feldman, *The Insufficiency of Antitrust Analysis for Patent Misuse*, 55 HASTINGS L.J. 399 (2003).

324 *See* Eldred v. Ashcroft, 537 U.S. 186, 219–20 (2003).

325 *Id*.

A. The Linkage Between Copyright and Sexual Harassment in the Creative Industries

This Section explains why copyright law should be linked with sexual harassment law. First, the creative industries have a problem of sexual harassment that cannot be addressed adequately by Title VII for the reasons explained above. Part I's survey of over 670 incidents of alleged sexual harassment in the creative industries, as well as the qualitative analysis of some of the worst offenders, establish at least a prima face case of the potential existence of a serious problem in the creative industries, reaching the highest levels.[326] Title VII, which provides only modest protections for employees but excludes independent contractors, is wholly ill-suited to address this problem.

Second, linking copyright law and sexual harassment law will provide important recognition that copyright is not necessarily a benign feature of sexual harassment in the creative industries. As discussed in Part I above, in many of the alleged incidents of sexual harassment, the chance of starring or participating in the creation of a movie, TV show, photograph, or other work of authorship was the lure or enticement used by the alleged harasser—such as Weinstein, Moonves, Singer, Cosby, Franco, Rose, and Richardson—to create their opportunity for the sexual harassment of aspiring or young artists and staff.[327] Many victims recounted similar experiences of expecting a work meeting or their participation in creating or performing a work, only to be subjected to alleged sexual harassment.[328] The worst alleged harassers often were "power brokers" who harmed the livelihoods and careers of many, including, in some cases, minors.[329] These power brokers decided what creative works were produced—and who could participate in their creation.[330] Moreover, TV networks whose main purpose is creating copyrighted works provided the site, locus, or opportunity for alleged sexual harassment to occur—and recur.[331] Sometimes, the alleged harassment even took place during the actual creation of copyrighted works, such as the filming of a movie or photo shoots with models.[332] Salma Hayek, for example, alleged that Weinstein forced her to do a

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326 *See supra* Part I and accompanying notes.

327 *See supra* Part I.C.

328 *See supra* notes 187–99 and accompanying text.

329 *See supra* notes 83–131, 145–65 and accompanying text.

330 *See supra* notes 87–89, 121–31, 145–65 and accompanying text.

331 *See* Rachel Abrams & John Knoblin, *At '60 Minutes,' Independence Led to Trouble, Investigators Say*, N.Y. TIMES (Dec. 6, 2018), https://www.nytimes.com/2018/12/06/business/media/60-minutes-jeff-fager-don-hewitt.html.

332 *See supra* notes 153–59, 196–202 and accompanying text.

sex scene in the movie *Frida*, produced by Weinstein.[333] In cases like these, the nexus between the copyrighted work and the alleged sexual harassment was direct.

Beyond serving as a lure used by sexual harassers, copyrighted works may also have a subtle, yet substantial financial relationship to a serial harasser's ability to continue in such harassment. As shown in the examples in Part I, a serial harasser often needed hush money to silence his victims. For the power brokers in the creative industries, their source of money comes from the revenues derived from exploitation of copyrighted works, such as movies. Copyright is a statutory grant of exclusive rights that enables the copyright owner to charge higher prices—and potentially monopoly rents—on works of authorship for the term of copyright.[334] That monopoly rent could not be exacted, absent the copyright. For example, if none of Weinstein's movies were copyrighted, the revenues from the movies would be far less, given that third parties could freely copy and disseminate the movies, including online.[335] Likewise, if NBC's broadcast of the Olympics lacked copyright protection, the value of NBC's broadcast and what it can charge to advertisers would be far less, given that others could freely copy and share the broadcast. Even though it is impossible to quantify the extent of the financial nexus between copyright and hush money without access to the financial records, it is reasonable to surmise that a significant portion of the hush money paid by Weinstein and other power brokers in the creative industries was derived from revenues generated from copyrighted works.

Take, for example, Weinstein. He (along with his brother) made a fortune by producing a long line of successful movies through the studio they founded in 1979, Miramax Pictures, which they sold to Walt Disney in 1993 for $60 to $70 million.[336] In 2005, the Weinstein brothers formed The Weinstein Company, which produced many other successful movies and the *Project Runway* TV series.[337] In 2018, Harvey Weinstein's net worth was estimated to be between $240 and $300 million—and it is reasonable to assume that his wealth derived

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[333] Salma Hayek, *Harvey Weinstein Is My Monster Too*, N.Y. TIMES (Dec. 12, 2017), https://www.nytimes.com/interactive/2017/12/13/opinion/contributors/salma-hayek-harvey-weinstein.html.

[334] *See* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 310 (1996).

[335] Indeed, it is virtually unthinkable that a major motion picture would be donated to the public domain or allowed to be freely copied by the copyright owner. Studios would not likely finance any movie if they suspected that a proposed movie was at risk of forfeiting its copyright due to his sexual harassment.

[336] *See* Brad Tuttle, *Harvey Weinstein Is One of the Richest Men in Hollywood. Here's What We Know About His Money*, MONEY (May 25, 2018), http://time.com/money/4978630/harvey-weinstein-net-worth-money/.

[337] *Id.*

from his movie successes.[338] Copyright plays a part in the financial success of a movie by granting the copyright owner of the movie several exclusive rights that enable the owner to generate higher revenues from the movie's exploitation based on its exclusivity. Without copyright protection, the copyright owner would not be able to charge as high an amount for movie tickets, DVDs, streaming, merchandise, or other items because competitors could freely copy the movie and any derivative works. Moreover, no major studio would finance a movie absent such copyright. Weinstein's successful movies yielded him not only substantial revenues and wealth, but also the power to control job opportunities for actors and others to participate in the creation of new movies he produced. Over ninety women, including some of the most prominent actors in Hollywood (e.g., Cate Blanchett, Salma Hayek, Angelina Jolie, Ashley Judd, Rose McGowan, Gwyneth Paltrow, Mira Sorvino, Uma Thurman) have accused Weinstein of sexual harassment and, in some cases, rape.[339] A recurring allegation among many of the accusers is that Weinstein attempted to force himself on them to have sex and threatened them with reprisal, such as not casting them in a movie or jeopardizing their acting careers if they did not submit to his demands.[340] Weinstein's wealth also enabled him to pay off some of his accusers with so-called "hush money" to secure non-disclosure agreements from the victims during at least a twenty-year period of alleged abuses of women.[341]

In sum, the connection between copyrighted works and sexual harassment in the creative industries—as a potential lure to entice victims and a potential source of revenues that can be used as hush money to silence victims—provides a sufficient basis for Congress to step in. In analogous situations with federal contracting (Title VI) and federal funding in education (Title IX), Congress has incorporated anti-discrimination laws to protect people from discrimination in situations where entities are receiving a federal benefit of some kind.[342] Just as recipients of federal contracts and federal funding are expected to abide by anti-

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338 *Id.*

339 *See supra* notes 1–11 and accompanying text; *see also* Sian Cane, *Rose McGowan's Memoir Brave Details Alleged Rape by Harvey Weinstein*, GUARDIAN (Jan. 29, 2018, 7:01 PM), https://www.theguardian.com/film/2018/jan/30/brave-rose-mcgowans-memoir-details-by-harvey-weinstein.

340 *See* Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY, https://www.usatoday.com/story/life/people/2017/10/27/Weinstein-scandal-complete-list-accusers/804663001 (last updated June 1, 2018, 4:51 PM); *Harvey Weinstein Scandal: Who Has Accused Him of What?*, BBC (Jan. 10, 2019), https://www.bbc.com/news/entertainment-arts-41580010.

341 Farrow, *supra* note 106; Kantor, *supra* note 1 ("Mr. Weinstein has reached at least eight settlements with women, according to two company official speaking on the condition of anonymity. Among the recipients … were a young assistant in New York in 1990, an actress in 1997, an assistant in London in 1998, an Italian model in 2015 and Ms. O'Connor shortly after ….").

342 *See* 20 U.S.C. § 1681(a) (2012) (Title IX); 42 U.S.C. § 2000d (2012) (Title VI).

discrimination laws, so too the recipients of federal copyrights should be required to follow such federal laws.[343] In all of these contexts, the federal government has an important interest in not only protecting people from discrimination, but also in ensuring that federal benefits, funds, and grants are not facilitating, in any way, the occurrence or continuance of such discrimination.[344]

The proposed industry-specific approach to sexual discrimination is precisely how Congress targeted the problem in education by enacting Title IX in 1972. As the bill's sponsor, Senator Birch Bayh of Indiana, explained, Title IX was intended as an "antidote" to end "the continuation of corrosive and unjustified discrimination against women" in the American educational system.[345] This problem "reaches into all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales."[346] Bayh recognized a linkage between education and employment: "[B]ecause education provides access to jobs and financial security, discrimination here is doubly destructive for women."[347] In other words, the sexual discrimination women suffered in education can negatively affect the same women in terms of their employment opportunities. Therefore, Title IX was intended to "root out, as thoroughly as possible at the present time, the social evil of sex discrimination in education."[348] Notably, Title IX even covers *employment*-related sexual discrimination in federally-funded education institutions and is not displaced by the general employment provisions of Title VII.[349]

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[343] To be sure, Congress's enactments for spending and for copyright law emanate from different Article I powers, the Spending Clause and the Copyright Clause, respectively. However, under either Clause, Congress has considerable discretion. *See* Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc., 570 U.S. 205, 213 (2013) ("The [Spending] Clause provides Congress broad discretion to tax and spend for the 'general Welfare,' ...."); Eldred v. Ashcroft, 537 U.S. 186, 218 (2003) (recognizing that courts owe deference to Congress's enactment of copyright law).

[344] Moreover, anyone who objects to the government's condition of non-discrimination to receive a federal benefit has a simple remedy: voluntarily choosing not to receive the federal benefit, such as abandoning the copyright. *Cf.* Fla. Dep't of Health & Rehab. Servs. v. Califano, 449 F. Supp. 274, 284 (N.D. Fla. 1978) ("[A]ny state which objects to the 'strings' attached to receipt of the federal funds [under Rehabilitation Act] has the option to refuse both the grants-in-aid and the objectionable conditions.").

[345] 118 Cong. Rec. 5803 (1972).

[346] *Id*.

[347] *Id.* at 5804.

[348] *Id.*

[349] *See* Fox v. Pittsburg State Univ., 257 F. Supp. 3d 1112, 1122 (D. Kan. 2017) (adopting the majority approach taken by First, Third, Fourth and Sixth Circuits). *But see* Lakoski v. James, 66 F.3d 751, 754 (5th Cir. 1995) (holding that Title VII displaces Title IX for employment related discrimination in education).

A similar approach should be taken for the creative industries. A common problem in both contexts—education and the creative industries—is the pernicious, long-term effect sexual harassment can have on the aggrieved person's future employment opportunities, whether due to the diminishment of educational and career opportunities for the aggrieved person's development or due to outright blacklisting and retaliation by the alleged harasser. Aspiring artists should be protected by federal law no less than students.

B. Proposed Amendment to Copyright Law to Deter Sex Discrimination in Creative Works

Just as Title IX signals a "national commitment to end [sex] discrimination"[350] in education, the Copyright Act can do the same for the creative industries. Congress should amend the Copyright Act to protect people from sex discrimination and harassment related to creative works. The proposed Protect Artists from Sexual Harassment Act (PASHA) is set forth in the sections below, followed by a detailed explanation of each section.[351]

Protects Artists from Sexual Harassment Act

Section 1. Protections.
(a) Discrimination. No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in the development of a work of authorship that receives a federal copyright, including in the casting, creation, production, financing, or promotion of a work of authorship.

(b) Retaliation. No person in the United States shall be subjected to retaliation for opposing any practice that the person believes violates Section 1(a), or for making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under this subchapter.

Section 2. Private Right of Action. A person subjected to discrimination on the basis of sex in violation of Section 1 may bring an action for monetary and injunctive relief against any person who violates Section 1, as well as the copyright owner whose work of authorship was implicated in the violation, provided that the copyright owner engaged in the discrimination or is vicariously liable under subsection (a).

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[350] Alison Renfrew, *The Building Blocks of Reform: Strengthening Office of Civil Rights to Achieve Title IX's Objectives*, 117 PENN ST. L. REV. 563, 564 (2012) (alteration in original).

[351] Additional information about the proposed bill can be found at PROTECT ARTISTS FROM SEXUAL HARASSMENT, https://protectartists.wordpress.com/ (last visited Nov. 17, 2019).

(a) Vicarious liability. A copyright owner shall be vicariously liable for a violation of Section 1 that is committed by an agent, employee, or independent contractor hired by the copyright owner to assist in the development of a work of authorship if the violation occurred during the development of a work of authorship, such as in the casting, creation, financing, production, or promotion of a copyrighted work at any stage of its development. The aggrieved party must prove that the copyright owner had the right and ability to supervise the agent, employee, or independent contractor at the time of the violation, and that the violation occurred during the development of a work of authorship, such as in the casting, creation, financing, production, or promotion of the copyrighted work. Upon such proof, the copyright owner may raise an affirmative defense to avoid vicarious liability if: (i) the copyright owner exercised reasonable care to prevent and correct promptly any sexually discriminatory or harassing behavior, and (ii) the aggrieved party failed to take advantage of any preventive or corrective opportunities provided by the copyright owner or to avoid harm otherwise.

(b) Statutory damages. In lieu of actual damages, a prevailing aggrieved party may elect to receive statutory damages in the amount determined by the court in a range of $200 to $150,000 per each act of discrimination suffered. Each incident of sexual harassment shall be considered a separate act.

(c) Nothing in this provision affects an aggrieved party's rights to pursue other legal claims under federal or state law.

Section 3. Administrative enforcement.

(a) Investigative powers. The [designated Agency] may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate Section 1. The Agency is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of Section 1. For such investigation, any member of the Agency or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Agency deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing. If the Agency determines after such investigation that there is reasonable cause

to believe that a violation of Section 1 has occurred, the Commission shall advise the party in violation and first seek compliance with Section 1 by voluntary means before resorting to subsection (b).

(b) Civil enforcement. Whenever it shall appear to the Agency that any person has violated Section 1, the Agency may bring an action for monetary and injunctive relief against any person who violates Section 1, as well as the copyright owner whose work of authorship was implicated in the violation, provided that the copyright owner engaged in the discrimination or is vicariously liable under subsection (a). The court shall have jurisdiction to impose, upon a proper showing, any of the additional remedies authorized in Section 4.

Section 4. Additional remedies.

(a) Disgorgement, suspension, and forfeiture. If a court finds a violation of Section 1, sufficient proof of direct liability or vicarious liability of the copyright owner who fails to prove the affirmative defense, and the copyright owner was willful or wanton in committing or allowing the violation, the court may order additional relief, including (i) disgorgement of profits the copyright owner derived from the copyrighted work, (ii) suspension of the enforcement of the copyright, and (iii) forfeiture of the copyright, as the court deems reasonable to remedy the discrimination. Such relief may be ordered in any case where the author or the copyright owner participated in the violation or where the author or the copyright owner is vicariously liable under Section 2(a).

(b) Trustee. If the court orders a remedy of disgorgement of profits, the court shall appoint a Trustee to oversee the disbursement of the profits. If the court orders a remedy of suspension or forfeiture of copyright, the court shall appoint a Trustee to oversee, for the period of suspension or the remainder of the term of copyright respectively, the copyright and the administration of expenses and any revenues generated from exploitation of the copyrighted work. In all cases of disgorgement, suspension, or forfeiture, the Trustee has a fiduciary duty to act in the best interests of the public and the innocent individuals who participated in the development of the underlying work, and must make an annual reporting to the [designated Agency] on the administration of the copyrighted work.

Section 5. Statute of Limitations. No civil action shall be maintained under the provisions of this act unless it is commenced within three years after the claim accrued. The statute of limitations for successive acts of sexual

harassment or retaliation shall be treated in the same way as continuing acts of copyright infringement are treated as separate acts. As long as an act of sexual harassment or retaliation occurred within three years of filing of the lawsuit, it shall be actionable.

C. Section-by-Section Analysis

Below the key terms are explained in a section-by-section analysis. Courts and the Agency designated in the statute will play important roles in interpreting the statute. Also, the Agency will have authority to issue regulations to interpret and enforce the amendment.

1. Section 1: Provision Against Discrimination and Retaliation

a. No Person in the United States

The proposed amendment adopts the same language in Title IX's anti-discrimination provision to signal a broad sweep.[352] As the Supreme Court explained, Title IX's provision is broader in scope than Title VII, which proscribes discrimination of protected classes in the employment setting: "[T]he use of passive verbs in Title IX, focusing on the victim of the discrimination rather than the particular wrongdoer, gives this statute broader coverage than Title VII."[353] Unlike Title VII, no employment relationship is required in the proposed amendment for a person to fall within the protected class. *Anyone* in the United States, whether employee or not, can invoke the amendment's protection if subjected to sex discrimination under the conditions defined in the provision. Thus, the proposed law fixes one of the chief flaws of Title VII in failing to address sexual harassment involving independent contractors or non-working relationships that form during the development of copyrighted works. All persons in the United States, regardless of employment status, are protected by the amendment if the other conditions are met.

b. On the Basis of Sex, Be Subjected to Discrimination

The proposed amendment uses the same language in Title IX in proscribing sex discrimination. This provision encompasses sex discrimination of all kinds, including (i) sexual harassment, both a hostile work environment and *quid pro quo* harassment (e.g., a producer demanding sex from an actor in exchange for

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[352] 20 U.S.C. § 1681(a) (2012).

[353] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 296 (1998) (Stevens, J., dissenting).

a starring role in a movie); and (ii) sex discrimination in terms of benefits, such as pay.

One difficult question is whether the high burden of proving a hostile work environment under Title VII should be reformed. Part II above criticized the current standards of Title VII as creating a very high burden for aggrieved parties, who are asked to suffer "sufficiently severe or pervasive" sexual harassment before being able to file a legal claim based on a hostile work environment.[354] Likewise, courts interpreting "hostile educational environment" claims under Title IX have borrowed the same high burden of proof required under Title VII.[355] Under this approach, "[a] Title IX plaintiff must show [1] that he subjectively perceived the environment to be hostile or abusive and [2] that the environment objectively was hostile or abusive, that is, that it was permeated with discriminatory intimidation, ridicule, and insult sufficiently severe or pervasive to alter the conditions of his educational environment."[356]

If Congress were writing on a blank slate, this Article would propose a different, lower standard of hostile work environment than the one courts have recognized for both Titles VII and IX. The way many courts have interpreted "sufficiently severe or pervasive" is a harmful and outdated way of conceiving a hostile work environment in the twenty-first century, in that it may require victims to suffer repeated acts of sexual harassment that can cause great harm to them before a legal claim of hostile work environment even accrues. However, given the long line of Supreme Court and lower court decisions that have developed in this area, this Article refrains from proposing a change to this standard—unless the change is a uniform standard of hostile environment claims under federal law generally, a topic saved for a later day.

Although not the focus of this Article, this provision would also cover sex discrimination in terms of benefits, such as income. Another significant issue raised by the Time's Up initiative is the pay disparity between leading male and female actors in Hollywood.[357] In one glaring example, Mark Wahlberg received $1.5 million to re-shoot certain scenes of *All the Money in the World*, while co-star Michelle Williams received less than $1,000, which was "less than one-tenth

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354 *See supra* notes 253–62 and accompanying text.

355 *See* Hayut v. State Univ. of N.Y., 352 F.3d 733, 744–45 (2d Cir. 2003); *see also* Davis *ex rel* LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999).

356 Papelino v. Albany Coll. of Pharmacy of Union Univ., 633 F.3d 81, 89 (2d Cir. 2011).

357 *See* Natalie Robehmed, *How Time's Up Could Help Close Hollywood's Pay Gap*, FORBES (Jan. 17, 2018, 3:55 PM), https://www.forbes.com/sites/natalierobehmed/2018/01/17/how-times-up-could-help-close-hollywoods-pay-gap/#42162b1f49ef.

of 1% of her male co-star."[358] Due to the bad publicity following the *USA Today's* reporting of the story, Wahlberg donated the $1.5 million to the Time's Up group, which organized as part of the #MeToo movement.[359]

c. The Copyright Nexus Requirement

A key component of the provision is the nexus between the sex discrimination and the copyrighted work required for a violation to occur. The provision targets sex discrimination that occurs during the development of a work of authorship, including in casting, creating, financing, producing, and promoting a work of authorship that receives a federal copyright. Each period or activity is discussed in turn.

The first activity that falls within the provision's coverage is the casting of people for the creation of a work of authorship. Casting refers to the process of deciding who will participate in the creation of a movie or other work, such as a photograph, television show, or computer program. This provision targets the notorious "casting couch," which refers to when directors or producers demand sex from actors in order for them to get an acting role, as Harvey Weinstein allegedly did to numerous actors.[360] The provision is not limited to just movies, but would apply to casting of anyone, such as models, in the creation of works of authorship. Importantly, the provision applies to a work at any stage of development, including when it is a concept or idea. It does not require that a work of authorship be fixed or completed. For example, if a producer or director invited a person to a meeting with the lure of starring in a future movie or TV show, as Weinstein and Singer allegedly did,[361] Section 1 would be violated if the producer or director sexually harassed the person at the meeting.

The next activity covered by the provision is creating, financing, and producing a work. Production of a movie typically involves several stages, including securing financing, writing or selecting a script (which can include purchasing the rights to adapt another work, such as a novel or comic book), directing the filming, and editing the movie. Production has some overlap with creation of a work, but, at least for films, involves some activities, such as financing, that do not directly involve creating the work.

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[358] *See* Andrea Mandell, *Exclusive: Wahlberg Got $1.5M for 'All the Money' Reshoot, Williams Paid Less Than $1,000*, USA TODAY, https://www.usatoday.com/story/life/people/2018/01/09/exclusive-wahlberg-paid-1-5-m-all-money-reshoot-williams-got-less-than-1-000/1018351001/ (last updated Jan. 10, 2018, 11:18 PM).

[359] *See* Yohana Desta, *The Hollywood Wage Gape Isn't Getting Better—But Actresses Are Pushing Back*, VANITY FAIR (Jan. 19, 2018), https://www.vanityfair.com/hollywood/2018/01/hollywood-wage-gap-times-up.

[360] *See supra* notes 48–49 and accompanying text.

[361] *See supra* notes 4, 160 and accompanying text.

The final activity covered is the promotion of a copyrighted work, such as a movie that is just released. For films, it is customary for the film's actors and director to go on talk shows to promote the movie. Sexual harassment during such promotion, such as in the form of unwelcome groping or other sexual harassment of interviewers or hair and makeup artists, is prohibited by the provision. For example, Ben Affleck groped interviewer Hilarie Burton while promoting his movie *Jersey Girl* in 2004; the incident was caught on video.[362]

Some may object that the proposed prohibition against sexual harassment involving a work of authorship violates the U.S.'s international obligation under Article 5 of the Berne Convention, which prohibits the imposition of "any formality" to the "enjoyment and the exercise of" copyright for works of foreign origin.[363] Although Berne does not define formalities, historically they related to procedural or administrative requirements to secure a copyright, such as publication with copyright notice or registration of the copyrighted work.[364] As the 1978 *WIPO Guide to the Berne Convention* described, "[t]he word 'formality' must be understood in the sense of a condition which is necessary for the right to exist—administrative obligations laid down by national laws, which, if not fulfilled, lead to loss of copyright."[365] Arguably, a substantive law that protects artists from sexual harassment does not constitute a formality. To the extent it does, the Berne Convention only applies to works of foreign origin, so Congress can limit the above amendment to "United States works," an approach Congress has already adopted in the Copyright Act's requirement of registration to file a copyright lawsuit.[366]

d. Retaliation

Subsection (b) offers protection from retaliation for people who report claims of alleged sexual harassment or who testify or otherwise participate in an investigation or proceeding under the amendment. Both Title VII and IX have comparable protections, although Title IX lacks an express retaliation

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362 *See* Kate Feldman, *SEE IT: Ben Affleck Seen Groping TV Anchor, Asking for More Cleavage in 2004 Interview*, N.Y. DAILY NEWS (Oct. 11, 2017), http://www.nydailynews.com/entertainment/ben-affleck-groping-tv-anchor-2004-interview-article-1.3556608.

363 Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris, July 24, 1971, art. 5(2), 25 U.S.T. 1341, 828 U.N.T.S. 221.

364 *See* Jane C. Ginsburg, *Berne-Forbidden Formalities and Mass Digitization*, 96 B.U. L. REV. 745, 747-48 (2016).

365 World Intellectual Property Organization, Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) 33 (1978).

366 *See* Lee, *supra* note 293, at 20–21 (discussing 17 U.S.C. § 411 (2012)).

provision.[367] As Part I above recounted, many people who alleged they were sexually harassed by Weinstein, Moonves, and others also alleged they were subjected to reprisals after rebuffing their harasser.[368] Under this provision, an aggrieved party need not prove a successful claim of sexual harassment to prevail on a claim of retaliation.

2. Section 2: Private Right of Action

Section 1 can be enforced by two methods. The first method is a private right of action brought by aggrieved parties in federal court: "A person subjected to discrimination on the basis of sex in violation of Section 1 may bring an action for monetary and injunctive relief against any person who violates Section 1, as well as the copyright owner whose work of authorship was implicated in the violation, provided that the copyright owner engaged in the discrimination or is vicariously liable under subsection (a)." There is no requirement that the aggrieved party file an administrative charge with the Agency (as is required by Title VII for employment discrimination claims that must be first filed with the EEOC). An aggrieved party can go directly to court.

a. Direct Liability

This provision follows an approach similar to Title IX's private right of action, although the latter has been implied by courts and was not set forth by statute. Section 1's private right of action may be brought by the aggrieved party against the person who committed the harassment, as well as against copyright owner of the work involved, under vicarious liability, if there is a sufficient nexus between the copyrighted work and the alleged sexual harassment. The copyright owner may be directly liable under Section 2 if the copyright owner participated in the sexual harassment.

b. Vicarious Liability

The proposed law recognizes vicarious liability. The copyright owner of a copyrighted work shall be liable for the acts of discrimination that fall within Section 1 and that are committed by agents, employees, or independent contractors hired by the copyright owner to assist in the development of a copyrighted work. The aggrieved party has the burden of proving "that the copyright owner had the right and ability to supervise the agent, employee, or

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[367] *See* 42 U.S.C. § 2000e-3 (2012) (Title VII); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173–74 (2005) (Title IX).

[368] *See supra* notes 11, 24–29, 79, 124–29 and accompanying text.

independent contractor at the time of the violation, and that the violation occurred during the development of a work of authorship, such as in the casting, creation, financing, production, or promotion of the copyrighted work." This standard is modeled on the first element of proving vicarious liability for copyright infringement, a form of liability that increases the scope of copyright protection for copyright owners.[369] One of the underlying rationales of the proposed law's borrowing of standards from existing copyright law that protect the copyright owner in enforcing copyrights is *reciprocity*: What's sauce for the goose is sauce for the gander. Thus, just as copyright owners can obtain vicarious liability against defendants who had the right and ability to supervise a third party who infringed the copyright (provided the copyright owner had a financial interest in the activity), so too copyright owners can be held vicariously liable under the proposal if they had the right and ability to supervise a third party who engaged in sexual harassment (provided the other conditions are met).

If the aggrieved party successfully carries its burden, the copyright owner may raise an affirmative defense to avoid vicarious liability if: "(i) the copyright owner exercised reasonable care to prevent and correct promptly any sexually discriminatory or harassing behavior, and (ii) the aggrieved party failed to take advantage of any preventive or corrective opportunities provided by the copyright owner or to avoid harm otherwise." This approach follows the same approach of vicarious liability under Title VII.[370] It rejects the even higher "deliberate indifference" standard recognized by the Supreme Court for Title IX.[371]

c. Statutory Damages

The provision allows the aggrieved party who prevails in proving a Section 1 claim to elect to receive statutory damages "in a range of $200 to $150,000 per each act of discrimination suffered" as determined by the court. For example, if a defendant proved a hostile work environment based on being sexually harassed

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[369] *See* Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262 (9th Cir. 1996). The second element of copyright vicarious liability (the defendant's "direct financial interest" in the infringing activity) is unhelpful to include and is not typically a consideration of employment discrimination. *See id.* at 263. The nexus requirement in the proposed law operates to ensure a relationship to the copyrighted work for which the copyright owner has a direct financial interest, but it would be inapt to require a financial interest in the sexual harassment itself. Moreover, the affirmative defense available to the copyright owner under the new law provides an additional safeguard to preclude the copyright owner's exposure to liability where it took proper remedial action.

[370] *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 753–54 (1998).

[371] *See* Davis *ex rel* LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 641 (1999) ("[A] recipient of federal education funds may be liable in damages under Title IX where it is deliberately indifferent to known acts of sexual harassment by a teacher.").

in three separate incidents, a court could award a maximum of $450,000 in statutory damages; for five incidents, $750,000, and so forth. The amount represents the same range of statutory damages that the copyright owner can recover for infringement claims (based on a per work basis) under current copyright law.[372] There is no cap on damages under the proposed law as there is under Title VII.

3. Section 3: Administrative Enforcement

Section 1 can also be enforced by an administrative agency. Section 3 bestows on the agency investigative powers, including the power to subpoena witnesses and require the production of documents, in a way analogous to the powers of investigation and enforcement of the SEC for securities violations.[373] The agencies that might serve in such a role are the Department of Justice (such as its Civil Rights Division), the EEOC, or the Department of Labor. A new agency might also be established. This administrative investigatory approach is similar to the Department of Education's role in enforcing Title IX, as well as the SEC's role in enforcing federal securities laws. One reason to include administrative enforcement is that agencies can conduct investigations with subpoena power and negotiate settlements to remedy instances of discrimination, thereby obviating the need for an aggrieved party to file a lawsuit herself and eliminating one of the main flaws of Title VII. By contrast, the vast majority of Title IX complaints are handled by the Department of Education via administrative enforcement.[374]

4. Section 4: Additional Remedies

A key feature of the proposed amendment is the section authorizing a court to award additional remedies as the court deems reasonable to remedy the discrimination: (i) disgorgement of profits derived from the copyrighted work; (ii) suspension of the enforcement of the copyright; and (iii) forfeiture of the copyright. These three remedies are civil penalties intended to correct a public wrong—namely, discrimination based on sex—and to deter others from engaging in sex discrimination in the manner proscribed in Section 1.[375] Discrimination of protected classes has long been recognized as a public wrong,

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372 *See* 17 U.S.C. § 504(c) (2012).

373 *See* 15 U.S.C. § 78u-1 (2012).

374 U.S. DEP'T OF EDUCATION OFFICE FOR CIVIL RIGHTS, ACHIEVING SIMPLE JUSTICE: HIGHLIGHTS OF ACTIVITIES, OFFICE FOR CIVIL RIGHTS 2 (2016) (from 2009–2016, DOE resolved 66,102 cases out of 76,022 complaints received).

375 *See* Kokesh v. SEC, 137 S. Ct. 1635, 1642 (2017); Huntington v. Attrill, 146 U.S. 657, 668 (1892).

as is evident in the administrative enforcement of anti-discrimination provisions by the Department of Education, EEOC, and other agencies.[376]

a. Disgorgement

The first remedy is disgorgement of profits derived from a copyrighted work that has the requisite nexus to the sex discrimination under Section 1. Disgorgement developed as an equitable remedy to deprive an offender from "ill-gotten gains."[377] The financial gains are tainted by the illegal activity that helped to derive the gains for the offender.[378] The taint might even extend to the money paid to innocent parties who participated in the casting, creation, production, or promotion of the copyrighted work, but this remedial provision only applies to disgorge profits from the copyright owner found to be in violation of the statute. Of course, others involved may choose to donate some or all of their earnings from a tainted copyrighted work to worthy causes, as filmmaker Kevin Smith and actor Ben Affleck did with respect to Harvey Weinstein-produced movies they were involved in.[379]

The proposed remedy thus expands the existing disgorgement recognized by the Copyright Act for an infringer's profits.[380] Just as disgorgement is available to deprive an infringer from benefiting from his bad acts, this amendment makes disgorgement available to deprive a copyright owner from benefiting from his bad acts or the bad of acts of his associates. The amount of disgorgement need not be the entire profits, but can be an amount commensurate with the severity of the offense or the degree to which the offense factored into the casting, creation, financing, production, or promotion of the copyrighted work involved. The court will decide the precise amount of profits to be disgorged by the copyright owner as is reasonable to remedy the offense. Under Section 4(b), the "Trustee has a fiduciary duty to act in the best interests of the public and the innocent individuals who participated in the development of the underlying

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[376] *See* Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526, 589 (1961) ("[T]he statutes make it clear that discrimination is regarded as a public wrong and not merely the basis for a private grievance ….").

[377] *See* SEC v. Cavanagh, 445 F.3d 105, 118–20 (2d Cir. 2006) (discussing history of courts in equity ordering disgorgement of "ill-gotten gains").

[378] For example, in civil enforcement proceedings, the SEC can seek disgorgement of money obtained from activities that violated federal securities laws. *See* Kokesh v. SEC, 137 S. Ct. 1635, 1639 (2017).

[379] *See* Joyce Chen, *Kevin Smith Donating Residuals from Weinstein-Made Movies to Women in Film*, ROLLING STONE (Oct. 18, 2017, 9:12 PM), https://www.rollingstone.com/movies/movie-news/kevin-smith-donating-residuals-from-weinstein-made-movies-to-women-in-film-202174/; Matt Fernandez, *Ben Affleck Says He'll Donate Residuals from Weinstein, Miramax Films to Charity*, VARIETY (Nov. 6, 2017, 1:36 PM) https://variety.com/2017/film/news/ben-affleck-weinstein-miramax-charity-1202608188/.

[380] 17 U.S.C. § 504 (2012).

work, and must make an annual reporting to the [designated Agency] on the administration of the copyrighted work." Exercising its fiduciary duty, the Trustee will decide how the money obtained from disgorgement shall be used or donated, such as donation of funds to fight sexual harassment in the creative industries.

b. Suspension of Enforcement of Copyright

The second remedy authorized by Section 4 is the suspension of enforcement of the copyright of the work implicated in a Section 1 lawsuit. This remedy is the same as the equitable remedy granted in cases of copyright misuse, which bars the copyright owner from recovering for infringement of his copyright during a period he misuses the copyright.[381] The misuse doctrine bars recovery until the misuse has ceased.[382] The proposed remedy would not require any showing of copyright misuse. If a plaintiff proved a Section 1 claim, then the court can order the suspension of enforcement of the copyright related to the work involved in the Section 1 claim. Such a suspension would be appropriate, for example, where the copyright owner or author repeatedly engaged in acts of sexual harassment. The consequence of such a suspension order would be that the public could freely exploit the copyrighted work without permission of the copyright owner or the need to pay royalties. In other words, the work in question would redound to the benefit of the public's free and unrestricted use during the period of suspension specified by the court. The copyright owner can apply for reinstatement of the copyright upon proof to the court that the sexual discrimination has ceased.

c. Forfeiture of Copyright

The third remedy is forfeiture of the copyright at issue in the Section 1 lawsuit. Of the three remedies, forfeiture is the strongest as it results in the copyright owner's permanent loss of the copyright. The copyright itself is not invalidated, however. Instead, the copyright is transferred by operation of law to the control of a Trustee appointed by the court. In this respect, the remedy is less severe than how the 1909 Copyright Act imposed complete loss of copyright and entry of the work into the public domain if the author failed to publish his work with the required copyright notice or to renew the copyright in the twenty-eighth year of copyright.[383] Although these formalities are no longer required,

381 *See* Lasercomb America, Inc. v. Reynolds, 911 F.2d 970, 976–77 (4th Cir. 1990).

382 *See* Apple Inc. v. Psystar Corp., 658 F.3d 1150, 1157 (9th Cir. 2011).

383 *See* J.H. Reichman, *Goldstein on Copyright Law: A Realist's Approach to a Technological Age*, 43

they do provide a historical precedent showing that forfeiture of copyright was a routine part of the prior Copyright Act as a consequence of the copyright owner's failure to abide by a condition of copyright.[384] For willful and wanton violations of Section 1 by the copyright owner, the court has the discretion to order the forfeiture of copyright, considering such factors as the severity of the acts of discrimination or harassment, how many victims were affected, and the copyright owner's intent and level of knowledge and involvement in the discrimination. If the court orders a forfeiture of copyright, it must appoint a Trustee to oversee the copyrighted work's continued exploitation, including whatever licensing deals already exist. Just as in the case of disgorgement of profits or suspension of copyright, the Trustee has a fiduciary duty to act in the best interests of the public and the innocent individuals who participated in the development of the underlying work.

5. Section 5: Statute of Limitations

The amendment adopts a three-year statute of limitations in the same manner as copyright law does for infringement. Under this approach, laches is no defense, and each successive act or violation by the same defendant starts a new three-year period, no matter how long ago the first act occurred.[385] Thus, under this approach, if Weinstein continued to retaliate against Judd in 2021, such violation would be actionable up to the year 2023.

D. Application of Proposed Amendment

To understand the operation of the proposed amendment, this section applies the amendment to the Harvey Weinstein case. The law would not apply retroactively to past conduct, but, for illustrative purposes, imagine that the proposed amendment existed during Weinstein's alleged abuses and that the proposed law applied to such conduct.

The Agency vested with authority to investigate potential violations of Section 1 can undertake an investigation of Weinstein based on the allegations of sexual harassment reported, along with his public apology. To aid its investigation, the Agency can "subpoena witnesses, compel their attendance,

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STAN. L. REV. 943, 950–51 (1991) (1909 Act renewal requirement "resulted in technical forfeiture of some 85 of active copyrights after their first 28-year term"); *see, e.g.*, Milton H. Green Archives, Inc. v. BPI Commc'ns, Inc., 378 F. Supp. 2d 1189, 1196 (C.D. Cal. 2005).

[384] *See id.*; Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS 311. 329-332 (2010).

[385] *See* Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962, 1969, 1972–73 (2014).

take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Agency deems relevant or material to the inquiry." If the Agency found that there is reasonable cause to believe that Weinstein violated Section 1, it would first seek Weinstein's voluntary compliance in correcting the violations. However, such a remedy might not be availing, given that Weinstein was fired and his company filed for bankruptcy.

The Agency could also file a civil action against both Weinstein and the copyright owner (presumably, Miramax or The Weinstein Company)[386] to the movies Weinstein produced that had the requisite nexus to the sexual harassment of actors related to the movies—perhaps *Frida*, *Lord of the Rings*, and others.[387] If the Agency proved, by a preponderance of the evidence, that Weinstein violated Section 1 by his sexual harassment of actors in the development of a copyrighted movie, it could seek monetary and injunctive relief from Weinstein.

In addition, if the Agency proved that the copyright owner (let's assume Miramax or The Weinstein Company) was directly or vicariously liable for Weinstein's conduct and that the copyright owner was "willful or wanton in committing or allowing the violation," the Agency could ask the court to impose additional remedies on the copyright owner. There seems to be a decent chance that the "willful or wanton" standard is met, given the decades of alleged sexual harassment, statements of employees who said Weinstein's harassment was known or an "open secret," and Weinstein's own employment contract at The Weinstein Company that contained an express provision contemplating his misconduct with a sliding scale of payments he would owe.[388] Assuming the Agency proved that the copyright owner was "willful or wanton" in allowing the sexual harassment to occur and continue, the court could order that some or all of the profits derived from the movies involved (e.g., *Lord of the Rings*, *Pulp Fiction*, *Kill Bill*, or *Frida*, with a finding of the requisite nexus) be disgorged and that the copyrights be suspended or forfeited to the control of a court-appointed Trustee. The Trustee would then oversee the future exploitation of the movies and administer the revenues in the best interest of the public and the individuals involved in the movies who are entitled to residuals or royalties.[389]

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386 Granted, the corporate relationships might be more complex if project LLCs were used to create the movies and assigned the copyrights back to Weinstein's companies. *See supra* note 243 and accompanying text.

387 *See supra* notes 27–29, 333 and accompanying text.

388 *See supra* note 96 and accompanying text.

389 The proposed amendment could be drafted to ensure filing for bankruptcy would not extinguish claims under the amendment.

V. RESPONDING TO OBJECTIONS TO THE PROPOSED AMENDMENT

This final Part addresses potential objections to the proposal. No solution is perfect. However, the objections discussed below do not pose insurmountable hurdles to enacting the proposed amendment.

A. Drawing a Line Between Artist and Work of Authorship

Some critics may object to the very notion that the sexual harassment or misconduct of an artist or producer of a work should affect the profits derived from the work or its copyright. In other words, the proposed linkage between copyright and sexual harassment law should be categorically rejected. In an essay in the *Wall Street Journal*, Adam Kirsch critiqued the position that the public should separate the artist from their works—i.e., "to draw a sharp line between creator and creation."[390] In support of that view, Kirsch pointed to a number of famous examples of artists with misdeeds in their past, including Caravaggio, Ezra Pound, Byron, and Oscar Wilde.[391] Indeed, one can add Picasso to the list—the artist is famous not only for his masterpiece artworks, but for the many young mistresses he had during his career, some of whom became the subjects of his paintings, only to suffer the same fate of Picasso casting them aside.[392] As Picasso's granddaughter Marina Picasso frankly described, "He submitted them to his animal sexuality, tamed them, bewitched them, ingested them, and crushed them onto his canvas. After he had spent many nights extracting their essence, once they were bled dry, he would dispose of them."[393] Yet, despite Picasso's misogyny, people should simply ignore his indiscretions and admire his masterpieces of art.[394] After all, artists have long been viewed as subversive and often troubled—part of their creativity is fueled by transgression, one may argue.[395]

Yet, as Kirsch points out, today, people are re-examining this compartmentalizing of an artists' misdeeds from their art. "For the truth is that,

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[390] Adam Kirsch, *What Should We Do About Scandalous Artists—Accusations of Misconduct Against Beloved Creators Are Changing the Way We Think About Genius*, WALL ST. J., Jan. 26, 2019, at C1.

[391] *Id.*

[392] *See* Cody Delistraty, *How Picasso Bled the Women in His Life for Art*, PARIS REV. (Nov. 9, 2017), https://www.theparisreview.org/blog/2017/11/09/how-picasso-bled-the-women-in-his-life-for-art/.

[393] *Id.*

[394] *But see* Shannon Lee, *The Picasso Problem: Why We Shouldn't Separate the Art from the Artist's Misogyny*, ARTSPACE (Nov. 22, 2017), https://www.artspace.com/magazine/interviews_features/art-politics/the_picasso_problem_why_we_shouldnt_separate_the_art_from_the_artists_misogyny-55120.

[395] *See* Kirsch, *supra* note 390.

in many famous cases, no such clear line can be drawn."[396] For living artists especially, the public may play an unwitting role as financial "patrons" of an artist who profits from the works he creates (possibly while committing sexual harassment or engaging in other sexual misconduct),[397] which then enables the artist to continue to prey on others with more sexual harassment. As explained above, Harvey Weinstein very likely could not have sexually harassed as many young actresses as he allegedly did over decades—and gotten away with it—if his movies lacked copyrights.[398] Put simply, no major studio would have financed a movie that was in serious jeopardy of losing its copyright.[399] Copyright was a critical component to Weinstein's success and power. Thus, if any line should be drawn, it should be the line *linking* copyright and sexual harassment law.

B. Allegations Versus Proof of Sexual Harassment

Whenever sexual harassment allegations are made, a common objection is that they are just "allegations," especially if there is no independent "corroboration" (e.g., physical evidence or third-party witnesses) of the accuser's charge. Along these lines, some may question the #MeToo allegations by many people as not sufficient proof that the incidents in fact occurred. This argument for "corroboration" of sexual harassment is similar to the now-repudiated additional requirement in criminal cases of sexual assault that required a woman to provide direct corroborating evidence to sustain a sexual assault conviction.[400] Although the law today repudiates such a gender bias, people may nonetheless cling to their own biases in evaluating charges of sexual assault or harassment.[401] Moreover, in the reporting of the #MeToo allegations, journalists are under no requirement to obtain sworn affidavits from the accusers (although journalists at newspapers and magazines typically are subject to an internal fact-checking process).

Regardless of one's view of the #MeToo allegations and the issue of corroboration, the important point to recognize is that Congress has wide powers to call witnesses, hold hearings, commission studies, and find facts before

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396 *Id*.

397 *Id*.

398 *See supra* notes 327–41 and accompanying text.

399 *See supra* Part IV.A.

400 *See* Vitauts M. Gulbis, Annotation, *Modern Status of Rule Regarding Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense*, 31 A.L.R. 4th 120, § 3[a] (1984) (majority approach rejects corroboration as a requirement to prove sexual assault and listing 40 states adopting that view).

401 *See* Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 157 (1996).

enacting legislation.[402] Granted, some allegations have been disputed by the alleged harassers, and it's impossible to rule out completely that an allegation was based on faulty memory or even outright fabrication. But, in many instances, the accuser's allegations had some form of support, including admissions by the harasser, third-party witnesses, and the accuser's disclosure of the incident to a third-party.[403] Moreover, in many cases (involving, e.g., Moonves, Lauer, Levine, and Garner) employers undertook their own investigations, at times hiring outside counsel to conduct the internal investigation, and 84% of the investigations found sufficient evidence of misconduct. Thus, the record of sexual harassment in the creative industries already provides Congress with ample basis to hold hearings to investigate and address the problem. The public record shows that hundreds of people have come forward with serious allegations of sexual harassment, assault, and retaliation in the creative industries—some of which have already been substantiated by internal investigations, third-party witnesses, and, in some cases, admissions of wrongdoing by the harassers. The recent revelations of sexual harassment in the creative industries should also be viewed against the notorious history of the "casting couch" dating back for decades in Hollywood.[404]

C. Due Process Concerns with the Proposed Amendment

Others may question the proposed amendment as a way to address the problem. This section responds to several concerns.

1. Forfeiture and Due Process Concerns

Perhaps the most controversial part of the proposal is the establishment of a remedy of forfeiture of a copyright based on a finding that a copyrighted work had the requisite nexus to the sexual harassment. Part of the concern emanates from the federal government's expansive use of civil forfeiture of property related to criminal offenses, such as drug offenses, which has generated widespread criticism by legal scholars, policymakers, nonprofit groups, and also

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[402] *See* Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1179–80 (2001).

[403] *See supra* Part I.B.2.

[404] *See* JOHN AUSTIN, TALES OF HOLLYWOOD THE BIZARRE 131–41 (1992); Amy Zimmerman, *How SAG Is Complicit in Hollywood's Abusive Casting Couch Culture*, DAILY BEAST, https://www.thedailybeast.com/inside-hollywoods-abusive-casting-couch-culture (last updated Feb. 10, 2019, 10:53 AM) (reviewing R*ocking the Couch* documentary, which chronicles sexual harassment in Hollywood in 1980s and 1990s).

legislators and some courts.[405] In 2000, Congress attempted to address many of the concerns by enacting greater safeguards in the Civil Asset Forfeiture Reform Act.[406] However, criticisms remain. The biggest concerns with civil forfeiture are several-fold: (1) property with only modest relationship to a crime can be subject to civil forfeiture; (2) the property of so-called "innocent owners" who had nothing to do with the underlying crime may lose their property unless they successfully prove the "innocent owner defense" under the statute; (3) the government needs only to prove the property is subject to forfeiture based on the civil standard of the preponderance of the evidence; (4) civil forfeiture may give law enforcement a perverse incentive to bring even marginal cases because a portion of the money derived from sale of property forfeited goes to the law enforcement agencies to spend as they wish with little oversight; and (5) more generally, some critics contend that civil forfeiture should be considered an unconstitutional form of punishment that, if permitted, must be subject to criminal procedures and safeguards.[407] The Supreme Court's recent decision recognizing that the Eighth Amendment's proscription of "excessive fines" applies not just to the federal government, but also to the states may bring renewed scrutiny of civil forfeitures.[408]

However valid these concerns are regarding civil forfeiture, they do not provide a basis to reject the proposed copyright forfeiture. There is a fundamental difference between forfeiture of copyright, a creation of federal law, and civil forfeiture of real or personal property, a creation typically of state law. Although a government-initiated forfeiture of intellectual property is rare today (as shown in a recent case rejecting the government's attempt to seek criminal forfeiture of a trademark of the Mongol Nation),[409] forfeiture of copyright has a long history. Indeed, forfeiture of copyright existed since the very first Copyright Act of 1790 and continued in an unbroken chain of copyright acts until the Copyright of 1976, which eventually removed mandatory formalities (of copyright notice and renewal of copyright) and eliminated forfeiture of copyright as a consequence of an author's noncompliance with the statutory formalities.[410] This unbroken chain of prior

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[405] *See, e.g.*, Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387 (2018).

[406] Pub. L. 106-185, 114 Stat. 202 (2000) (codified as amended at 18 U.S.C. §§ 983, 985).

[407] *See How Crime Pays*, *supra* note 405, at 2389–93, 2395.

[408] *See* Timbs v. Indiana, 139 S. Ct. 682, 689 (2019).

[409] *See* Joel Rubin, *Jury Orders Mongols Motorcycle Club to Forfeit Logo Trademarks*, L.A. TIMES (Jan. 11, 2019, 5:10 PM), https://www.latimes.com/local/lanow/la-me-mongols-trademark-verdict-20190111-story.html.

[410] *See* Robert Brauneis, *A Brief Illustrated Chronicle of Retroactive Copyright Term Extension*, 62 J. COPYRIGHT SOC'Y U.S.A. 479, 499–500 (2015) ("First, from the 1790 Act until the March 1, 1989 effective date

copyright legislation, dating back to the First Congress's enactment of first Copyright Act, that allowed forfeiture of copyright provides a strong basis for the constitutionality of the practice, given that some of the Framers were members of the First Congress.[411] Likewise, Congress has vast discretion to enact copyright law under the Copyright Clause,[412] whereas Congress has little power over real or personal property, creatures of state law.[413] Congress has far more power to decide the conditions under which a federal copyright is granted—and lost. The same holds true of Congress's exercise of its spending power, which underlies the anti-discrimination law of Title IX for educational institutions receiving federal funding.[414] Granted, the current copyright law has eliminated mandatory formalities that can result in forfeiture of copyright—a decision that was made for the U.S. to join the Berne Convention, which does not allow members to impose formalities on works of foreign origin.[415] But copyright law's century and a half practice of allowing forfeitures, dating back to the First Congress's enactment, indicates that forfeiture of copyright is not an unconstitutional consequence for failing to follow a requirement of federal copyright law.

The proposed amendment addresses the most troubling concerns raised above. First, the amendment removes any incentive for the government to forfeit copyrights indiscriminately. As the proposal states, "the court shall appoint a Trustee to oversee the administration of funds and the copyright in the best interests of the public and the innocent individuals who participated in the development of the underlying work." Likewise, the amendment requires not only a nexus between the sexual harassment and the copyrighted work that is

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of the Berne Convention Implementation Act, publication of a work without the observation of required formalities, which variously over time included registration, copyright notice on copies and/or in newspapers, and deposit, could result in immediate forfeiture of copyright, and injection of the work into the public domain."); Jane C. Ginsburg, *The U.S. Experience with Mandatory Copyright Formalities: A Love/Hate Relationship*, 33 COLUM. J.L. & ARTS. 311, 324–27 (2010) (charts showing different copyright acts and approaches to forfeiture).

411 *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884) ("[C]onstruction placed upon the Constitution by [the drafters of] the first [copyright] act of 1790 and the act of 1802 … men who were contemporary with [the Constitution's] formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight …."); *accord* Golan v. Holder, 565 U.S. 302, 321 (2012) (quoting *Burrow-Giles Lithographic Co.*, 111 U.S. at 57); Eldred v. Ashcroft, 537 U.S. 186, 213 (2003) (quoting *Burrow-Giles Lithographic Co.*, 111 U.S. at 57).

412 *See Eldred*, 537 U.S. at 222.

413 The Takings Clause in the Constitution limits both federal and state interference with private property rights under state law if the interference constitutes a "taking" of property. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014–15 (1992).

414 *See* Gebser v. Lago Vista Ind. School Dist., 524 U.S. 274, 287 (1998).

415 *See* Ginsburg, *supra* note 410, at 324–27 (2010) (containing charts showing lack of forfeiture as a penalty after 1989 Berne Convention Implementation Act).

subject to forfeiture, but also a finding by the court that the copyright owner acted willfully or wantonly in either committing sexual harassment or allowing it to continue in the development of the underlying copyrighted work. Finally, the proposal adopts the general civil standard of preponderance of the evidence, the same standard used in both copyright and sexual harassment cases.[416]

2. The Costs of Agency Enforcement

Another set of objections may relate to the unspecified agency in the proposal that will be given investigative and enforcement powers to address sexual harassment and sexual discrimination in the creative industries. First, to be effective, an agency needs staffing, money, and resources. In a climate of fiscal austerity and budget deficits, the prospect of expanding considerably the workload of an existing agency or, even worse, creating a new agency may seem unrealistic. Second, there is always a concern with agency capture by industries or powerful lobbying groups; for example, some empirical studies suggest that the SEC goes softer, in terms of investigations or penalties, on firms that donate campaign contributions to key members of Congress who oversee the budget allocations for the SEC.[417] Third, whenever an agency has investigatory and enforcement powers, due process is a concern. For example, the SEC's increased used of internal enforcement actions in administrative proceedings instead of actions in court has been sharply criticized on due process and other grounds.[418] Finally, some may object that an enforcement agency may run amok and chill office romances.[419]

Although these concerns cannot be dismissed out of hand, they do not raise direct challenges to the overall goal of curbing sexual harassment in the creative

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[416] *See, e.g.*, Donald Frederick Evans & Assoc., Inc. v. Cont'l Homes, Inc., 785 F.2d 897, 903 (11th Cir. 1986) (requiring preponderance of the evidence to prove copyright claim); Costa v. Desert Palace, Inc., 299 F.3d 838, 848 (9th Cir. 2002) ("[T]he inquiry [under Title VII] is simply that of any civil case: whether the plaintiff's evidence is sufficient for a rational factfinder to conclude by a preponderance of the evidence that the employer violated the statute—that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"). The same civil standard was used in prior copyright law where the forfeiture of copyright was an issue (due to the failure to comply with formalities). *See, e.g.*, Ruskin v. Sunrise Mgmt., Inc., 506 F. Supp. 1284, 1287 (D. Colo. 1981) (describing burden of proof to invalidate copyright without any higher standard).

[417] *See* Urska Velikonja, *Politics in Securities Enforcement*, 50 GA. L. REV. 17, 38–39 (2015).

[418] *See* Adam M. Katz, Note, *Eventual Judicial Review*, 118 COLUM. L. REV. 1139, 1140 (2018). The Supreme Court decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018) rendered numerous past decisions of administrative law judges in the SEC unconstitutional because they were not properly appointed as "Officers of the United States" under the Appointments Clause. *Id.* at 2055.

[419] *See generally* Claire Zillman, *Employers Are Clamping Down on the Office Romance in the #MeToo Era, But It Will Never Truly Die*, FORTUNE (July 18, 2018), http://fortune.com/2018/07/18/metoo-office-romance-workplace-policy/.

industries. Thus, the important point is not to abandon the goal, but to figure out ways to achieve it while minimizing the risks of adverse consequences. Whether federal funding can be allocated to investigation and enforcement of the new law is a bridge that must passed at the time when Congress considers the bill. It is simply too hard to predict the federal budget situation in the future, although it is worth pointing out that Congress increased the budget of the Department of Education in 2019 to $71.5 billion, the highest allocation to the agency in its history.[420]

Agency capture is a danger regardless of agency. With large, powerful lobbying groups in the entertainment and other creative industries, the potential for agency capture or untoward influence on the agency by lobbying groups might be heightened. One important safeguard would be to make sure the budget of the agency is not beholden to the decisions of a few powerful members of Congress.[421] Another measure might be for Congress to select an existing agency that is known for its independence—perhaps the Department of Labor.[422]

The proposed amendment addresses due process concerns. While the agency is empowered with the power to enforce the statute administratively, it does not have power to grant additional remedies affecting any copyrights. Only a federal court can authorize the disgorgement of profits derived from copyrighted works or the complete forfeiture of copyright, and it can do so only where the copyright owner was involved in the sexual harassment or meets the standard of vicarious liability, fails to prove the affirmative defense, *and* acted willfully or wantonly in the violation. Finally, the fear that the agency will chill workplace romances is misplaced. As already discussed, any agency will face budgetary constraints in how many and which types of complaints to investigate, with priority given to the most serious offenses or allegations. Whether or not workplace romances are appropriate is an issue that many employers and companies are already re-evaluating in response to the #MeToo movement.[423]

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[420] *See* Andrew Ujifusa, *See the New Federal Education Budget Signed into Law by Donald Trump*, EDUC. WEEK (Oct. 1, 2018, 8:09 AM), http://blogs.edweek.org/edweek/campaign-k-12/2018/10/donald-trump-education-spending-increase-second-straight-year.html.

[421] *See* Velikonja, *supra* note 417, at 39–41.

[422] *See* Seth D. Harris, *Managing for Social Change: Improving Labor Department Performance in a Partisan Era*, 117 W. VA. L. REV. 987, 1026 (2015) (describing the increased success of Department of Labor in meeting its performance goals during a five year period ending in Fiscal Year 2013).

[423] *See* Jacob Passy, *In the Wake of #MeToo, Relationships With Co-workers Have Become Even Riskier*, MARKETWATCH (Dec. 13, 2018, 8:35 AM), https://www.marketwatch.com/story/one-third-of-office-romances-end-in-termination-by-the-employer-2018-02-08; Zillman, *supra* note 419; *see also* Sabrina Barr, *Workplace Romances Have Become More Taboo in Wake of #MeToo, Research Finds*, INDEPENDENT (Sept. 27, 2018, 5:40 PM), https://www.independent.co.uk/life-style/love-sex/workplace-relationships-sexual-harassment-metoo-colleagues-companies-study-a8558096.html; Yoree Koh & Rachel Feintzeig, *Can You Still Date a Co-Worker?*

D. Expanding Laws Against Sexual Harassment

Relatedly, critics may contend that the proposal will make every workplace incident of sexual harassment in the creative industries a federal case, expanding the reach of anti-discrimination law well beyond the status quo. To be sure, the proposal is an expansion of anti-discrimination law. It establishes an industry-specific approach to address sexual harassment in the creative industries modeled on Title IX's approach in education. It also establishes new remedies, including disgorgement of profits and forfeiture of copyright with the requisite nexus to the sexual harassment. In short, the goal of the proposed amendment is zero-tolerance for sexual harassment in the creative industries.

At the same time, the fear that the proposal will turn every incident of sexual harassment into a federal case is misplaced—if what is meant by a case is a formal complaint filed in court or agency. As discussed above, the vast majority of sexual harassment in the workplace is never reported, much less the subject of a complaint. It would be Pollyannaish to believe that one law could offer a panacea to change that reluctance. Moreover, if the fear is that the agency entrusted with the power to investigate sexual harassment in the creative industries will be overreaching in its investigations without proper basis, that fear ignores both the procedural safeguards built-in, including ultimate appeal to the federal courts, and the *practical* constraints, including a limited budget, that require any federal agency to decide which investigations to pursue. For example, the Office of Civil Rights (OCR) in the Department of Education received 76,022 complaints between fiscal years 2009 and 2016, and resolved 66,102 cases.[424] By comparison, OCR initiated only 204 investigations or "compliance reviews" of potential violations, without a third-party filing of a complaint during this same period.[425] Just as Title IX does in education, the proposed amendment ultimately relies on the creative industries enforcing anti-discrimination laws in the workplace. The industry-specific approach and new remedies are designed to increase deterrence in the creative industries—which bear the ultimate responsibility of protecting people from sexual harassment in the workplace.

Well, It's Complicated, WALL ST. J. (Feb. 6, 2018, 5:30 AM), https://www.wsj.com/articles/can-you-still-date-a-co-worker-well-its-complicated-1517913001.

[424] *See* ACHIEVING SIMPLE JUSTICE, *supra* note 374, at 2.

[425] *Id.*

E. Collateral Damage

Finally, some critics may argue that the forfeiture of copyright may end up harming innocent people who participated in the creation of the underlying work, such as actors in a movie who are entitled to residuals or royalties under their contracts. Such innocent people may end up "collateral damage" from the proposal's recognition of forfeiture of copyright as an additional remedy. This concern is misplaced. A court can order the forfeiture of copyright only in exceptional cases involving willful or wanton violations by the copyright owner, accompanied by sufficient proof of a nexus between the copyrighted work and the sexual harassment, satisfaction of the requirements of vicarious liability, and the copyright owner's failure to prove the affirmative defense. Moreover, the copyright is not invalidated. Instead, a court must appoint a Trustee to oversee the copyright in the best interests of the public and the innocent individuals who participated in the development of the underlying work. For example, a Trustee can decide that the "best interests" standard is met by continuing to pay all residuals to actors or other artists involved in the work at issue under existing contracts, while donating some of the profits that would have gone to the copyright owner to educational and other efforts to combat sexual harassment in the creative industries.

CONCLUSION

To address the serious allegations of sexual harassment against many prominent figures in the creative industries, this Article proposes a new way to combat sexual harassment through copyright law. Federal legislation should be enacted to prohibit sexual harassment in the development of works of authorship that receive federal copyrights—as outlined above in the draft bill. The proposed legislation is modeled on Title IX's prohibition of sex discrimination in educational institutions that receive federal funding. The proposal authorizes a federal agency to investigate complaints of sex discrimination in the creative industries and to pursue enforcement actions. A key part of the legislation is the enactment of new remedies: Federal courts may order the additional remedies of suspension or outright forfeiture of copyright and disgorgement of profits derived from a copyrighted work if the copyright owner acted willfully or wantonly regarding the violations and the requisite nexus exists between the copyrighted work and the sexual harassment.