

Innocence of Cindy Lee Garcia: Why a Copyright Claim was the Wrong Choice for Legal Relief

Ahtoosa Amini*

I. INTRODUCTION

Imagine you are an aspiring actress. You audition for roles, even low-budget amateur films, in order to receive some experience. You are cast in a film. You do not expect the \$500-pay for four pages of script that requires only three days of filming to lead to stardom. However, you certainly do not expect to be the subject of a fatwa, an Islamic legal pronouncement,¹ condemning you to death for involvement with the film.²

This is an unlikely, but extremely controversial, situation that many actors, including Cindy Lee Garcia, faced after the release of a trailer for the anti-Islamic film *Innocence of Muslims* on YouTube.³ Mark Basseley Youssef, the film's writer and producer, induced the actors into believing that they were participating in an amateur dramatic film with the working title *Desert Warrior*.⁴ However, Youssef actually edited the film and released it, as seemingly intended, as an anti-Islamic film on YouTube causing protests that generated worldwide news coverage.⁵

Youssef used Garcia's scene and dubbed it over so that it appeared that Garcia was asking, "Is your Mohammed a child molester?" which are fighting words to many faithful Muslims.⁶ The film angered many Muslims and resulted in protests around the world.⁷ Soon after, an Egyptian cleric issued a fatwa sentencing all involved with the film to death, which

*Candidate for Juris Doctor 2016, Baylor Law School. I would like to thank Professor David Swenson and Professor Michael Morrison for their guidance and support.

¹Noah Feldman, Third Annual Henry Lecture: *The Democratic Fatwa: Islam and Democracy in the Realm of Constitutional Politics*, 58 OKLA. L. REV. 1, 5 (2005).

²*Garcia v. Google, Inc.*, 766 F.3d 929, 932 (9th Cir. 2014), *rev'd en banc*, 786 F.3d 733 (9th Cir. 2015).

³*Id.*

⁴*Id.*

⁵*See id.*

⁶*See id.*

⁷*Id.*

ultimately caused Garcia, and the other actors, to receive death threats.⁸ This forced Garcia to take a number of security precautions and to request that Google⁹ remove this film from YouTube.¹⁰

Google has an important interest in refusing to interfere with one's freedom of expression.¹¹ The public has a strong interest in its First Amendment protections.¹² With this in mind, Google resisted and eventually refused to act upon Garcia's requests.¹³ In response, Garcia filed for a temporary restraining order seeking removal of the film from YouTube.¹⁴ The district court denied her motion because she delayed in bringing the action, failed to demonstrate the relief an injunction would allow, and, most importantly, failed to prove that she had a copyright interest.¹⁵

When the Ninth Circuit received the case, it reviewed the case on an abuse of discretion standard.¹⁶ Despite this high standard, the Ninth Circuit reversed and granted the preliminary injunction.¹⁷ It found that Garcia would likely succeed on her copyright claim, that the removal would prevent harm, and that the balance of equities favors Garcia.¹⁸ The troubling result of this case is the finding that an actor could possibly have a copyright interest in his or her role in a film, even without being the author of the scene he or she participated in.¹⁹ In September 2014, Gaylord Flynn, another actor in the *Innocence of Muslims*, filed suit against the director and Google for copyright infringement as well.²⁰

⁸ *Id.*

⁹ YouTube is a Google company. *About YouTube*, YOUTUBE, <https://www.youtube.com/yt/about/> (last visited Apr. 9, 2015).

¹⁰ *Garcia*, 766 F.3d at 932.

¹¹ *Id.* at 948 (Smith, J., dissenting).

¹² *Id.*

¹³ *Id.* at 932 (majority opinion).

¹⁴ *Id.*

¹⁵ *Id.* at 932–33.

¹⁶ *Id.* at 933.

¹⁷ *Id.* at 940.

¹⁸ *Id.*

¹⁹ *See* 17 U.S.C. § 102 (2012).

²⁰ Andrew Chung, *Second Actor Sues Google Over 'Innocence of Muslims' Movie Trailer*, REUTERS (Sept. 15, 2014, 2:35 PM), <http://www.reuters.com/article/2014/09/15/us-usa-google-movie-idUSKBN0HA20420140915>.

The Ninth Circuit should have affirmed the denial of the preliminary injunction, despite the terrible consequences that have fallen upon these actors.²¹ Even with the removal of the video, people still have access to it, and it will not necessarily provide the relief that the actors desire.²² As the trial court noted in this case, there is no way to repair Garcia's harm because even if this video is taken down from YouTube, people still have downloaded the video and have placed it on other websites.²³ One judge asked Garcia's lawyer an important question during the en banc re-hearing, "Is there anybody in the world that doesn't know that your client is associated with this video?"²⁴ Garcia's attorney had no response.²⁵

Even if removal of the film would provide relief, the actors should have sought state law causes of action.²⁶ Despite the ability to actually bring Youssef into court, the actors would have more satisfactory relief through state law claims.²⁷ However, extending actors a copyright interest undermines Congress's power to delegate the scope of copyright law. It also provides an interest to actors that Congress never intended to protect.²⁸ The government provides copyright protection to authors in their forms of expression.²⁹ Actors are not the authors of a scene in a film.

This comment addresses the issues of creating a copyright interest for actors in a film, and the alternative routes these actors could have sought relief for their injuries. Part II focuses on the history of copyright law to demonstrate in detail the reason Congress has not provided acting as a subject matter to be protected under copyright laws. Part III discusses the Ninth Circuit decision and its implications. Part IV suggests other possible solutions under state law rights and remedies that could properly relieve these actors. Part V explores the en banc re-hearing granted to Google in December 2014 that ultimately affirmed the original denial of a preliminary

²¹ See *Garcia*, 766 F.3d at 932 ("An Egyptian cleric issued a fatwa, calling for the killing of everyone involved with the film, and Garcia soon began receiving death threats.").

²² United States Court of Appeals for the Ninth Circuit, 12-57302 *Cindy Garcia v. Google, Inc.*, YOUTUBE (Dec. 16, 2014), <https://www.youtube.com/watch?v=I7klODSykgU>.

²³ See generally *id.*

²⁴ *Id.* at 1:02:08–1:02:22.

²⁵ *Id.*

²⁶ See discussion *infra* Part IV.

²⁷ See discussion *infra* Part IV.

²⁸ See 17 U.S.C. § 102(a) (2012) (Acting is not specifically included by Congress as a type of work with a protected interest).

²⁹ *Id.*

judgment. Finally, Part VI concludes with an emphasis on the importance of limiting copyright protection to the creators of the film, rather than the actors portraying the creators' ideas.

II. HISTORY OF COPYRIGHT

A. *Beginning With the Printing Press*

Copyright laws emerged in the wake of the printing press and have evolved to encompass other methods of reproducing works of authorship, such as photography, motion pictures, musical compositions, and sound recordings.³⁰ By the mid-1400s, Johannes Gutenberg, a German goldsmith, developed a printing press.³¹ By 1472, he created a larger press that ultimately led to production of the first printed version of the Bible.³²

The new technology began with some resistance from nobles, who refused to tarnish their libraries of hand copied manuscripts with printed books, and the Catholic Church, which wanted to control technology of mass communication.³³ Nonetheless, the technology spread throughout Europe.³⁴ By 1469, the Venetian Republic granted Johann Speyer a patent for the printing press, giving him the exclusive right to print books for all Venetian territories for five years.³⁵ A few decades later, the Venetian Cabinet for the first time gave the exclusive rights in printing particular books, rather than over the technology of reproduction, to Daniele Barbaro.³⁶ He was awarded a ten-year exclusive grant to publish a book written by his late brother, Ermolao.³⁷

Soon after the introduction of the printing press, England granted the first "copyright" by royal decree in 1556.³⁸ The Crown only allowed Stationers' Company to be in the printing business for political reasons.³⁹

³⁰RICHARD R. BOWKER, COPYRIGHT: ITS HISTORY AND ITS LAW 10 (William S Hein & Co. 1912).

³¹See 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:2 n.2 (2015).

³²*Id.*

³³See *id.*

³⁴BOWKER, *supra* note 30, at 13.

³⁵*Id.*

³⁶*Id.*

³⁷*Id.*

³⁸*Id.* at 21.

³⁹*Id.*

The printers, not authors, of the company had the exclusive right to print and sell books forever.⁴⁰ The government awarded the copyrights to loyal publishers who would not publish books that the Crown considered politically or religiously objectionable.⁴¹ In 1694, Stationers' Company's exclusive right ended, and it faced competition for the first time.⁴² This prompted the Parliament to pass the Statute of Anne in 1710, which paved the way to the more modern approach to copyright law.⁴³ This statute created the foundation for copyright law in the United States.⁴⁴

B. Statute of Anne to the United States Laws

The Statute of Anne gave *authors*, rather than printers, the exclusive right over their works.⁴⁵ Their rights were limited to only 14 years, renewable once for 14 more years, unlike the perpetual rights given to Stationers' Company.⁴⁶ The statute had a complex system of registration, notice, and deposit requirements, and the government set the maximum price at which authors could sell their books.⁴⁷ Copyright developed throughout Europe in order to protect *authors* and to promote moral rights.⁴⁸

The United States started to pass state copyright laws based on the Statute of Anne shortly after gaining independence, promoting similar goals as those in Europe.⁴⁹ Some states were even more restrictive than those laws in Europe.⁵⁰ Problems arose with applying conflicting state laws, which led to the creation of federal copyright laws that were authorized by the federal government in the Constitution.⁵¹ One of the first acts of the new Congress was to pass the Copyright Act of 1790, which granted authors protection for books, maps, and charts for 14 years, with one renewal.⁵² As

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 22.

⁴³ *Id.* at 23.

⁴⁴ *Id.*

⁴⁵ *Id.* at 24.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See id.*

⁴⁹ *Id.* at 35.

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² *Id.*

new technology was created, Congress would incorporate other forms of media.⁵³ By the end of the nineteenth century and into the twentieth, copyright protection was extended to prints, musical compositions, dramatic works, photographs, graphic works, and sculpture.⁵⁴

C. Changes to the Copyright Act During the Twentieth Century

In 1909, a major revision was made to the Copyright Act. The Act provided that copyrights may be secured for “all the writings of an author”⁵⁵ under one of the following classes: (1) books; (2) periodicals; (3) lectures, sermons, addresses, prepared for oral delivery; (4) dramatic compositions; (5) musical compositions; (6) maps; (7) works of art, models, or designs for works of art; (8) drawings or plastic works of scientific or technical character; (9) photographs; and (10) prints and pictorial illustrations.⁵⁶ This listing is followed by a note that copyright protection is not limited to the subject matter as defined by the classes.⁵⁷ Congress intended a flexible definition so not to “freeze the scope of copyrightable subject matter at the present stage of communications technology or . . . allow unlimited expansion into areas completely outside the present congressional intent.”⁵⁸ Yet, the courts and the Copyright Office implicitly assumed that the list provided by Congress was exhaustive and would not protect works unless the work was specifically defined by the Act.⁵⁹

By 1976, Congress compiled a new Act that comprises the basis for copyright law today. This Act ended the dichotomy previously in place with common law copyright and federal copyright through Section 301(a) of the current Act.⁶⁰ The new Act listed seven broad categories of work, which included: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic and

⁵³ See *id.* at 37 (For example, Congress revised the Act of 1870 to include “paintings, drawings, chromos, statuettes, statuary, and models or designs intended to be perfected as works of the fine arts.”).

⁵⁴ *Id.* at 39.

⁵⁵ Copyright Act of 1909, ch. 320, § 4, 35 Stat. 1075, 1076.

⁵⁶ *Id.* § 5, 35 Stat. at 1076–77.

⁵⁷ *Id.* § 5, 35 Stat. at 1077.

⁵⁸ 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.03[A] (2015).

⁵⁹ *Id.* at n.7.

⁶⁰ *Id.* § 2.02.

sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings.⁶¹ An eighth category, architectural works, was added by amendment in 1990.⁶²

In order to have a copyright protection, there are three basic requirements: (1) originality; (2) work of authorship; and (3) fixed in any tangible medium of expression.⁶³ The originality requirement, distinguished from novelty, merely calls for independent creation.⁶⁴ It requires that the work owes its origin to the author and not copied from other works.⁶⁵ Reading the statute literally, works of authorship are not necessarily limited to the eight broad categories listed under 17 U.S.C. § 102(a).⁶⁶ However, the House Report seems to imply that works that have been in existence for generations, but have only now gradually come to be recognized as creative and worthy of protection, will not be protected unless explicitly listed under Section 102.⁶⁷ For example, choreography and sound recordings were not protected under the Copyright Act of 1909, although dramatic works and musical compositions were listed specifically as works of authorship.⁶⁸ Choreography and sound recordings were later added as specific categories.⁶⁹ Finally, the work must be fixed to a tangible medium, which is not only a statutory condition, but also a constitutional necessity.⁷⁰ Thus, the work must be reduced to a tangible form.⁷¹

III. *GARCIA V. GOOGLE, INC.* – THE TROUBLING DECISION AND ITS IMPLICATIONS

There is no doubt that Garcia, and the other actors in the film, were in a terrible position. Unfortunately, Youssef was an unavailable target because he did not appear in court.⁷² The only defendant Garcia could find relief

⁶¹ *Id.* § 2.03[A] n.6.

⁶² *Id.*

⁶³ 17 U.S.C. § 102(a) (2012).

⁶⁴ NIMMER, *supra* note 58, § 2.01[A].

⁶⁵ *Id.* § 2.01[A].

⁶⁶ *Id.* § 2.03[A].

⁶⁷ *Id.* § 2.03[A].

⁶⁸ Compare Copyright Act of 1909, ch. 320, § 4, 35 Stat. 1075, 1076, with 17 U.S.C. § 102(a).

⁶⁹ 17 U.S.C. § 102(a).

⁷⁰ NIMMER, *supra* note 58, § 2.03[B].

⁷¹ *Id.*

⁷² *Garcia v. Google, Inc.*, 766 F.3d 929, 932 n.1 (9th Cir. 2014), *rev'd en banc*, 786 F.3d 733 (9th Cir. 2015).

from was Google.⁷³ One can understand why the Ninth Circuit desired to grant her the relief she desired.⁷⁴ However, the Ninth Circuit cannot stray from the abuse of discretion standard it is required to abide by,⁷⁵ and allowing the protection through creation of law is normally a route that courts should avoid.

A. The Ninth Circuit Decision in Detail

Garcia filed eight takedown notices under the Digital Millennium Copyright Act.⁷⁶ The district court treated her application as a motion for preliminary injunction.⁷⁷ The court denied her motion because she had failed to demonstrate that the requested preliminary relief would prevent any harm and was unlikely to succeed on the merits because she had granted Youssef an implied license to use her performance.⁷⁸

The Ninth Circuit could only reverse the denial of the preliminary injunction if the district court abused its discretion.⁷⁹ In order to grant a preliminary injunction, the court needed to consider four factors: (1) a plaintiff's likely success on the merits; (2) the likelihood that irreparable harm will result if an injunction does not issue; (3) the balance of equities; and (4) the public interest.⁸⁰ A court should grant a preliminary injunction if there is a likelihood that the plaintiff will succeed on the merits.⁸¹ The Ninth Circuit erroneously found that Garcia was likely to succeed on the merits.⁸²

The Ninth Circuit admitted that it had no basis to find whether Garcia conceived the film as a joint work with Youssef.⁸³ A joint work consists of a number of contributions by different authors.⁸⁴ In order to have a joint

⁷³ *Id.*

⁷⁴ *See id.* at 932 (Garcia began receiving death threats because of the issuance of the fatwa).

⁷⁵ *Id.* at 933.

⁷⁶ *Id.* at 932.

⁷⁷ *Id.*

⁷⁸ *Id.* at 932–33.

⁷⁹ *Id.* at 933.

⁸⁰ *Id.* (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

⁸¹ *Id.*

⁸² *See id.* at 940.

⁸³ *Id.* at 933.

⁸⁴ *Id.*

work, the authors must intend the work to be so.⁸⁵ Because Garcia expressly disclaimed such intent and the lack of evidence that Youssef had intent for a joint work, the Ninth Circuit correctly disregarded this idea.⁸⁶

However, the Ninth Circuit delved into the idea that Garcia may still have a copyright interest in her own performance.⁸⁷ The court stated, “Nothing in the Copyright Act suggests that a copyright interest in a creative contribution to a work simply disappears because the contributor doesn’t qualify as a joint author of the entire work.”⁸⁸ The court then noted the three basic requirements for copyright protection: the interest must be a work of authorship,⁸⁹ fixed in a tangible medium of expression,⁹⁰ and original.⁹¹

For the first requirement, the court incorrectly compared Garcia’s acting, which was dubbed over, to pantomimes or choreographic works, which is protected under 17 U.S.C. § 102.⁹² Then, the court assumed that her performance was fixed because it was attached to the film.⁹³ With the originality requirement, the court noted that although Youssef wrote the dialogue and managed all aspects of production, including dubbing over her part, Garcia did far more than speak words, she also “live[d] [her] part inwardly and . . . [gave] . . . [her] experience an external embodiment.”⁹⁴ The court also compared acting to vocal performances.⁹⁵ Although the court correctly pointed out that vocal performances, when fixated, are often copyrighted, it failed to recognize that 17 U.S.C. § 102 specifically lists sound recordings as a subject matter that can be protected.⁹⁶

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 934.

⁸⁹ 17 U.S.C. § 102(a) (2012).

⁹⁰ *Id.* § 101.

⁹¹ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (stating that originality means that the work was independently created by the author and possessing at least some minimal degree of creativity).

⁹² 17 U.S.C. § 102(a)(4); *Garcia*, 766 F.3d at 934.

⁹³ See *Garcia*, 766 F.3d at 934 (“Where, as here, the artistic contribution is fixed, the key question remains whether it’s sufficiently creative to be protectible.”).

⁹⁴ *Id.* (quoting CONSTANTIN STANISLAVSKI, AN ACTOR PREPARES 15, 219 (Elizabeth Reynolds Hapgood trans., 1936)).

⁹⁵ *Id.* at 935.

⁹⁶ 17 U.S.C. § 102(a); *Garcia*, 766 F.3d at 935.

The court concluded that Garcia did make a protectable contribution to the film because she used her creativity to bring life to her character, even if her voice was dubbed over.⁹⁷ The court noted that it did not need to decide whether every actor has a copyright interest in his performance within a movie.⁹⁸ It also stated that the district court could still find that Garcia did not have a copyrightable interest, once the court needed to decide whether to issue a permanent injunction.⁹⁹ However, this is a strange holding because, as the dissent points out, “[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits”¹⁰⁰

The dissent correctly explained that the majority failed to apply the requisite standard of review for the type of relief Garcia was seeking.¹⁰¹ The dissent opined that Garcia was specifically seeking a mandatory injunction, which is different from the usual prohibitory injunction.¹⁰² This mandatory injunction, which goes beyond seeking the status quo as the usual prohibitory injunction provides, is particularly disfavored and subject to a higher degree of scrutiny.¹⁰³

To reverse the district court’s denial of this preliminary injunction, the Ninth Circuit needed to find that the district court’s decision was illogical or implausible.¹⁰⁴ The majority stated that there is a possibility that Garcia had no copyright interest at all,¹⁰⁵ which does not abide by this abuse of discretion standard.¹⁰⁶ The Ninth Circuit found this copyright interest for Garcia, even though an actor has never been found to have such an interest, resulting in creating new law to obtain the result it desired.¹⁰⁷

⁹⁷ *Garcia*, 766 F.3d at 935.

⁹⁸ *Id.*

⁹⁹ *Id.* at 935.

¹⁰⁰ *Id.* at 941 (Smith, J., dissenting) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

¹⁰¹ *Id.* at 940.

¹⁰² *Id.*

¹⁰³ *Id.* (quoting *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994)).

¹⁰⁴ *Id.* (citing *United States v. Hinkson*, 585 F.3d 1247, 1263–64 (9th Cir. 2009)).

¹⁰⁵ *Id.* at 935 (majority opinion).

¹⁰⁶ *Id.* at 941 (Smith, J., dissenting).

¹⁰⁷ *Id.*

B. Even Though Congress Has Not Listed an Actor's Individual Performance in a Film as a Subject of Copyright Interest, the Ninth Circuit Allowed This to Be Constituted as Work

In order to have a copyrightable interest, Garcia's acting performance must be a "work."¹⁰⁸ The types of work that Congress included to have a protected interest are: (1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.¹⁰⁹ Congress further included that copyright protection does not "extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form . . ."¹¹⁰ None of the listed interests specifically include acting, a type of work that Congress had the ability to explicitly state.¹¹¹

Congress included the ability to protect a motion picture.¹¹² The acting, along with other performances and abilities included in a film, could be considered "procedure[s]" or "process[es]" by which an "original work" is performed.¹¹³ A copyrightable interest cannot be extended to the parts creating the film, "regardless of the form in which it described, illustrated, or embodied in" the original work.¹¹⁴ The majority in *Garcia* seemingly failed to consider the importance of the whole statute. Acting was not included as a protectable interest.¹¹⁵ Congress also prevented the performance of acting to be protected by Section (b) of the statute, since it is procedure or process that makes up the film.¹¹⁶

Congress can allow protection of a work by amending the statute. For example, sound recordings were not protected under federal law until 1972.¹¹⁷ In the 1909 Copyright Act, Congress allowed protection of musical

¹⁰⁸ 17 U.S.C. § 102(a) (2012); *Garcia*, 766 F.3d at 941 (Smith, J., dissenting).

¹⁰⁹ 17 U.S.C. § 102(a).

¹¹⁰ *Id.* § 102(b).

¹¹¹ *Garcia*, 766 F.3d at 942 (Smith, J., dissenting).

¹¹² 17 U.S.C. § 102(a)(6).

¹¹³ *Garcia*, 766 F.3d at 942 (Smith, J., dissenting).

¹¹⁴ *Id.*

¹¹⁵ 17 U.S.C. § 102(a).

¹¹⁶ *See id.* § 102(b).

¹¹⁷ UNITED STATES COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS 7 (2011), available at <http://copyright.gov/docs/sound/pre-72-report.pdf>.

compositions, but not musical recordings.¹¹⁸ Before the protection of musical recordings, commentators, such as the respected Judge Learned Hand, expressed the opinion of the need for copyright protection of sound recordings, but were in agreement that there was no authority for federal protection.¹¹⁹ Beginning in 1925, copyright provision bills were created with the attempt to add protection to sound recordings.¹²⁰ More than thirty bills were proposed including this extended protection, and none passed.¹²¹ In 1957, Barbara Ringer published a study of the Copyright Office arguing the need for the protection, and why it was under the scope of the Constitution, that was part of the foundation for the amendment adding protection for these sound recordings.¹²²

This shows the important reason why the courts cannot create copyright protection outside the scope of a subject matter that Congress did not provide for. Before it received its protection, it took Congress years of analysis and preparation to understand how much protection sound recording needed, if any.¹²³ For the Ninth Circuit to find a copyright protection interest for Garcia, even in her dire situation, was premature. The court overstepped its judicial authority to create this copyright interest that Congress specifically omitted from the subject matter portion that is required for a protected interest.

C. The Ninth Circuit Has Found That an Actor is the Author of Her Performance, Even Though the Actor Was Directed, Given Lines to Deliver, and Had a Scene That Was Eventually Edited by Other People

Garcia could not possibly be the author of her scene. The copyright law of the United States must be founded on the provision of the Constitution, which empowers Congress “to promote the progress of . . . useful arts, by securing, for limited times, to *authors* . . . the *exclusive* right to their respective writings”¹²⁴ The Copyright Act emphasizes the fact that copyright protection may be extended to original works of authorship fixed

¹¹⁸ *Id.* at 8.

¹¹⁹ *Id.* at 9.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 9–10.

¹²³ *See id.*

¹²⁴ U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

to any tangible medium of expression.¹²⁵ The Constitution and Act only provide protection to those authors and their writings, such as a motion picture.¹²⁶

Clearly, Garcia did not create *Innocence of Muslims*.¹²⁷ Her purpose of filing this lawsuit was to have the film removed from the Internet.¹²⁸ Her goal was to be disassociated with the film. Yet, she asserted that she has some copyrightable interest in her acting in the film.¹²⁹ This implies that she is a creator of her work in the film.¹³⁰ Analyzing the implications of granting Garcia a copyright interest in her performance leads to a strange result. Her claim is that she created the work and art that is presented on YouTube,¹³¹ yet she implies that she was tricked into participating in the film's finished product.¹³² She had no creative input in creating this anti-Islamic film;¹³³ her intentions were different.¹³⁴

As distasteful and offensive as the film was, the creativity of the film belongs to Youssef. He had the intention to record the actor's performances and dub them over to instigate protests.¹³⁵ No other person can attach the requirements of originality to the film.¹³⁶ The person in control of the work is one of the most important factors in deciding the author.¹³⁷ Garcia did not have any control over the creation of *Innocence of Muslims*.¹³⁸ Yet, the Ninth Circuit awarded Garcia a copyrightable interest in order to avoid the terrible consequences created by Youssef.¹³⁹ But the Ninth Circuit cannot

¹²⁵ 17 U.S.C. § 102 (2012).

¹²⁶ *Id.*

¹²⁷ *See Garcia v. Google, Inc.*, 766 F.3d 929, 932 (9th Cir. 2014), *rev'd en banc*, 786 F.3d 733 (9th Cir. 2015) (“The film’s writer and producer, Mark Basseley Youssef . . .”).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *See* U.S. CONST. art. I, § 8, cl. 8.

¹³¹ *Garcia*, 766 F.3d at 933.

¹³² *See id.* at 932 (requesting multiple times that the film be taken down).

¹³³ *See id.* at 932–33.

¹³⁴ *Id.*

¹³⁵ *See id.* at 932 (explaining that Youssef used the scenes to create an anti-Islamic film).

¹³⁶ *See Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000) (holding a person is not a joint author without proof that both authors intended to be joint authors).

¹³⁷ *See id.* (“Control in many cases will be the most important factor.”).

¹³⁸ *Garcia*, 766 F.3d at 943 (Smith, J., dissenting).

¹³⁹ *Id.* at 941.

overstep the boundaries Congress created. Within 17 U.S.C. § 102, there is no reference to protection of performances in a film.¹⁴⁰

An actor is similar to a vocalist.¹⁴¹ A film is similar to a musical composition.¹⁴² An actor makes a creative contribution to a film like a vocalist makes an addition to a musical recording.¹⁴³ Congress has allowed musical works, including the accompanying words to be copyrightable.¹⁴⁴ The Ninth Circuit also has already decided previously that a vocalist has no claim for the singing in a song, even though the entire song recording is copyrightable.¹⁴⁵ Here, although an entire motion picture is copyrightable, the acting in the film should not be granted copyright protection. The court should have followed the dissent's suggestion of comparing an actor's contribution to a film to a vocalist's lending of her voice.¹⁴⁶

This decision would lead to many different creators of a film having a copyrightable interest in their work. Will the courts start granting copyright interests to the camera operator for his skill in cinematography? The editor for seamlessly bringing together the scenes with sound and music? The lighting director for creating the atmosphere of the film? All of these components of a film come together with the aid of the director or producer, the person with the visual and audio control over the final product. A party cannot license a right she does not have.¹⁴⁷ Therefore, the Ninth Circuit wrongly reversed the denial of the preliminary injunction to Garcia.

D. Even If Garcia Were to Have a Copyright Interest, It Would Be Released Due to the Work for Hire Doctrine

Under the Works Made for Hire Doctrine, "the employer or other person for whom the work was prepared is considered the author for purposes of

¹⁴⁰ 17 U.S.C. § 102 (2012).

¹⁴¹ *Garcia*, 766 F.3d at 945 (Smith, J., dissenting).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ 17 U.S.C. § 102(a)(2).

¹⁴⁵ See *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1145 (9th Cir. 2006) ("It is hard to imagine how a copyright would remain meaningful if its licensees were potentially subject to suit from any performer anytime the copyrighted material was used.").

¹⁴⁶ *Garcia*, 766 F.3d at 945 (Smith, J., dissenting).

¹⁴⁷ Brief of Amici Curiae Electronic Frontier Foundation et al. in Support of Defendants-Appellees at 10, *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc) (No. 12-57302), available at <http://cdn.ca9.uscourts.gov/datastore/general/2014/11/25/12-57302%20Amicus%20by%20EFF.pdf>.

this title”¹⁴⁸ It goes on to state that unless parties have expressly agreed otherwise, the employer owns all copyrights comprised in the work.¹⁴⁹ This doctrine is especially important in the motion picture realm because most contributions to a film are created as works made for hire, such as editing, lighting, costume design, and acting.¹⁵⁰ Here, Garcia conceded that Youssef managed all aspects of production, including the manner and means of making the scene that Garcia participated in.¹⁵¹ Garcia could have protected her performance by contract; however, she lost all copyright interests that she could have had.¹⁵²

Granting this type of copyright protection to actors places third-party content distributors in an uneasy position.¹⁵³ A third-party content distributor, like Netflix, is unable prevent a suit against itself with an indemnity agreement between actors and their producers.¹⁵⁴ Even if the indemnities in the film contracts were broad, there would be a heavy financial and logistical burden placed on these distributors because of the highly fact-sensitive nature of these cases.¹⁵⁵ In its amicus brief for the Ninth Circuit rehearing, Netflix also makes an important point that technology makes it easier for anyone with a camera to create artistic work, requiring more than ever that the Act is followed uniformly and predictably, instead of the shocking grant that the Ninth Circuit did for Garcia.¹⁵⁶

¹⁴⁸ 17 U.S.C. § 201(b).

¹⁴⁹ *Id.*

¹⁵⁰ *Garcia*, 766 F.3d at 946 (Smith, J., dissenting).

¹⁵¹ *Id.*

¹⁵² *Id.* at 948.

¹⁵³ Brief of Amicus Curiae Netflix Inc. in Support of Defendants-Appellees at 2, *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc) (No. 12-57302), available at <http://cdn.ca9.uscourts.gov/datastore/general/2014/04/14/12-57302%20Amicus%20by%20Netflix.pdf>.

¹⁵⁴ *See id.* at 6–7 (“Even an indemnity from a well-heeled studio would not prevent a suit against a distributor like Netflix, or shield Netflix from the trouble and distraction of litigating such a claim to conclusion and the harm that would come from an injunction requiring the removal of content enjoyed by millions of subscribers.”).

¹⁵⁵ *Id.* at 7.

¹⁵⁶ *Id.* at 6.

IV. OTHER POSSIBLE SOLUTIONS UNDER STATE LAW CLAIMS THAT COULD REMEDY GARCIA

Garcia's situation is atypical. She attempted to sue Google and the director under state law claims at first.¹⁵⁷ However, after denial of an initial preliminary injunction, she voluntarily dismissed the claim and immediately sought relief in federal court.¹⁵⁸ In other situations that may arise similar to Garcia's, an actor should obtain relief through state law means rather than through federal law. This comment also suggests a form of relief Garcia could receive through state law claims, even if the defendant did not respond to her complaint. Fraud would be the most obvious cause of action, along with defamation and publicity protection.

Section 301 of the Copyright Act specifically allows for these other state law rights and remedies.¹⁵⁹ It states that the Copyright Act exclusively governs anything that has a *protected* copyright interest.¹⁶⁰ However, nothing in the Copyright Act annuls or limits any rights or remedies provided by the common law or statutes of a state if the subject matter does not come within the Copyright Act, including works of authorship not fixed in any tangible medium of expression.¹⁶¹ Thus, state law rights and remedies would be more appropriate for wrongs committed unto actors like Garcia.

However, even though Garcia could not reach Youssef through the court system, she could still obtain relief that may be better than copyright protection, which is inappropriate since she is an actor, not the creator of the film. An Egyptian cleric may not care if the film is removed from YouTube because the film is still on the Internet. His fatwa may still be in place. However, if she receives a court order determining that Youssef fraudulently induced her into the film, or a holding stating that her involvement in the film was based on deceit, this may give her another form of relief.

¹⁵⁷ Garcia v. Google, Inc., 786 F.3d 733, 738 (9th Cir. 2015) (en banc).

¹⁵⁸ *Id.*

¹⁵⁹ 17 U.S.C. § 301 (2012).

¹⁶⁰ *Id.* § 301(a) (emphasis added).

¹⁶¹ *Id.* § 301(b)(1).

A. Fraud

Under Texas law,¹⁶² fraud is defined as trickery or deceit, intentional misrepresentation, concealment, or nondisclosure of some material fact.¹⁶³ This is the most obvious form of relief for the wrong Youssef committed to these actors. He lured these actors into a film, having them think it was somewhat insignificant.¹⁶⁴ If these actors had knowledge of the offensive content of the film, it is easy to say that none of them would have been involved.

1. Common Law Fraud and Fraudulent Inducement

To establish common law fraud, a plaintiff must prove six elements.¹⁶⁵ These elements include: (1) the defendant made a material representation; (2) that was false; (3) that was either known to be false when made or which was recklessly made as a positive assertion without knowledge of its truth; (4) that the speaker made with intent that it be acted upon; (5) the other party took action in reliance upon this misrepresentation; and (6) the other party suffered injury.¹⁶⁶ As to the intent element, evidence must be presented that a representation was made with the intent to deceive and with no intention of performing as represented at the time the representation was made.¹⁶⁷ The speaker's intent at the time of representation may be inferred from the speaker's subsequent acts after the representation was made.¹⁶⁸

¹⁶²Texas law is used throughout Part IV of the comment as an example; however, other states follow the same principles that Texas does. Many states, like Texas, follow the restatement for the elements of fraud. *See, e.g.*, *Small v. Fritz Cos.*, 65 P.3d 1255, 1258 (Cal. 2003); *Gennari v. Weichert Co. Realtors*, 691 A.2d 350, 367 (N.J. 1997); *Gaines v. Preterm-Cleveland, Inc.*, 514 N.E.2d 709, 712 (Ohio 1987); *Gibbs v. Ernst*, 647 A.2d 882, 889 (Pa. 1994); RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST. 1977).

¹⁶³*In re E.P.*, 185 S.W.3d 908, 910 (Tex. App.—Austin 2006, no pet.) (quoting Webster's Third New International Dictionary 904 (1986)).

¹⁶⁴*Garcia v. Google, Inc.*, 766 F.3d 929, 937 (9th Cir. 2014), *rev'd en banc*, 786 F.3d 733 (9th Cir. 2015).

¹⁶⁵*In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 758 (Tex. 2001); *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex. 1990); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983).

¹⁶⁶*In re FirstMerit Bank, N.A.*, 52 S.W.3d at 758; *Formosa Plastics Corp.*, 960 S.W.2d at 47; *DeSantis*, 793 S.W.2d at 688; *Trenholm*, 646 S.W.2d at 930.

¹⁶⁷*Formosa Plastics Corp.*, 960 S.W.2d at 48; *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986).

¹⁶⁸*Spoljaric*, 708 S.W.2d at 434.

Here, Garcia would have an easy case of proving common law fraud. Youssef made representations to her, and the other actors, that she was going to be in a completely different type of movie.¹⁶⁹ She suffered significant injury from the death threats and mental anguish resulting from her reliance on Youssef's misrepresentations.¹⁷⁰ Garcia would be able to prove his malicious intent through his subsequent acts when he published a video online that was anything but a low-budget drama film.¹⁷¹ The result would be even simpler if Youssef failed to appear in court and allowed Garcia to receive a default judgment against him.

In addition to common law fraud, Garcia could have a claim of fraudulent inducement against Youssef. Fraudulent inducement requires elements similar to common law fraud.¹⁷² However, fraudulent inducement only arises in the context of a contract and requires the existence of a contract as part of its proof.¹⁷³ Because this arises out of a film contract, the plaintiff will be able to receive attorneys' fees in addition to actual damages in a state like Texas.¹⁷⁴ Again, Garcia would have no issue proving the elements of fraudulent inducement, and she would also be able to recover under this cause of action using her employment contract between herself and Youssef.

2. Relief Under Fraud

In order to obtain injunctive relief, a plaintiff must prove that there is no other adequate legal remedy.¹⁷⁵ Here, money damages would most likely not be adequate for Garcia. The difficulty in requiring the director to remove the video is that it will not necessarily repair her harm; however, a

¹⁶⁹ *Garcia*, 766 F.3d at 932.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² See *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 524 (Tex. 1998) (holding that fraudulent inducement requires proof: (1) that a material representation was made; (2) that the representation was false; (3) that, when the speaker made the representation, he knew it was false or made it recklessly without knowledge of the truth as a positive assertion; (4) that the speaker made it with the intention that it should be acted upon by the claimant; (5) that the claimant acted in reliance upon it; and (6) that the claimant thereby suffered injury).

¹⁷³ *Wal-Mart Stores, Inc. v. Coughlin*, 255 S.W.3d 424, 432 (Ark. 2007); *Lazar v. Super. Ct.*, 909 P.2d 981, 985 (Cal. 1996); *Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001).

¹⁷⁴ *Kenneco Energy*, 962 S.W.2d at 514.

¹⁷⁵ *Town of Palm Valley v. Johnson*, 87 S.W.3d 110, 111 (Tex. 2001).

declaration that Garcia was fraudulently induced into participating in an anti-Islamic film could possibly disassociate her from the film.

Garcia admitted in her affidavit after the film was widely discussed and disseminated that she went public and advised the public that she did not condone the film.¹⁷⁶ The dissent made an excellent observation that Garcia failed to link her allegations of future harm to potential future viewings of the film on YouTube.¹⁷⁷ Whether or not removal of the film will repair her harm, a finding of fraud against Youssef from the courts would reinforce Garcia's efforts to remove her involvement from the offensive film.

B. Defamation and Other Publicity Protection

Defamation and other publicity protections are state law actions with some constitutional limitations.¹⁷⁸ In *Zacchini*, a right to publicity case, the U.S. Supreme Court considered whether a person could recover damages when a news station published a video, without the person's consent.¹⁷⁹ While the Court noted that entertainment and news deserved First Amendment protection, this protection did not take away the right for a person to object to a publication without his consent.¹⁸⁰ Thus, the First Amendment can shield a defendant only to a certain point in these types of cases.

1. Defamation

The elements to defamation include: (1) a publication of a statement; (2) that was defamatory concerning the plaintiff; (3) and the defendant had the requisite degree of fault.¹⁸¹ There are different requisite degrees of fault depending on whether the plaintiff is a private or public figure.¹⁸² If the plaintiff was a public figure or official, then there must be proof of actual

¹⁷⁶ *Garcia*, 766 F.3d at 947 (Smith, J., dissenting).

¹⁷⁷ *Id.*

¹⁷⁸ 128 AM. JUR. TRIALS 1, § 1 (West, Westlaw through Apr. 2015).

¹⁷⁹ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 562 (1977).

¹⁸⁰ *Id.* at 578.

¹⁸¹ *Smith v. Maldonado*, 85 Cal. Rptr. 2d 397, 402 (Cal. Ct. App. 1999); *Cangelosi v. Schwegmann Bros. Giant Super Mkts.*, 390 So. 2d 196, 198 (La. 1980); *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998).

¹⁸² *McLemore*, 978 S.W.2d at 571.

malice; otherwise, a private individual only needs to show negligence.¹⁸³ In Garcia's case, the publication could include the statement dubbed over that was so offensive to the Muslim community.¹⁸⁴ It would not be difficult to prove the requisite degree of fault that would be required of Youssef.

However, a concerning problem for obtaining an injunction has recently been brought up in the Texas Supreme Court.¹⁸⁵ In *Kinney*, the court affirmed the idea that defamatory publications made online could be removed off the website.¹⁸⁶ However, the plaintiff requested more.¹⁸⁷ He wanted the defendant to be prohibited from making similar publications in the future.¹⁸⁸ The court concluded that this would be impermissible under the Texas Constitution because it would be restraining future speech.¹⁸⁹

Applying those thoughts to this case, it would be easy to show the inadequacy of a legal remedy. However, it would be difficult for Garcia to prohibit Youssef from republishing the video in a different form, even if it had a similar message. It would mean that Garcia would have to continue taking Youssef to court to obtain injunctions against every publication made. Other courts may follow a similar view that the Texas Supreme Court just adopted. Thus, fraud may be a better solution to her problem because the court could issue a decree that Youssef tricked her into participating in the film.

2. Misappropriation of Name or Likeness

The elements for misappropriation of name or likeness include these considerations: (1) whether the defendant appropriated the plaintiff's name or likeness for its value rather than incidentally or for a newsworthy purpose; (2) whether the plaintiff is easily identifiable; and (3) whether the defendant received an advantage or benefit as a result of the appropriation.¹⁹⁰ Under Texas's common law right of publicity, an actor

¹⁸³ *Id.* (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989)).

¹⁸⁴ *Garcia v. Google, Inc.*, 766 F.3d 929, 932 (9th Cir. 2014), *rev'd en banc*, 786 F.3d 733 (9th Cir. 2015).

¹⁸⁵ *Kinney v. Barnes*, 443 S.W.3d 87, 93 (Tex. 2014).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 93–94.

¹⁹⁰ *Maxwell v. Dolezal*, 179 Cal. Rptr. 3d 807, 810 (Cal. Ct. App. 2014); *Doe v. TCI Cablevision*, 110 S.W.3d 363, 368 (Mo. 2003); *Express One Int'l, Inc. v. Steinbeck*, 53 S.W.3d

should have no difficulty winning against a defendant.¹⁹¹ In Garcia's situation, she would have to argue that the producers used her likeness for its value rather than incidentally.¹⁹² Garcia was clearly identified from the publications as noted by the death threats she received.¹⁹³ Finally, Garcia should argue that the defendants received a political advantage or benefit from the publication of the film, rather than the claimed economic gain that the actors expected.

3. False Light

Although Texas does not allow the claim of false light,¹⁹⁴ some states, like California,¹⁹⁵ follow the Restatement (Second) of Torts. Under the Restatement, false light requires: (1) publication by the defendant to the public; (2) publication that identifies the plaintiff; (3) the false light would be highly offensive to a reasonable person; and (4) the defendant was at fault in publishing the publication.¹⁹⁶ In *Sullivan*, the U.S. Supreme Court also required actual malice in this type of case.¹⁹⁷ Actual malice requires that the wrongdoer made the statement with knowledge that it was false or with reckless disregard to the truth.¹⁹⁸

Here, Garcia was published on the Internet in a way that she could be identified.¹⁹⁹ Youssef's portrayal of Garcia offended many in the Muslim community, and there is no doubt he published it.²⁰⁰ A court may have issues finding that Youssef had malice towards Garcia herself; however,

895, 900 (Tex. App.—Dallas 2001, no pet.); RESTATEMENT (SECOND) OF TORTS § 652C (AM. LAW INST. 1977).

¹⁹¹ See *Maxwell*, 179 Cal. Rptr. 3d at 810; *Doe*, 110 S.W.3d at 368; *Steinbeck*, 53 S.W.3d at 900; RESTATEMENT (SECOND) OF TORTS § 652C (AM. LAW INST. 1977).

¹⁹² See *Garcia v. Google, Inc.*, 766 F.3d 929, 932 (9th Cir. 2014), *rev'd en banc*, 786 F.3d 733 (9th Cir. 2015);

see also *Steinbeck*, 53 S.W.3d at 900; *Maxwell*, 179 Cal. Rptr. 3d at 810; *Doe*, 110 S.W.3d at 368; RESTATEMENT (SECOND) OF TORTS § 652C (AM. LAW INST. 1977).

¹⁹³ See *Garcia v. Google, Inc.*, 786 F.3d 733, 737 (9th Cir. 2015) (en banc).

¹⁹⁴ *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579–80 (Tex. 1994).

¹⁹⁵ *Fellows v. Nat'l Enquirer, Inc.*, 721 P.2d 97, 99–100 (Cal. 1986).

¹⁹⁶ RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977).

¹⁹⁷ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

¹⁹⁸ *Id.*

¹⁹⁹ See *Garcia v. Google, Inc.*, 766 F.3d 929, 932 (9th Cir. 2014), *rev'd en banc*, 786 F.3d 733 (9th Cir. 2015).

²⁰⁰ *Id.*

Youssef did know that the actors were not knowingly participating in this anti-Islamic film²⁰¹ and most likely knew that they would not have participated if they had known otherwise.²⁰² Thus, this is another claim that Garcia could have sought in order to obtain relief for the wrong that Youssef committed against her.

V. EN BANC HEARING OF *GARCIA V. GOOGLE, INC.*

On November 12, 2014, the Ninth Circuit granted a rehearing en banc.²⁰³ The eleven-member panel reconsidered the petition that Garcia originally brought to the Ninth Circuit.²⁰⁴ The court's decision becomes exceptionally clear with the second sentence: "[A] weak copyright claim cannot justify censorship in the guise of authorship."²⁰⁵ The court sympathized with Ms. Garcia's terrible position; however, it noted that the claim against Google was not grounded in privacy, emotional distress, or tort law.²⁰⁶ The court correctly noted that the previous decision would allow any contributor from a "costume designer down to . . . a best boy" to have some sort of copyright interest in a film.²⁰⁷ Garcia only moved for a preliminary injunction on the copyright claim, so the court could not consider her tort allegations.²⁰⁸ The court ended the opinion agreeing that she had suffered greatly, but could not grant the relief she desired through the copyright claim.²⁰⁹

VI. CONCLUSION

Although Youssef placed Garcia in a terrible circumstance, the Ninth Circuit was ultimately correct in finding that Garcia should not have been granted a copyright interest in her five-second scene in *Innocence of Muslims*. Acting in a film has yet to ever be recognized as work under the Copyright Act,²¹⁰ and even if acting should be recognized, Garcia could

²⁰¹ *See id.*

²⁰² *See id.*

²⁰³ *Garcia v. Google, Inc.*, 771 F.3d 647 (9th Cir. 2014) (granting rehearing en banc).

²⁰⁴ *See id.*

²⁰⁵ *Garcia v. Google, Inc.*, 786 F.3d 733, 736 (9th Cir. 2015) (en banc).

²⁰⁶ *Id.* at 737.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 739.

²⁰⁹ *Id.* at 747.

²¹⁰ *See supra* Part III.

hardly claim that she was the author of her scene with her lines dubbed over with an offensive statement. She also loses any copyright interest that she might have because of the work for hire doctrine.²¹¹ Thus, she fails to meet the requirements needed to maintain a copyright interest in her acting performance.

The en banc opinion reiterates the importance of following the law.²¹² Allowing such a claim would allow many actors, and other contributors, in a film to bring similar claims of their copyright interests in films against third-party content distributors that only reproduce the films the actors were in. Thus, a more appropriate form of relief for Garcia, and actors in her situation, would be to seek the state law causes of action. Rather than seeking relief against the company that is merely republishing another author's work, Garcia, and other contributors, needs to assert her claims against the author himself. Even if the Ninth Circuit decided to grant her a preliminary injunction, Garcia still needed to prove her copyright claim on the merits in order to obtain a permanent injunction, which is highly unlikely. Instead of working around existing copyright law to grant Garcia temporary relief, Garcia should have sought state law the way she sought federal law to have justice serve her properly.

²¹¹ Garcia v. Google, Inc., 766 F.3d 929, 948 (9th Cir. 2014) (Smith, J., dissenting), *rev'd en banc*, 786 F.3d 733 (9th Cir. 2015).

²¹² See *supra* Part V.