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Alexis Miller

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REALITY CHECK FOR PRODUCTION COMPANIES: WHY WRITERS ON REALITY TELEVISION ARE ENTITLED TO OVERTIME PAY

I. INTRODUCTION

In an unprecedented move, a major television network recently announced plans to shake-up its prime-time lineup and devote the first hour each night to low-cost, unscripted shows.¹ This decision echoes a growing trend as networks reduce their dependence on traditional, scripted programs to fill their prime-time lineups.² When *Survivor* debuted on CBS in 2000, it brought with it a dramatic change in network programming as reality television shifted from a marginal sideshow to a network standard.³ As of November 2006, reality television occupied about fifteen hours of prime-time programming.⁴ Comparatively, sitcoms only fill about ten hours of the same prime-time slots.⁵ Although reality shows present themselves as unscripted productions, these shows use “writers” to produce story lines in order to build drama.⁶ Unfortunately, the pay for reality writers is meager compared to writers on scripted shows.⁷ The recent reality writer strike on *America’s Next Top Model*,⁸ in which twelve reality writers went on strike

1. Richard Verrier, *No Time for Making New ‘Friends’ at NBC?*, L.A. TIMES, Nov. 7, 2006, at C1.

2. *Id.*

3. *Id.*

4. *Id.* This figure has dropped in the last two years, which has led some skeptics, including Dean Valentine, the former head of Disney’s television unit and president of UPN, to question the staying power of reality television. He also predicts that the generic sitcom is not coming back. Despite the fact there are fewer hours of reality television than two years ago, “a resurgence of sitcoms is unlikely . . . because younger audiences prefer short, interactive entertainment found on websites such as YouTube.”

5. *Id.*

6. Rodney Ho, *Labor Dispute Raises Curtain on Writers of TV Reality*, ATLANTA J. CONST., Sept. 4, 2006, at 1A.

7. *See id.* (noting that while a writer on a reality show may be paid in the range of \$600–\$2,000 a week, reality writers are often paid about 1/4 of what a comparable writer on a drama series receives). This is due in part to the fact most reality shows are not covered by guild contracts. The median salary for a writer who is a member of the guild is \$106,756.

8. *See* Dave McNary, *IATSE Wins Vote to Rep ‘Model’ Employees*, VARIETY, Dec. 5, 2006, at 34.

to protest the lack of pension, credits, and health benefits,⁹ exemplifies the ongoing tension with reality writers.

Writers on reality shows often find themselves working sixteen-hour days, fifteen days in a row, while receiving less pay than the average writer who is a member of the Writers Guild of America, West (“WGAW”).¹⁰ With even more unscripted shows expected to debut and the number of nightly prime-time sitcoms shrinking, labor tensions in Hollywood are growing as television writers worry about the market for their services.¹¹ While there are opportunities for writers in reality television, the poor pay and lack of benefits is a constant concern.

One reason reality television writers receive poor pay is that production companies attempt to maneuver their way around wage and hour laws by labeling these workers “exempt” to avoid payment of overtime.¹² Exempt employees are salaried professionals who do not receive overtime.¹³ There are various types of exemptions, but the category of exemption applicable to writers on reality television shows is that of “creative professional.”¹⁴ The issue is whether the writers on reality television legally fit into this exempt category in order for production companies to avoid liability under wage and hour law. While the entertainment industry tends to attract people who define themselves as creative, companies cannot simply label employees exempt without considering their underlying job functions.¹⁵

This Comment will show that production companies cannot circumvent wage and hour compliance by claiming writers are creative to the same extent as writers on scripted sitcoms. Part II of this Comment will provide a background on reality television and explore the relevant portions of the Fair Labor Standards Act (“FLSA”) and California exemption regulations. Part III will analyze California’s application of exempt status

9. Ho, *supra* note 6.

10. Jeff Bartsch, Editors in the Writers Guild? . . . Say What?!, Writers Guild of America, West, <http://www.wga.org/organizesub.aspx?id=1072> (last visited Sept. 21, 2006).

11. Verrier, *supra* note 1.

12. See, e.g., Sharon Waxman, *Union Plans to File Suit for Reality TV Workers*, N.Y. TIMES, June 29, 2005, at E1 (discussing how the Writers Guild of America plans to file a lawsuit against networks and production companies, based on a perceived breach of California overtime laws).

13. 29 U.S.C. § 213(a)(1) (2000).

14. See 29 C.F.R. § 541.302(a) (2006) (“To qualify for the creative professional exemption, an employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability or training.”).

15. *Id.* § 541.2.

in *Sharp v. Next Entertainment*¹⁶ and *Shriver v. Rocket Science Laboratories*,¹⁷ two recent class action lawsuits filed by reality writers. Subsequently, Part III will examine significant cases on the creative professional exemption and analyze the reality writer's role to determine whether the creative exemption should apply. This author will pay particular attention to California law, which is more protective of employees than federal regulations, thus controlling for suits filed in the state. Finally, Part IV examines possible solutions, such as unionization, which may give reality writers more pay and might be less costly than restitution for lost overtime pay. This Comment will establish that from a legal standpoint, as defined by the FLSA regulations and the California Wage Orders, reality writers should be entitled to overtime pay because their work is not sufficiently creative in character.

II. BACKGROUND

A. Reality Writers and the Lack of Overtime Pay

Unscripted television has captured the public's fascination since the days of *Candid Camera*.¹⁸ While unscripted television may not be a new genre, the concept of writers scripting "reality" is a recent phenomenon. Cementing reality writers' entrance into the world of reality television was the success of MTV's *The Real World*, which debuted in 1992.¹⁹ This series introduced the idea of placing seven strangers in a house and recording the drama that ensued.²⁰ *The Real World* rarely dealt with complex real-life issues, contrary to the impression provided by the title. The "characters" on the show were supposed to be archetypes of youth culture, whose interactions would exhibit the sort of melodramatic behavior

16. *Sharp v. Next Entm't, Inc.*, No. BC 336170 (Cal. Super. Ct. L.A. County filed July 7, 2005).

17. *Shriver v. Rocket Sci. Labs., L.L.C.*, No. BC 338746 (Cal. Super. Ct. L.A. County filed Aug. 23, 2005).

18. *Candid Camera* was a long-running television series that started in 1948. The premise of the show was to film ordinary people being confronted by unusual situations. *Candid Camera*, <http://us.imdb.com/title/tt0040034/#Comment> (last visited Nov. 27, 2006).

19. See Chuck Klosterman, *To Tell the Truth: He Did Reality Before She Did Reality TV*, N.Y. TIMES MAG., Dec. 26, 2004, at 55. Mary-Ellis Bunim, and her longtime collaborator, Jonathan Murray, constructed MTV's *The Real World* in 1992 which introduced the narrative style of reality series to mainstream television. They went on to make *Road Rules*, *Making the Band* and Paris Hilton's *The Simple Life*.

20. MTV, *The Real World New York*, <http://www.mtv.com/#/ontv/dyn/realworld-season1/summary.jhtml> (last visited Jan. 29, 2007).

that would drive a scripted TV program.²¹ The reality writers on the series originated certain stylistic conventions, such as switching between on-screen events and after-the-fact confessionals that serve as narration.²²

Reality shows do not often officially use the term “writer.”²³ In fact, many production companies avoid calling anyone a writer, hoping to circumvent guild coverage by the WGAw.²⁴ Story producers, field producers, segments producers, and various other types of producers and editors often perform writing on a reality show.²⁵ At the same time, production companies often refer to these people as writers internally.²⁶ This Comment will refer to any person whose writing shapes the story on a reality show as an employee.

The year 2000 ushered in mainstream success for reality television.²⁷ Since then, major networks have attempted to fill their summer line-ups with reality programming, as the reality genre’s success and economic incentives became increasingly apparent.²⁸ Not surprisingly, the recent vintage of reality programming borrowed the stylistic conventions introduced by *The Real World*, while shows such as *Survivor* created the special living environment where producers designed the format of the show and controlled the day-to-day activities.²⁹ Reality television is now firmly rooted as a television genre. Networks depend on reality programming because production of reality shows costs less than new scripted shows and generates higher ratings than repeats.³⁰

21. Klosterman, *supra* note 19.

22. *Id.*

23. Reality United, What We Do, http://www.realityunited.com/what_we_do (last visited Nov. 13, 2006).

24. *Id.* Job titles do not determine exempt status. In order for an exemption to apply, an employee’s specific job duties and salary must meet all the requirements of the Department of Labor’s regulations. 29 C.F.R. § 541.2 (2006). The issue of unionization, while related in many respects is a separate matter and not to be confused with whether an employee is exempt. *See* Part IV, *infra*.

25. Reality United, *supra* note 23. Editors who are not on reality shows often perform much of the same tasks as do their reality show counterpart. *See* Bartsch, *supra* note 10. However, editors are normally part of the Motion Picture Editors Guild (MPEG). It is debatable as to whether the appropriate forum for editors on reality shows would in fact be the MPEG, as opposed to WGAw.

26. Reality United, *supra* note 23.

27. Verrier, *supra* note 1.

28. *See* Bill Carter, *Reality TV, Ripening In the Heat Of Summer*, N.Y. TIMES, May 29, 2006, at C1.

29. *See Surviving and Thriving*, THE AGE, Nov. 13, 2003, <http://www.theage.com.au/articles/2003/11/12/1068329621438.html>.

30. *See* Carter, *supra* note 28 (“Reality series still have lower costs than scripted shows, though they no longer qualify as dirt-cheap programming. Most reality series approach a

Yet, since the early days of *The Real World* viewers have questioned the authenticity of the reality programming.³¹ Designed to be entertaining on television, reality shows have a traditional “dramatic narrative model.”³² To keep the audiences’ attention there must be elements of conflict and resolution.³³ Before being aired storylines are shaped. Essentially, the writers at production companies must filter hundreds of hours of videotape and shape coherent episodes.³⁴

In July of 2006, a labor dispute at *America’s Next Top Model* fixated the public’s attention on the issue of “reality” in reality television.³⁵ The twelve writers of the program went on strike protesting the lack of pay, credits, and benefits, and desired to join the Writers Guild union.³⁶ And, this uprising was not unique, as writers on reality shows have complained of working sixteen-hour-days, fifteen days in a row while receiving less pay than the average writer who is a member of WGAW.³⁷ In fact, over 1,000 writers, editors, and producers have signed with the WGAW in order to force reality production companies and the networks to negotiate a union contract.³⁸

Reality television, burgeoning with success, eventually left the sidelines and began headlining on network and cable television. However, heightened success brought a stark juxtaposition between the reality of production companies’ goals and the compensation goals of employees on reality television. Production companies see reality television as a way to minimize costs.³⁹ There are no high priced actors to pay on the soap-opera styled reality programs. Workers on reality shows are generally non-unionized and as such do not receive benefits, like health insurance or pensions.⁴⁰ Additionally, a scripted show will have a larger production staff than its reality television counterpart.⁴¹ A scripted show on average

production cost of one million dollars an hour, about a third less than a scripted hour.”).

31. See Klosterman, *supra* note 19 (explaining how critics of the show questioned the veracity of every plot twist).

32. Ho, *supra* note 6.

33. *Id.*

34. *Id.*

35. Jeanne McDowell, *Strikers on the Catwalk*, TIME ONLINE, July 27, 2006, <http://www.time.com/time/printout/0,8816,1220040.00.html>.

36. Ho, *supra* note 6.

37. Bartsch, *supra* note 10.

38. Waxman, *supra* note 12.

39. Jim Rendon, *Unions Aim to Share in the Success of Reality TV*, N.Y. TIMES, Jan. 25, 2004, at 34.

40. *Id.*

41. *Id.* The larger production staff on a scripted show includes camera operators, scriptwriters and union actors. Comparatively, reality programming mostly uses editors,

will cost around one million to two million dollars, whereas the average reality programming only costs a network about \$700,000.⁴²

Writers on reality shows want to realize the benefits that writers see on scripted television if they are going to work long hours.⁴³ If unionized, reality writers would receive the same pay and benefits that go to unionized workers of other network shows.⁴⁴ Currently, “to the extent that there are writers [on reality television], they are not treated like writers on other shows.”⁴⁵ Two class action lawsuits are currently pending that involve reality television employees: *Sharp v. Next Entertainment*⁴⁶ and *Shriver v. Rocket Science Laboratories*.⁴⁷ These lawsuits allege unfair labor practices against such companies as Fox, ABC, and other major production studios that rely on reality television for low budget productions.⁴⁸ Attempting to recoup some of their perceived economic losses, reality writers seek restitution for lost overtime pay.⁴⁹ However, in order to receive overtime pay, law requires that writers perform work that is *not* creative in nature.⁵⁰ Otherwise, law classifies them as salaried employees whose finished work product does not correlate with the number of hours spent on a project.⁵¹

B. Problem: Longstanding Production Practices May Lead to Liability for Wage and Hour Claims

The two class action suits previously referenced reflect an issue faced by all employers in every industry: the correct classification of employees as exempt or nonexempt. Minimum wage and overtime regulations are not applicable to exempt employees.⁵² Employers cannot simply maneuver their way around wage and hour law by labeling workers exempt and paying them a salary.⁵³ Employees must be salaried *professionals* before production companies and networks can legally allow employees to work

producers and non-paid contestants.

42. *Id.*

43. Waxman, *supra* note 12.

44. Rendon, *supra* note 39.

45. *Id.*

46. *Sharp v. Next Entm't, Inc.*, No. BC 336170 (Cal. Super. Ct. L.A. County filed July 7, 2005).

47. *Shriver v. Rocket Sci. Labs., L.L.C.*, No. BC 338746 (Cal. Super. Ct. L.A. County filed Aug. 23, 2005).

48. *See Sharp*, No. BC 336170.

49. *See, e.g.*, Complaint at 10, *id.*

50. *See* 29 C.F.R. § 541.302 (2006).

51. 29 U.S.C. § 213(a)(1) (2000).

52. *Id.*

53. 29 C.F.R. § 541.2.

long hours without overtime.⁵⁴ Nonetheless, many production companies of reality television shows continue to pay flat salaries to their writers.⁵⁵ FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over forty hours in a workweek.⁵⁶ However, FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees.⁵⁷ Within the professional exemption, there is a further division between the learned professional and creative professional.⁵⁸

To claim a creative professional exemption under the FLSA, a production company's employees must perform original and creative work.⁵⁹ An employee's primary duty must be the performance of work requiring invention, imagination, originality, or talent, and it must be in a recognized field of artistic or creative endeavor.⁶⁰ Under federal law, recognized artistic endeavors include "music, writing, acting and the graphic arts."⁶¹ Courts construe these categories very narrowly with specific attention paid to the plain meaning of the statutory language and intent of Congress.⁶² Exemption as a creative professional depends on the extent of the invention, imagination, originality, or talent exercised by the employee.⁶³

This Comment focuses on the application of California law because of the state's close ties to the entertainment industry. While California regulations are "intended to be construed in accordance with" federal law,⁶⁴ sometimes federal and state laws differ. California imposes law most

54. 29 U.S.C. § 213(a)(1).

55. *See, e.g.,* Ho, *supra* note 6 (stating that some writers on reality television work eighteen to twenty hours a day for a flat salary based on weekly commensuration).

56. 29 U.S.C. § 207(a)(1) (2000).

57. *Id.* § 213(a)(1).

58. 29 C.F.R. § 541.302.

59. *Id.* § 541.302(b).

60. *Id.* § 541.302(b), .700.

61. *Id.* § 541.302(b)

62. *See* A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 491, 493 (1945) (discussing whether an interstate grocery chain store system is an 'establishment' within the meaning of the Fair Labor Standards Act and holding that "to extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people"); *see also* Abshire v. County of Kern, 908 F.2d 483, 485-86 (9th Cir. 1990) ("Employers who claim that an exemption applies to their employees . . . must show that the employees fit 'plainly and unmistakably within [the exemption's] terms.'").

63. 29 C.F.R § 541.302(b), .700.

64. CAL. CODE REGS. tit. 8, § 11120(1)(a)(3)(e) (2002).

favorable to the employee.⁶⁵ The dispositive factors under California law include the amount of discretion and independent judgment exercised by the employee⁶⁶ as well as whether an employee in California devoted more than fifty-percent of his or her time to exempt activities.⁶⁷ As it currently stands, California law controls because it protects employees more than federal law.⁶⁸

C. *History of the Fair Labor Standards Act (FLSA)*

Congress enacted the FLSA partly because of its concerns over substandard working conditions.⁶⁹ Congress had several goals for this law, one of which was to eliminate extremely low wages and excessively long work weeks.⁷⁰ Another of Congress' goals was to help "those employees who lack sufficient bargaining power to secure . . . a minimum subsistence wage."⁷¹ Among the many exemptions under the FLSA are "white-collar workers"—the executive, professional, and administrative employees.⁷²

Congress relied on the Department of Labor ("DOL") to determine whether occupations were exempt.⁷³ The DOL defines exempt categories of employees.⁷⁴ Interpretations are only the views of the DOL and "do not have the force of law"—they are merely suggestions that courts may

65. MING W. CHEN ET AL., CAL. PRACTICE GUIDE- EMPLOYMENT LITIGATION 11-83 at ¶ 11:706 (Rutter Group 2006) (citing *Pac. Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1426-27 (9th Cir. 1990); *Aguilar v. Ass'n for Retarded Citizens*, 285 Cal. Rptr. 515, 523 (Cal. Ct. App. 1991)).

66. CAL. CODE REGS. tit. 8, § 11120(1)(a)(3)(c).

67. CAL. LAB. CODE § 515(e) (West 2003) (creating an exception when the employee spends more than fifty percent or more of his or her work time in the learned or artistic profession). *But see* 29 C.F.R. § 541.700(b) ("Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work.").

68. CHEN ET AL., *supra* note 65.

69. S. Rep. No 75-884, at 2 (1937).

70. *Id.*

71. *Olerachick v. Am. Steel Foundries*, 73 F. Supp. 273, 277 (W.D. Pa 1947); *see also* Daniel V. Yager & Sanda J. Boyd, *Reinventing the Fair Labor Standards Act to Support the Reengineered Workplace*, 11 LAB. LAW. 321, 330 (1996) ("[The] FLSA was originally enacted to protect those who lack bargaining leverage with their employers.").

72. *Freeman v. NBC*, 846 F. Supp. 1109, 1112 (S.D.N.Y. 1993). *But see* Deborah C. Malmud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2306 (1998) (noting that the wage and hour division did not view the Act's goal as only protecting employees "who worked in low-wage jobs in exploitative conditions").

73. *See* 29 C.F.R. § 541.1 (2006).

74. *See id.* § 541 (categorizing employees as executive, administrative, professional, computer, etc.).

choose to follow.⁷⁵ The DOL may add or delete occupations classified under the regulations.⁷⁶ The exempt categories may expand as new occupations come into existence, even if the DOL did not originally contemplate these new vocations.⁷⁷ For example, journalists were not originally included in exemptions, but since 2004, the revised Code of Federal Regulations specifically addresses journalists under the creative professional exemption.⁷⁸

D. The Professional Exemption

The FLSA recognizes eleven categories of workers, ranging from amusement park employees⁷⁹ to babysitters,⁸⁰ who are exempt from minimum wage and overtime compensation.⁸¹ The FLSA also provides an exemption for white-collar employees, which applies to individuals “employed in a bona fide executive, administrative, or professional capacity. . . .”⁸²

Learned⁸³ and creative⁸⁴ professionals are two subcategories of the professional exemption. Learned professionals are those whose primary duty is to perform work that requires “advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.”⁸⁵ Examples of learned professionals include individuals in law, medicine, and ministry.⁸⁶ Trades learned through apprenticeships do not qualify as professional even though they may require a great amount of skill or specialized knowledge.⁸⁷ In other words, no exemption exists for occupations where employees develop

75. *Sherwood v. Wash. Post*, 871 F. Supp. 1471, 1481 (D.D.C. 1994) (citing *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 699 n.17 (3d Cir. 1994)).

76. See Edward D. Cavanaugh, *Journalists as Professionals: Rethinking the Professional Exemption Under the Fair Labor Standards Act*, 16 LOY. L.A. ENT. L.J. 277, 278 (1995) (“In November 1985, the Department of Labor (“DOL”) published an advanced notice of proposal rulemaking in the Federal Register, inviting views of the public as to whether the DOL should reconsider the status of various professions under the FLSA and its regulations.”).

77. *Id.*

78. 29 C.F.R. § 541.302(d).

79. 29 U.S.C. § 213(a)(3), (15) (2000).

80. *Id.*

81. *Id.*

82. *Id.* § 213(a)(1).

83. 29 C.F.R. § 541.301.

84. *Id.* § 541.302.

85. *Id.* § 541.301(a).

86. *Id.* § 541.301(c).

87. *Id.* § 541.301(d).

skills primarily through experience.⁸⁸

The focus of this Comment is on the creative professional. The creative professional is an employee who engages in “the performance of work requiring invention, imagination, originality or talent.”⁸⁹ The creative professional classification encompasses a reality writer’s job to a greater extent than any other exempt classification. This Comment investigates whether reality television writers are professionals and exempt from coverage under the FLSA or whether they qualify as wage earners and FLSA includes them in its coverage.

In determining whether writers are creative professionals, one must examine their job functions and determine whether their work requires invention, imagination, originality, or talent.⁹⁰ The statute does not encompass all artistic or creative activities—an employee’s function must still be within a recognized field.⁹¹ Finally, “[t]he exemption does not apply to work which can be produced by a person with general manual or intellectual ability or training.”⁹²

E. Primary Duty Test for the Professional Exemption

One possible justification behind the white-collar exemption is that the value an employer places on work performed by professional employees is unrelated to the number of hours worked.⁹³ As a result, professionals are neither paid more for working more hours a week nor paid less for working fewer hours in a given week.⁹⁴ Professionals receive a salary for a predetermined amount of compensation that is “not subject to reduction because of variations in the quantity or quality of the work performed.”⁹⁵ Therefore, the threshold requirement for any exempt

88. *Id.* (“[T]he learned professional exemption is available to the occasional lawyer who has not gone to law school However, the learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field”).

89. 29 C.F.R. § 541.302(a) (2006).

90. *See id.*

91. *Id.* § 541.302(c) (“This requirement generally is met by actors, musicians, composers, conductors, and soloists. This requirement is generally not met by a person who is employed as a copyist, as an ‘animator’ of motion-picture cartoons, or as a retoucher of photographs, since such work is not properly described as creative in character.”).

92. *Id.* § 541.302(a).

93. *See* U.S. GENERAL ACCOUNTING OFFICE, FAIR LABOR STANDARDS ACT: WHITE-COLLAR EXEMPTIONS IN THE MODERN WORKPLACE, GAO/HEHS-99, at 5–6 (Sept. 24, 1999) (stating exempt salaried workers become cheaper “when they work over 40 hours”).

94. *Id.*

95. 29 C.F.R. § 541.118(a) (2006).

employee is that he or she receives a statutory minimum salary.⁹⁶ Upon meeting the statutory minimum, the employee's job duties must meet the conditions set forth in the applicable exemption.⁹⁷

Prior to 2004, courts analyzed an employee's duties under either the long or short test.⁹⁸ The new regulations eliminated both tests⁹⁹ and replaced them with a single standard test, which combines factors from its two predecessors.¹⁰⁰ It is important, however, to understand the application of the regulations prior to 2004, because the new regulations "preserve the case law that existed under the old regulations."¹⁰¹ Prior to 2004, if an employee earned between \$170 and \$250 per week, courts applied the long test.¹⁰² The long duties test required "the 'consistent' exercise of discretion and judgment in the employee's work."¹⁰³ Exempt work had to be "predominantly intellectual and varied in character."¹⁰⁴ Further, the test required that the results of the work "depend primarily on [the employee's] invention, imagination, or talent."¹⁰⁵ Finally, the test mandated that an employee spend at least eighty percent of his or her time on qualifying work.¹⁰⁶

Courts found the short test more applicable to creative professionals.¹⁰⁷ In *Sherwood v. Washington Post*, the court found it was not appropriate to use language from the long test for creative professionals.¹⁰⁸ Under the short test, courts used a two-prong analysis to

96. *Id.* § 541.300(a)(1).

97. *See id.* § 541.602(a).

98. Joseph E. Tilson & Jeremy J. Glenn, *The FLSA: Emerging Trends in Wage and Hour Litigation*, 746 PRACTICING L. INST. 571, 577 (2006).

99. *Id.*

100. *Id.*

101. *Id.*; *see also* Wage & Hour Op. Ltr., No. FLSA2005-19 (Dep't of Labor Aug. 2, 2005) (reiterating that the New Regulations were designed to clarify, rather than substantively change, existing law).

102. L. Camille Hebert, *Symposium: The Fair Labor Standards Act: "Updating" the "White-Collar" Employee Exemptions to the Fair Labor Standards Act*, 7 EMPL. RTS & EMPLOY. POL'Y J. 51, 59 (2003).

103. *Id.* at 64.

104. *Id.*

105. *Id.*

106. *Id.*

107. *See Sherwood v. Wash. Post*, 871 F. Supp. 1471, 1480 (D.D.C. 1994) (concluding that "the short test applies in this case" because the plaintiff's work "required invention, imagination, and talent").

108. The long test required that the result of the employees work depend *primarily* on the employee's invention, imagination and talent. The short test requires only that the primary duty be work *requiring* invention, imagination, or talent. *See id.* (holding that the reporter was an exempt professional because his primary duties consisted of work *requiring* invention

determine whether an employee qualified as an exempt creative professional.¹⁰⁹ The test required an employee's compensation be a salary or fee basis of at least \$250 per week, and a primary duty consisting of "work requiring invention, imagination, or talent in a recognized field of artistic endeavor."¹¹⁰

The 2004 regulations eliminated the short and long tests and imposed a standard duties test while raising the minimum salary level to \$455 per week.¹¹¹ Under the standard duties test, the court must focus on the employee's primary duty in order to determine exempt status.¹¹² The regulations also eliminated the requirement that the employees devote a certain percentage of time to exempt activities.¹¹³ Consequently, the 2004 regulations created a simplified way to determine whether reality television workers would qualify as exempt employees.

F. California Legislation and Interpretation

The California Industrial Welfare Commission ("IWC") is the state agency empowered to formulate regulations governing minimum wage, maximum hours, and overtime pay in California.¹¹⁴ The IWC law incorporated federal professional employee exemptions in its wage orders.¹¹⁵ Wage Order Twelve aims specifically at regulating wages, hours, and working conditions in the motion picture industry, including television film production.¹¹⁶ Similar to federal law, the provisions of the wage order do not apply to persons employed in administrative, executive, or professional capacities.¹¹⁷ The IWC provides a test for determining whether an employee's duties meet the requirements for an exemption, with the exemptions to be "narrowly construed against employers seeking

imagination or talent) (emphasis added).

109. *See id.* at 1478–79.

110. *See id.*

111. *See* 29 C.F.R. § 600(a) (2006) (setting the FLSA minimum salary basis at \$455 per week, which translates into \$23,660 per annum).

112. *Id.* § 541.700(a).

113. *Id.* § 541.700(b) (advising that employees devote over fifty-percent of their time to exempt duties, but that "time alone, however is not the sole test. . .").

114. CAL. LAB. CODE § 1173 (West 2003).

115. CAL. CODE REGS. tit. 8, § 11120(1)(a)(3)(e) (2002).

116. *Id.* § 11120(2)(K) (defining "motion picture industry" expansively to include not only motion pictures, but television and theatrical productions including "motion pictures for entertainment, commercial, religious, or education purposes, whether made by film, tape, or otherwise").

117. *Id.* § 11120(1)(A).

to assert them.”¹¹⁸ To qualify as exempt under this category, an employee must primarily engage in duties that meet the test for the exemption under FLSA.¹¹⁹ But unlike federal law, an employee must earn “no less than two times the state minimum wage for full-time employment.”¹²⁰ Therefore, an employee’s monthly salary must be at least \$2,600 for exempt status in California.¹²¹

There are two other differences between FLSA and California law that make it more difficult for an employer to prove an employee is exempt. First, unlike federal law, California requires an employee to customarily and regularly exercise discretion and independent judgment in performing his or her duties in order to be exempt.¹²² Second, “primarily” in California means more than fifty percent of an employee’s time is devoted to nonexempt activities.¹²³

III. IMPLICATIONS FOR PENDING CLASS ACTION SUITS

Arguably, applying the creative professional exemption to reality television writers would ultimately fail if litigated in court. While no court has yet ruled on this specific issue, a series of journalism-related cases indicate that a production company cannot successfully assert that its employees are exempt creative professionals.¹²⁴ Reality writers’ ability to expertly merge sound and images is due to their extraordinary diligence, intelligence, and accuracy, not to a legally qualitative creative ability. This section will analyze California’s application of exempt status and predict

118. *Reich v. Newspapers of New Eng., Inc.*, 834 F. Supp. 530, 535 (D.N.H. 1993) (citing *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)).

119. CAL. CODE REGS. tit. 8, § 11120(1)(a)(1)(e).

120. *Id.* § 11120(1)(a)(3)(d).

121. *See* Assemb. 1835, 2006-2007 Reg. Sess. (Ca. 2006) (increasing the minimum wage to \$7.50). Therefore, the calculation for the minimum exempt salary per month in California is as follows: \$7.50 (minimum wage) x 2 x 40 (hours per week) x 52 (weeks per year) / 12 (months) = \$2,600 per month. The average monthly salary of a reality writer is somewhere between \$2,400 and \$8,000; *see also* Ho, *supra* note 6 (discussing weekly salary level on average of \$600-\$2,000 a week). This indicates that at the lower limits the salary would not even pass the salary basis test under California law, while the upper limit far exceeds the minimum salary basis.

122. CAL. CODE REGS. tit. 8, § 11120(3)(c).

123. CAL. LAB. CODE § 515(e) (West 2003).

124. *See generally* *Reich v. Gateway Press Inc.*, 13 F.3d 685 (3d Cir. 1994) (concluding that journalists are covered by FLSA and not exempt employees); *Dalheim v. KDFM-TV*, 918 F.2d 1220 (5th Cir. 1990) (finding that reporters primary duties were not creative); *Wang v. Chinese Daily News, Inc.*, 435 F. Supp. 2d 1042 (C.D. Cal. 2006) (explaining that only a minority of employees perform creative work); *Reich v. Newspapers of New Eng., Inc.*, 834 F. Supp. 530 (D.N.H. 1993) (holding that reporters were not exempt employees).

its effect on *Sharp v. Next Entertainment*¹²⁵ and *Shriver v. Rocket Science Laboratories, L.L.C.*,¹²⁶ two recent class action suits filed by reality television writers.

The Fifth Circuit observed that issues involving the professional exemption under the FLSA are “intensely factbound and case specific[,]” which suggests that a summary judgment standard is not appropriate for these cases.¹²⁷ In proceeding to trial, California law has two requirements that are inherently different from the federal standard. First, the employee must spend more than fifty percent of his or her work time engaging in creative duties.¹²⁸ Second, the employee must customarily and regularly exercise discretion and independent judgment in performing duties in the learned or creative profession.¹²⁹ Close scrutiny of these two requirements reveals that the defendants in these class action suits will not prevail.

First, the reality writers allege in the complaint that they spent a large quantity of hours in post-production.¹³⁰ In *Shriver*, the writers claim they performed “a variety of storytelling functions in the production of reality televisions [sic] series,” including taking story notes that were used later to shape the editing process.¹³¹ However, the plaintiffs also emphasized they used “numerous hours of video footage” to create stories.¹³² The use of numerous hours of footage implies that reality writers were spending a substantial part of their workday cataloguing, as opposed to actually shaping the editing process. Further, Plaintiffs gave a detailed list of tasks performed in postproduction such as editing scenes, splicing dialogue and individual words, adding music, sound effects, and narration.¹³³

Second, Plaintiffs emphasized their total lack of discretion.¹³⁴ Plaintiffs stressed that the “storytelling product is reviewed by producers, including network executives who have final approval over content.”¹³⁵ In order to prevail, Plaintiffs must establish that the editors do more than simply review the Plaintiffs’ work. The plaintiffs must prove that a handful

125. *Sharp v. Next Entm’t, Inc.*, No. BC 336170 (Cal. Super. Ct. L.A. County filed July 7, 2005).

126. *Shriver v. Rocket Sci Labs, L.L.C.*, No. BC 338746 (Cal. Super. Ct. L.A. County filed Aug. 23, 2005).

127. *Dalheim*, 918 F.2d at 1226.

128. CAL. LAB. CODE § 515(e).

129. *Id.* § 515(a).

130. See Complaint at 21, *Shriver*, No. BC 338746.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

of editors and producers were ultimately responsible for the content of the episodes. This element might prove difficult because before disseminating a final product, it is customary in many professional environments for associates to first review each other's work. If the writers can prove that management is actually dictating the content of the episode, the work probably will not be exempt.¹³⁶

A. Establishing a Framework for Analysis

Most viewers are aware that reality televisions' success is not due to its authenticity. Unseen reality television editors, producers, and writers have more control over the stories than the onscreen participants do. However, in order for the plaintiffs in *Shriver and Sharp* to win, the question is whether the job functions of the writers are actually legally creative. The previous sections of this Comment have clarified the statutory scheme of the creative professional and the application of the doctrine. Using the class action complaints as a guidepost for analysis, this part of the Comment delves further into the specific duties of the reality writer, and determines that it does not fit into the described exemption under California law. Since California law encompasses the FLSA,¹³⁷ jurisprudence established outside of the state is still relevant to understand the individual components of the regulations. The two main differences, discretion and increased primary duty, will receive added emphasis.

The creative professional is one whose primary duty must be "the performance of work requiring invention, imagination, originality or talent . . ." ¹³⁸ Exactly how do courts define what is inventive, imaginative, original or talented work? Few cases have litigated the issue of whether or not the creative professional is applicable to private sector work environments.¹³⁹ Nonetheless, a line of cases has developed that finally addresses the issue by examining whether journalists fit within the creative exemption.¹⁴⁰ Courts will consider a number of factors in making

136. See, e.g., *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1229 (5th Cir. 1990) (holding that the reporters were nonexempt because "their day-to-day work is in large part dictated by management"); *Sherwood v. Wash. Post*, 871 F. Supp. 1471, 1482 (D.D.C. 1994) (holding that *Sherwood* was exempt because he "was not a robot run by his editors").

137. CHEN ET AL., *supra* note 65, at ¶ 11:707.

138. 29 C.F.R. § 541.302(a) (2006).

139. See *The Fair Labor Standards Act: While-Collar Exemption in the Modern Workplace: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. and the Workforce*, 106th Cong. 2 (2000) (statement of Nicholas Clark, Ass. Gen. Counsel, United Food and Commercial Workers Union) available at <http://commdocs.house.gov/committees/edu/hedwp6-104.000/hedwp6-104.htm>.

140. See *Reich v. Gateway Press, Inc.*, 13 F.3d 685 (3rd Cir. 1994).

their determination of what they consider creative work.¹⁴¹ The regulations distinguish creative work as requiring “invention, imagination, originality or talent” as opposed to work which requires “intelligence, diligence and accuracy.”¹⁴² The issue of exemption is fact-sensitive, with no one fact necessarily controlling.¹⁴³ This Comment creates a framework for comparing the analytical guidelines established by courts in journalism cases and applies these standards of invention, imagination, originality or talent to those required of the writers on reality television shows. Finally, this Comment will assess whether the reality writers can perform their activities without dependence on intelligence, diligence, or accuracy. The framework created will help to predict the success of the claims and defenses established by the parties to the pending class action suits.

B. Reality Writers Lack the Requisite Invention & Imagination Required by the Regulations

Imagination and invention are two essential elements that courts look at to determine creativity.¹⁴⁴ Journalists, like other professionals, fulfill the duty requirements for the creative professional exemption when their primary duty requires invention or imagination.¹⁴⁵ Since invention is defined as “a product of the imagination[.]”¹⁴⁶ this concept receives less emphasis from the courts, often being subsumed within the topic of imagination. Due to the implicit assumption that imagination is a naturally occurring byproduct of invention, the courts have not made a meaningful distinction between the two topics. As such, this Comment will not attempt to create a separate category where none exists. Instead, the analysis will focus on imagination, a concept to which the courts have given rigorous attention.¹⁴⁷ The courts have expanded on the DOL guidelines and interpreted imagination to mean the ability to develop “a fresh angle on a complicated topic.”¹⁴⁸ Journalists are not exempt creative professionals if they only collect, organize, and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.¹⁴⁹

141. See 29 C.F.R. §541.302(c).

142. *Id.*

143. *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1226–27 (5th Cir. 1990).

144. 29 C.F.R. § 541.302(a).

145. 29 C.F.R. § 541.302(d).

146. MERRIAM-WEBSTER ONLINE, <http://www.m-w.com> (last visited Nov. 7, 2006).

147. See *Reich v. Gateway Press, Inc.*, 13 F.3d 685 (3d. Cir. 1994).

148. *Id.* at 700.

149. See *id.*

For example, in *Reich v. Gateway Press, Inc.*, the court held that the reporters' work did not require any special imagination "[in] developing an entirely fresh angle on a complicated topic."¹⁵⁰ The reporters' primary duty was to collect information that was already out in the community and simply combine it into a single source.¹⁵¹ The reporters simply followed press releases, attended meetings, and recorded their findings in an article.¹⁵² The court held that there was no imagination involved because reporters merely took information that was already available and did not develop a new angle.¹⁵³

Arguably, there is imagination involved in the reality writers taking recorded video footage and creating a television show. For example, a reality writer's job involves creating "a beginning, middle, and end, with character development, goals, conflict, and resolution."¹⁵⁴ Scripted television and reality series both must have "sympathetic characters, interesting settings, and a sequence of events that inspires curiosity."¹⁵⁵ Reality writers do more than attend press releases and record the events in an accurate manner.¹⁵⁶ Rather, reality writers create back-stories, emotional journeys, and dynamic progressions for their characters.¹⁵⁷ The reality writer's job is more than passively collecting information; instead, they have an active involvement in the creation of an episode to develop a story.¹⁵⁸ The process might actually involve distributing a synopsis and proposed story beat to the shooting crew in order to collect all the required subtleties of the narrative.¹⁵⁹ This active involvement is more than simply attending a press release.

Based on the above description, a reality writer's duties are creative through characters, arcs, emotions, and active involvement in plot.¹⁶⁰ Nevertheless, further review reveals that the process merely involves taking bits and pieces of recorded footage and combining them into a single source. This process of editing is no different from the facts presented in

150. *Id.*

151. *Id.*

152. *Id.*

153. *Gateway Press, Inc.*, 13 F.3d at 700.

154. J. Ryan Stradel, *Day in the Life of a Reality TV Writer*, Writers Guild of America, West, <http://www.wga.org/organizesub.aspx?id=1096> (last visited Oct. 21, 2006).

155. *Id.*

156. *See id.*

157. *Reality Writer*, Writers Guild of America, West, <http://www.wga.org/organizesub.aspx?id=1092> (last visited Oct. 21, 2006).

158. *See id.*

159. *Id.*

160. *See id.*

Gateway Press where the court held the work was not imaginative because the reporters' primary duty was to collect information that was already out in the community and combine it in a single source.¹⁶¹ Although reality writers are creating traditional dramatic narratives, this creative process is distinguishable from writing for a scripted television drama. "The main component in writing" for reality television is throwing away extra footage.¹⁶² Rather than developing their own lines, reality writers catalogue footage, which is similar to facts "already out in the community," to find essential quotes and images.¹⁶³ Reality writers then take their words, interviews and quotes and combine the elements into a single thirty-minute television program. This process is the same as combining lunch menus and press releases into a single article. Moreover, even assuming that a reality writer's job involves imagination, there is still the problem of the primary duty requirement.

1. Reality Writers' Primary Duty Will Fail California's Stricter Test

Under California law, courts are required to determine whether more than fifty percent of an employee's time is devoted to non-exempt activities.¹⁶⁴ In considering primary duty, courts must remember that there are employees who work in a creative environment, but whose duties remain functional in nature.¹⁶⁵ An illustration of the stringent requirement for primary duty is in *Dalheim v. KDFW-TV*.¹⁶⁶ Applying the primary duty standard under FLSA, *Dalheim* held that news reporters are unable to meet even the lower standard.¹⁶⁷ In this case, while reporters did occasionally do creative work, under *Dalheim*, that work must be more than simply from "time-to-time."¹⁶⁸ Since California's primary duty requirement is even more stringent than that which the Fifth Circuit applied in *Dalheim*, it is unlikely that the reality writers would be able to fulfill California's requirement.

161. *Gateway Press, Inc.*, 13 F.3d at 700.

162. Ho, *supra* note 6 ("In Reality TV world, writers have to phrase out key quotes and moments as opposed to scripting actual lines.")

163. *Compare Gateway Press*, 13 F.3d at 700 (discussing duties of newspaper writers), with Ho, *supra* note 6 (discussing duties of reality television writers).

164. CAL. LAB. CODE § 515(e) (West 2003).

165. *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1229 (5th Cir. 1990).

166. *See id.* at 1228–29.

167. *See id.* at 1229.

168. *See id.*

Although a reality writer is responsible for creating emotions and articulating a story, a majority of the writers' time is spent sorting and "throwing away" video footage.¹⁶⁹ For example, to generate a thirty-minute episode, reality writers might have to catalogue about six days worth of footage.¹⁷⁰ Often, writers on reality television may even have to go through dozens of tapes simply to find one specific word.¹⁷¹ In light of the primary duty requirement, using one's imagination does not appear to take up more than fifty percent of a reality writer's time. Similar to *Gateway Press*, where the court held that the reporters' primary duty was to collect information that was already public and combine it into a single source,¹⁷² reality writers combine footage to make a single episode.¹⁷³ Moreover, even if the reality writers' job function involves imagination, they do not spend most of their time on imaginative tasks but, instead on searching for and cataloguing specific scenes.¹⁷⁴ For these reasons, it is unlikely that a court would find that writers on reality shows satisfy the primary duty requirement.

C. Reality Writers Lack Originality Required by the Regulations

Originality is another essential element that courts look at to determine creativity.¹⁷⁵ Current regulations include originality as part of assessing whether an employee's primary duty requires creativity.¹⁷⁶ While the old regulations contained no originality requirement,¹⁷⁷ courts nonetheless considered originality as a factor in determining creativity.¹⁷⁸ Courts interpret originality as the capacity to think or act independently.¹⁷⁹

169. Ho, *supra* note 6.

170. David Rupel, How Reality TV Works, Writers Guild of America, West, <http://www.wga.org/organizesub.aspx?id=1091> (last visited Oct. 23, 2006).

171. *Reality TV Editors and Producers Discuss "Frankenbyting" and Other Forms of Audience Deception*, REALITY BLURRED, Oct. 24, 2005, http://www.realityblurred.com/realitytv/archives/industry_news/2005_Oct_24_radar_editors (last visited Jan. 12, 2007) [hereinafter *Frankenbyting*].

172. *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 700 (3rd Cir. 1994).

173. *See* Rupel, *supra* note 170.

174. *See id.*

175. 29 C.F.R. § 541.302(a) (2006).

176. *See id.*

177. *Compare* *Sherwood v. Wash. Post*, 871 F. Supp. 1471, 1479 (D.D.C. 1994) (citing to the old regulations), *with id.* (including originality as part of the current regulations.).

178. *See* *Sherwood*, 871 F. Supp. at 1482.

179. *See* *Wang v. Chinese Daily News, Inc.*, 435 F. Supp. 2d 1042, 1052 (C.D. Cal. 2006) ("Reporters also do not qualify as exempt creative professionals if their work product is subject to substantial control by the employer.").

Thus, a court does not consider an employee whose work product is subject to substantial control by the employer to be acting or thinking independently, and therefore his or her work lacks legally quantifiable originality.¹⁸⁰ In California, the regulations go even further and require that the employee “customarily and regularly exercises discretion and independent judgment in the performance of duties.”¹⁸¹

For example, in *Dalheim v. KDFW-TV*, the court held that because management heavily dictated the news reporters’ duties, their work was not original and thus not exempt under FLSA.¹⁸² Some of the findings of fact revealed that the reporters received “the story that the station intend[ed] they cover, what they [were] expected to shoot, and the intended angle or focus of the story.”¹⁸³ The court found that because the reporters lacked the ability to control their own work product, their work was not original.¹⁸⁴ In comparison, in *Sherwood v. Washington Post* the court found that the reporter’s duties did require a degree of originality.¹⁸⁵ It was critical to the court’s ultimate finding that Sherwood “was not a robot run by his editors.”¹⁸⁶ The court held that because his job required him to “maintain a wide network of sources, write engaging, imaginative prose, and produce stories containing thoughtful analysis of complex issues[,]” Sherwood’s work was not subject to substantial control by management but, rather was original in character.¹⁸⁷

Reality television writers will be unable to prove their work is original in character because of the constant input from their supervisors.¹⁸⁸ These writers are more like robots because executives control every aspect of the writers work—from the making of a scene to the completion of an episode.¹⁸⁹ For instance, a writer needs to discuss the multiple ways to end a particular scene with a story producer as opposed to making a decision on his or her own.¹⁹⁰ Usually, reality writers work in teams to shape an episode; afterwards their work is subject to substantial input from executive

180. *See id.*

181. CAL. CODE REGS. tit. 8, § 11120(1)(a)(3)(c) (2002).

182. *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1229 (5th Cir. 1990).

183. *Id.*

184. *See id.*

185. *See Sherwood*, 871 F. Supp. at 1482 (“His job required him to originate his own story ideas . . .”).

186. *Id.*

187. *Id.*

188. *See Stradel*, *supra* note 154.

189. *See Bartsch*, *supra* note 10.

190. *See id.*

and network screenings.¹⁹¹ An executive producer watches the writer's cut and then provides notes that can eradicate weeks worth of work.¹⁹² This level of supervision is similar to *Dalheim*, where the station simply assigned to reporters the story they needed to cover.¹⁹³ Unlike Sherwood, who worked with sources, wrote imaginative prose, and produced thoughtful analysis of complex issues,¹⁹⁴ reality television writers are forced literally to "pen the executive producer's inspired, proposed story."¹⁹⁵

If the reality writers in *Shriver* and *Sharp* can effectively demonstrate this seeming lack of discretion, this evidence will go a long way toward meeting their burden of proof on this element. Furthermore, since California requires that employees who work in a professional capacity use discretion and independent judgment in the performance of their duties,¹⁹⁶ it is unlikely that employers can demonstrate that reality writers meet this more stringent application. Due to the forceful direction of an executive producer's insight, it is likely that in *Shriver* and *Sharp* a court will find that the primary duty of a reality writer does not require originality.

D. Reality Writers Lack Talent Required by the Regulations

Talent is another essential element included in the current regulations, and courts look to talent in determining whether an employee's primary duty requires creativity.¹⁹⁷ Talent is the opposite of general ability.¹⁹⁸ The exercise of talent requires an advanced skill or expertise.¹⁹⁹ An exempt employee's primary duty must not consist of routine or standard tasks.²⁰⁰

For example, in *Gateway Press*, the court held that the employees' primary duty consisted of routine labor that only required a general ability and was therefore lacking a unique talent.²⁰¹ In that case, the Secretary of Labor successfully argued that FLSA covered journalists,²⁰² thus, they were

191. See Stradel, *supra* note 154.

192. *Id.*

193. *Dalheim*, 918 F.2d at 1229.

194. *Sherwood*, 871 F. Supp. at 1482.

195. Reality Writer, *supra* note 157.

196. CAL. CODE REGS. tit. 8, § 11120(1)(a)(3)(c) (2002).

197. 29 C.F.R. § 541.302(a) (2006).

198. *See id.*

199. *See Reich v. Gateway Press, Inc.*, 13 F.3d 685, 700 (3d Cir. 1994).

200. *See id.*

201. *Id.*

202. *Id.* at 687.

not exempt employees.²⁰³ Gateway Press was a small newspaper with a local orientation and outlook.²⁰⁴ As a result, the reporters' job duties did not require a "unique talent in finding informants or sources that may give access to difficult-to-obtain information."²⁰⁵ In the court's view, while the reporters might have occasionally performed creative work, their primary duty was "routine fact gathering, work that could be done with 'general manual or intellectual ability and training.'"²⁰⁶ Nevertheless, some gathering of facts could constitute exempt work.²⁰⁷ The *Gateway Press* court referred to several specific jobs where fact gathering might be exempt, such as "an investigative journalist for the *Philadelphia Inquirer* or *Washington Post*, or a bureau chief for the *New York Times*."²⁰⁸ The key element in the holding of *Gateway* is that routine fact gathering does not require unique talent.²⁰⁹

Unlike investigative journalism, reality television writing merely requires a general ability. The role of a reality writer is to find a way to fill in the missing gaps in a story.²¹⁰ As explained by a career writer for reality television, filling in the missing gaps involves searching for "footage that may have happened days or weeks apart that are [*sic*] about the same topic."²¹¹ This aspect of reality writing is similar to the duties of the nonexempt employees in *Gateway Press* whose routine fact gathering did not give them access to difficult-to-obtain information.²¹² The reality writers' work does not involve difficult-to-obtain-information, but consists of collecting information from recorded footage.²¹³

Additionally, work performed on a reality show is not similar to that performed by an investigative journalist due to the lack of complexity involved in a reality writer's job duties. For example, a typical writer on a reality show will gather facts from recorded footage to create simple story lines, such as the break-up of an end-of-the-summer romance.²¹⁴ One example from a stereotypical reality show involves a writer who uses interview bites and a visual to show the main character solemnly taking his

203. *Id.* at 700.

204. *Id.* at 688.

205. *Gateway Press, Inc.*, 13 F.3d at 700.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. Rupel, *supra* note 170.

211. *Id.*

212. *See Gateway Press*, 13 F.3d at 700.

213. *See* Rupel *supra* note 170.

214. *Id.*

girlfriend's hand and leading her off, as the recorded interview segment explains how the main character needs to end the relationship.²¹⁵ Generating an episode about teenage puppy love only requires using general manual or intellectual ability; it does not require complex investigation. Due to inane fact gathering, the reality writer's primary duty is more similar to work performed by a small local newspaper affiliate, like the employees in *Gateway Press*, than work performed by "an investigative journalist for the *Philadelphia Inquirer* or *Washington Post*, or a bureau chief for the *New York Times*."²¹⁶

To illustrate, *Sherwood v. Washington Post* is a case that actually involved a prestigious paper, *The Washington Post*.²¹⁷ The court in that case agreed with the *Gateway Press* holding, finding that fact gathering for larger papers involved talent.²¹⁸ In *Sherwood*, the court compared the reporting jobs at *The Washington Post* with those at *Gateway Press*.²¹⁹ The court agreed with *Gateway Press*, insofar as it held that "local, weekly newspaper reporters, whose primary duties consisted of gathering facts for publications such as school lunch menus and wedding announcements," did not meet the requirements of the creative professional exemption.²²⁰ However, the reporting job at *The Washington Post* required "talent" that was not required at the hypothetical smaller local paper.²²¹ Reporters covered multifaceted topics "such as complex D.C. politics, Virginia politics, and vice presidential candidates, not school lunch menus and church news."²²²

Ultimately, the court found that the job of a *Washington Post* reporter was a "prestigious, competitive job among journalists."²²³ Talent seems to encompass more than just skill beyond a general ability. Talent, in a somewhat paradoxical twist, incorporates the idea that the reputation of the newspaper dictates the likelihood that the employees themselves are talented. Thus, it seems the higher the prestige of the paper, the greater the probability that the paper's employees are talented and creative professionals. Conversely, the smaller and less important the paper, the

215. *Id.*

216. *Gateway Press*, 13 F.3d at 700.

217. *Sherwood v. Wash. Post*, 871 F. Supp. 1471 (D.D.C. 1994).

218. *See id.* at 1482 (distinguishing between "a small reporter" and a reporter who "originate[s] his own story ideas, maintain[s] a wide network of sources, write[s] engaging, imaginative prose, and produce[s] stories containing thoughtful analysis of complex issues").

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Sherwood*, 871 F. Supp. at 1473.

less likely it is that the paper's employees are talented.

The primary duty of a reality writer is not similar to that of a *Washington Post* reporter. Reality writers take recorded footage and shape issues to engage the viewer's empathy, create tension, and provide turning points in the arc of a show's characters.²²⁴ Further, industry veterans such as talent agent Jerry Katzman, claim reality writing requires talent.²²⁵ Alternatively, the job duties of a reality writer are more similar to writing about school lunch menus and wedding announcements than covering D.C. politics. On a reality program, the writer's talent involves searching through footage to ensure that they actually have the shot they want, such as "the shot of Dane vomiting on Krystal . . . and if so, [that] it's vomit and not just spit, and that it's Krystal and not Madison."²²⁶ This is in sharp contrast to investigating the intricacies of the running platform for a D.C. mayoral candidate. If talent consists of covering complex topics, then scripting shots of a main character vomiting does not require much talent. Further, if the reputation of the employer dictates the likelihood that its employees themselves are talented, then reality writing is not at the top of the totem-pole. "In the writing culture of Hollywood, the top level is movie screenwriting, the middle is TV, the bottom is reality."²²⁷ Therefore, it is very unlikely that a court would find that a reality writer's job function involves talent, which is an essential step in determining whether an employee satisfies the creative professional's exemption.

E. Reality Writers' Work Depends Primarily on Intelligence, Diligence and Accuracy

Another significant element that courts use to determine whether an employee's work is creative is "intelligence, diligence and accuracy."²²⁸ The regulations define creative work as requiring "invention, imagination, originality or talent."²²⁹ Courts interpret "intelligence, diligence and accuracy" as any variety of work that is dependent on the employee being "consistent and repetitive."²³⁰ It is also important that a court "distinguish

224. See Bartsch, *supra* note 10.

225. See, e.g., Ho, *supra* note 6.

226. Stradel, *supra* note 154.

227. See William Booth, Reality Is Only An Illusion, Writers Say: Hollywood Scribes Want a Cut Of Not-So-Unscripted Series, WASH. POST, Aug. 10, 2004 at C1.

228. Wang v. Chinese Daily News, Inc., 435 F. Supp. 2d 1042, 1052 (C.D. Cal. 2006) (citing 29 C.F.R. § 541.302(d) (2006)).

229. 29 C.F.R. § 541.302(b).

230. Dalheim v. KDFW-TV, 706 F. Supp. 493, 502 (N.D. Tex., 1988) *aff'd* 918 F.2d 1220 (5th Cir. 1990).

between those persons whose work is creative in nature from those who work in a medium capable of bearing creative expression, but whose duties are nevertheless functional in nature.”²³¹ Courts recognize that the majority of reporters are engaged in “work which depends primarily on intelligence, diligence, and accuracy.”²³² The perception that “only a minority of reporters engage in work depending on invention, imagination, and talent” establishes a presumption that reporters are typically uncreative.²³³

For example, in *Dalheim v. KDFW-TV*, the Fifth Circuit held that the employees’ primary duties did not consist of creative work, but instead involved “diligence and intelligence.”²³⁴ KDFW-TV claimed that the daily responsibilities of their employees were creative because the reporters “meld[ed] language and visual images into an informative and memorable presentation.”²³⁵ The Fifth Circuit disagreed and found that the development of memorable presentations comprised of sound and pictures reflected the reporter’s dependence on accuracy, diligence and intelligence.²³⁶

The court reviewed the trial court’s determinations and inferences from fact (i.e. that a reporter’s work is uncreative) only for clear error, and concluded that the trial court did not err in holding that the reporters were nonexempt professionals.²³⁷ The trial court concluded that melding sound and pictures did not equate to creativity.²³⁸ The reporters’ use of special effects and graphics did not change the underlying implication that this type of work only requires “intelligence, diligence and accuracy.”²³⁹ The television station argued that the use of graphics in a “consistent and repetitive” manner was necessary for viewers to be comfortable with watching the program.²⁴⁰ Under *Dalheim*, it is not the finished product that courts consider in their determination of creativity. It is the employees’ underlying task to which a court would look to determine whether their

231. *Dalheim*, 918 F.2d at 1229.

232. *Wang*, 435 F. Supp. at 1052.

233. *Id.*

234. *Dalheim*, 918 F.2d at 1229.

235. *Id.* at 1228–29.

236. *Id.* at 1229.

237. *Id.*; see Cavanaugh, *supra* note 76, at 298 (noting that a not clearly erroneous finding is not dispositive of the issues raised in this case— “[i]ts decision, however, was hardly a ringing endorsement of the district court’s ruling below”).

238. *Dalheim*, 918 F.2d at 1229.

239. *Dalheim v. KDFW-TV*, 706 F. Supp. 493, 502 (N.D. Tex., 1988) *aff’d* 918 F.2d 1220 (5th Cir. 1990) (rejecting the argument that “use of special effects or graphics” has any effect on the fact that reporters are directed by management).

240. *Id.* (“[G]raphics are . . . used . . . where . . . there are several points or statements which the viewer needs to keep in mind simultaneously.”).

duties are functional in nature.²⁴¹

Similarly, writers on reality television do not utilize creativity in their work, but instead, create episodes using “intelligence, diligence and accuracy.” The role of a reality writer is to create a compelling story for an episode using recorded footage.²⁴² The duties of both news reporters and reality writers are similarly repetitive in nature. In particular, one technique reality writers use to make improvements to a story is frankenbyting.²⁴³ This technique involves a process of selective editing, creating the illusion that participants on reality shows said things that they never actually said.²⁴⁴

In order to create these “improvements,” reality writers have to watch tapes, find the right word, cut the scenes together and check to make sure the word matches with the rest of the dialogue.²⁴⁵ Frankenbyting does not require creativity, but involves diligence and accuracy in order to create a finished product. The process of frankenbyting is functional in nature because reality writers must listen to numerous hours of interviews just to find one specific word.²⁴⁶ Further, just as reporters meld sound and picture in a way that an audience can understand, frankenbyting requires accuracy and diligence in order to maintain the continuity of the footage with the audio that came from a different scene.²⁴⁷

Alternatively, in *Reich v. Newspapers of New England*, the court held that a photojournalist’s duties lacked the requisite imagination, invention or talent because the reporter spent more than fifty-percent of his time on standardized work.²⁴⁸ Acknowledging that there are creative aspects to photojournalism, the reporter admitted that the majority of *his* work was run-of-the-mill and standardized.²⁴⁹ The reporter attributed his lack of creativity to the absence of a personal statement in his work.²⁵⁰ The court agreed that a photojournalist’s work is not creative art because they “try to photograph reality, as it happens, without embellishment, without taking sides.”²⁵¹ It appears that the lack of embellishment and a personal

241. *Dalheim*, 918 F.2.d at 1229.

242. *Rupel*, *supra* note 170.

243. Verne Gay, *Who’s Doctoring Reality Shows?*, *NEWSDAY*, <http://www.newsday.com/entertainment/tv/ny-gay-realitydoctoring-0721,0,329167.story?coll=ny-television-headlines>.

244. *Id.*

245. *Frankenbyting*, *supra* note 171.

246. *Id.*

247. *Id.*

248. *Reich v. Newspapers of New Eng., Inc.*, 834 F. Supp. 530, 538 (D.N.H. 1993).

249. *Id.*

250. *Id.*

251. *Id.*

statement would distinguish creative work from work that depends on intelligence, diligence and accuracy.

Unlike reporters, photography without embellishment is exactly the opposite of what writers on reality shows do. The frankenbyte is the most potent tool reality writers possess for manipulating a viewer's perception of reality.²⁵² A frankenbyte allows writers of reality shows to manufacture conflicts, characters, and other elements of the plot by extracting only interesting elements from the recorded footage.²⁵³ Generally, this type of work is more similar to a personal statement because it allows writers on reality television to insert their own interpretation of events and embellish on the reality of the situation.

For example, on *America's Next Top Model*, a dilemma faced the writers: how do you make a show interesting when you have a closed universe of two-dimensional archetypes of pretty-but-dumb girls?²⁵⁴ To address this dilemma, the writers embellished on reality by creating religious confrontations.²⁵⁵ More specifically, by combining a multitude of interviews and footage, the reality writers used salient outtakes to create a story driven by conflict between Christians and Atheists.²⁵⁶ Thus, unlike the photojournalist, the reality writers did more than merely combine footage as it happens without embellishment or taking sides.

Nevertheless, this type of work is usually not that similar to creating a personal statement because the ultimate goal in frankenbyting is often to *approximate the missing scene*, not to create a new one.²⁵⁷ Reality writers often approximate scenes in order to fill missing footage when something occurs off camera.²⁵⁸ For example, in one show, the main character ended his relationship with his girlfriend off camera.²⁵⁹ Accordingly, the reality writers had to explain what happened by melding sound and interview techniques to create the missing scene.²⁶⁰ Sorting through hours of footage to create drama between two polarized groups is ultimately not that different than melding language and visual images to create a memorable

252. See Kevin Arnovitz, *Virtual Dictionary: A Guide to the Language of Reality TV*, SLATE, Sept. 14, 2004, <http://www.slate.com/id/2106572/>.

253. See *id.*

254. John Bowman, *God and Woman at America's Next Top Model*, Writers Guild of America, West, <http://www.wga.org/organizesub.aspx?id=1095> (last visited Oct. 23, 2006).

255. *Id.*

256. *Id.*

257. Rupel, *supra* note 170.

258. *Id.*

259. *Id.*

260. *Id.*

presentation, as the KDFW-TV reporters did.²⁶¹

Since creating an interesting reality show can be difficult, writers on reality programs must be incredibly skillful, intelligent and diligent. In order to create a coherent episode, the writer must sort through hours of interviews to find scenes that have similar emotional beats and voice tone, and shape the material into a new topic.²⁶² For example, in order to depict accurately an emotional break-up, reality writers must be diligent in finding footage depicting the same angry body language or similar looks of frustration.²⁶³

In some situations, courts recognized that only a minority of employees perform creative work, while the majority is engaged in work requiring intelligence, diligence, and accuracy.²⁶⁴ A court could find that reality writers are unable to overcome their burden by proving they perform in a creative work environment. First, courts often hold that melding sound and images is not necessarily creative because of the routine nature in which the task is completed.²⁶⁵ Second, the fact that reality writers are embellishing storylines is not dispositive because their actions can also be interpreted as creating scenes to approximate the missing ones.²⁶⁶ Finally, even if writers are embellishing on reality, their primary duty involves watching and cataloguing numerous hours of footage, merely to find a missing word.²⁶⁷ This type of work requires intelligence, diligence and accuracy rather than creative genius. Nevertheless, while reality television writers are not creative in the eyes of the law, they deserve recognition for the skill it takes to produce compelling narratives.

IV. FUTURE COMPENSATION ARRANGEMENTS

This Comment predicts that in the two pending class action suits, production companies will be liable to reality writers for overtime compensation because employers improperly classified them as exempt creative professionals. The success of these lawsuits might encourage production companies to look for alternatives to simply paying overtime to their employees. One possible solution is to allow the writers on the reality shows to unionize under the WGA. Hello Doggie, the production company

261. See *Dalheim*, 918 F.2d at 1229.

262. *Rupel*, *supra* note 170.

263. *Id.*

264. See *Wang v. Chinese Daily News, Inc.*, 435 F. Supp. 2d 1042, 1052 (C.D. Cal. 2006).

265. *Dalheim*, 918 F.2d at 1229.

266. See *Rupel*, *supra* note 170.

267. *Frankenbyting*, *supra* note 171.

that creates *The Daily Show*, found a union solution to be a suitable alternative to its overtime dilemma, rather than engaging in costly litigation.²⁶⁸

While *The Daily Show* is not a soap-opera styled reality program, it does involve a similar format. Researchers scanning major newspapers create guidelines for the show and then give possible topics to the writers.²⁶⁹ After the writers meet to discuss headline material for the lead news segment, the actors perform the material in a variety-style format.²⁷⁰ The WGA considers the unionization of the writers on *The Daily Show* to be a major victory for reality writers.²⁷¹ The writers on *The Daily Show* will see significant increases in their compensation, in line with the compensation received by writers on other late night comedy variety shows.²⁷² Further, writers will be paid residuals for additional runs of the program and for foreign broadcasts.²⁷³ A provision giving writers added coverage from the Writers Guild-Industry Health Fund is included in the agreement, as well as pension benefits.²⁷⁴ While many writers for reality shows consider unionization the most viable option in order to gain the benefits they seek, the issue still remains as to whether production companies will accept unionization as a solution.

There is a generalized belief in the entrainment industry that collective bargaining can ward off wage and hour lawsuits. However, in unionized settings, while workers cannot bring certain types of civil claims, courts have allowed workers to maintain wage and hour lawsuits outside the established grievance and arbitration system.²⁷⁵ Wage and hour obligations reflect a minimum standard set by law regardless of the collective bargaining agreement.²⁷⁶

Collective bargaining does have attractive aspects even if employees may still bring lawsuits under the collective bargaining agreements. There

268. Press Release, Writers Guild of America, East, Comedy Central's Daily Show Gets Writers Guild Contract (Aug. 25, 2006) available at http://www.wgaeast.org/news/industry/2006/08/25/daily_show_wga_contract/.

269. Comedy Central, *The Daily Show*, http://www.comedycentral.com/shows/the_daily_show/about_the_show.jhtml (last visited Apr. 26, 2007).

270. *Id.*

271. Press Release, *supra* note 268.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1076 (9th Cir. 2005) (“[T]he [Supreme] Court has sought to preserve state authority in areas involving minimum labor standards.”).

276. *See id.* (recognizing that parties cannot use a collective bargaining agreement to waive negotiable state rights conferred on employees by state law).

are three elements that must be present for a collective bargaining agreement to be valid: (1) the minimum wages, hours, and working conditions for the employee; (2) a regular rate of pay that is at least thirty-percent above the state minimum wage; and (3) "premium wage rates" for all overtime hours worked. Essentially, while employers must still pay a straight wage that is thirty-percent higher than the state minimum wage, they do not have to pay time and one-half for all overtime, as is required under state law.²⁷⁷ Thus, a collective bargaining agreement between reality writers and production companies could be a viable arrangement. Writers of reality programming could receive many of the benefits they covet, such as pension and health care, while production companies could pay a straight wage to their employees. Such a straight wage would be significantly less than the time and one-half required without such a collective bargaining agreement.

While a collective bargaining arrangement might work for the WGA, it might not work for all parties involved. If the guild covered reality writers, such coverage would result in writing credits.²⁷⁸ The pending wage and hour lawsuits are such contested issues for the entertainment industry because giving credit to reality writers could destroy the illusion that reality television portrays situations that naturally happen.²⁷⁹ One executive for a production company conceded that "reality show producers definitely do not want to see a 'written by' credit on their shows. It is important that people think it's real."²⁸⁰ This same executive said that a better solution would be to make a separate agreement to increase pay and health insurance, but does not want reality writers covered by a union contract.²⁸¹

Once guild contracts cover writers on reality television, the line between reality and scripted television writers becomes blurred. Do contestants on reality shows become members of the Screen Actors Guild? And if everyone is a member, will reality shows still be much more profitable? Producers are reluctant to create a slippery slope where, once reality writers have a guild contract, every one involved in creating a reality show will aspire to have a union contract. For these reasons, producers do not want to see a collective bargaining agreement, and guild members want reality shows considered "scripted."²⁸²

277. CAL. CODE REGS. tit. 8, § 11120(3)(a)(1)(2002).

278. See Booth, *supra* note 227.

279. *Id.*

280. *Id.*

281. See *id.*

282. See *id.*

This leads to both sides promulgating arguments that are entirely opposite from their stated position throughout this Comment. For example, in order to get reality writers covered under guild contracts, the WGA will need to claim there is a lot of creativity going on behind the scenes, including copious amounts of typing and manipulation.²⁸³ Further, the producers in this stage of argument will claim “writers on reality are not really writing in the traditional sense. There is no script. What they are doing is shaping the shows, which is different.”²⁸⁴ What is clear is that neither executives nor reality writers want to declare their position in this initial class action lawsuit for fear that an opposing party in a future lawsuit will use it against them.²⁸⁵

V. CONCLUSION

This Comment demonstrates that attempts to apply the creative professional exemption to writers on reality television will ultimately fail in the two pending class action suits. A reality writer’s ability to blend sound and images masterfully might be creative, but that ability is due to their extraordinary diligence, intelligence, and accuracy. A reality writer’s performance of his or her primary job duties does not require invention, imagination, originality or talent as defined and explained by court decisions discussing the requirements for a creative professional. Ironically, in order to receive overtime pay, the law requires that reality writers perform work that is not creative.²⁸⁶ Alternatively, if reality writer’s work is creative, they are designated as salaried employees, and not entitled to overtime compensation.²⁸⁷

283. *Compare id.* (stating that the WGA asserts that reality writers are creative professionals) *with* *Shriver v. Rocket Sci. Labs, L.L.C.*, No. BC338746 (Cal. Super. Ct. L.A. County filed Aug. 23, 2005) (alleging that the reality writers are not sufficiently creative to be exempt from overtime pay).

284. *See* Booth, *supra* note 227.

285. *Id.* (stating that, while lawsuits are pending, it is nearly impossible to get an executive or production company to comment on the high demand for unionization. Specifically, “[t]he executives decline to comment,” said Todd Beck, a spokesman for Bunin-Murray, the progenitors of reality shows including “The Simple Life” and “The Real World.” “They don’t want to talk about it at this time,” said Pam Gollum, spokeswoman for Nash Entertainment, producers of “Meet My Folks” and “For Love or Money”).

286. *See* 29 U.S.C. § 213 (a)(1) (2004).

287. *See id.*

This Comment establishes that reality writers should be entitled to overtime pay because their work lacks legally sufficient creative character. Thus, this Comment suggests that, although production companies are reluctant to work with unionized writers, it might be a smarter option to pursue a collective bargaining agreement than to be forced to pay costly overtime compensation.

*By Alexis Miller**

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