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Why new media should care about 'Innocence of Muslims'

Burgeoning media companies and performers should act now to protect themselves, regardless of the ultimate outcome of *Garcia v. Google*

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On December 15, the United States Court of Appeals for the 9th Circuit sat *en banc* to rehear the panel decision in *Garcia v. Google* — a copyright claim by actress Cindy Lee Garcia regarding her performance in the low-budget anti-Muslim film, "Innocence of Muslims." Previously, a divided three-judge panel agreed with Garcia that she had a copyright claim separate and apart from the filmmakers' copyright in the film. The final outcome may have significant consequences for both performers and media companies. The risk is particularly high for new media ventures that may lack the sophisticated legal agreements between actors and producers that have long been a staple of the media industry. Thus, burgeoning media companies and performers waiting for the 9th Circuit's decision should act now to protect themselves, regardless of the ultimate outcome.

In 2011, Cindy Lee Garcia answered a casting call for a low-budget film with the working title: "Desert Warrior." For three and a half days, Garcia participated in filming based on her character's appearance in four pages of script. She was paid approximately $500 for her efforts. But "Desert Warrior" was never completed. Instead, the filmmakers dubbed over and incorporated the footage of Garcia into a new, 14 minute anti-Islamic film entitled "Innocence of Muslims" that contained offensive depictions of the Muslim prophet, Mohammed. The short film was posted on YouTube and later displayed on Egyptian television, generating highly publicized protests across the world. An Egyptian cleric responded by issuing a fatwa, calling for the killing of everyone involved with the film. After receiving death threats, Garcia asked Google to remove the video from YouTube based on her alleged copyright interests in the production. When Google refused her takedown requests, she filed suit against Google seeking removal of the film.

The resulting litigation has generated nearly enough controversy, uncertainty and legal drama for its own movie script. While the district court denied Garcia's motion for preliminary injunction, a highly controversial opinion by the 9th Circuit, led by Judge Kozinski, reversed the district court. The split panel found that Garcia "was duped into providing an artistic performance that was used in a way she never could have foreseen" and that Garcia had "shown that she is likely to succeed on her copyright claim." Garcia's copyright claim was premised on the assertion that she possessed a "copyright in her performance." Specifically, Judge Kozinski noted:

An actor's performance, when fixed, is copyrightable if it evinces some minimal degree of creativity . . . no matter how crude, humble or obvious it might be. That is true whether the actor speaks, is dubbed over or, like Buster Keaton, performs without any words at all.

The panel also noted that Google was unlikely to be saved by the "work for hire" doctrine because Garcia was not an employee nor was there an agreement between Garcia and the filmmakers. Further, the panel found any "implied license" was likely vitiated by the filmmaker's fraud in procuring Garcia's performance in the film.

Although not akin to the demonstrations sparked by the film itself, the panel's holding generated significant protest among legal scholars and members of the technology and entertainment industries who raised, among other things, significant First Amendment concerns. Numerous *amici* filed briefs requested *en banc* review of the panel's decision, and the Copyright Office weighed in denying Garcia's copyright request because the Office's "longstanding practices do not allow a copyright claim by an individual actor or actress in his or her performance contained within a motion picture."

Like any good script, this story was destined for edits, and not without another plot twist: Before the 9th Circuit announced its plan for *en banc* review, the panel issued an amended order and companion dissent reaching the same conclusion, but softening its stance on Garcia's potential copyrightable interest by noting that "[n]othing we say today precludes the district court from concluding that Garcia doesn't have a copyrightable interest or that Google prevails on any of its defenses.

Thus, the stage was set for a contentious and entertaining oral argument. Judge Kozinski questioned Google's counsel on the parallels between Garcia's copyright claim to musicians' copyright ownership in performances, the applicability of the Beijing Treaty on Audiovisual Performances, whether the "parade of horribles" articulated by Google and other media companies was realistic, and why Garcia's performance was not akin to pantomime. On the other hand, several judges challenged Garcia's counsel with questions regarding issues of joint authorship, deference to the district court, the proper application of injunctive relief, the role of the First Amendment, and whether there was sufficient original expression in a dubbed, five second performance to justify copyright protection. Given the differing views and significant number of procedural and substantive issues that the 9th Circuit may latch onto in deciding this case, it seems unlikely that this will be the final act for actors' copyright interests in performances.

The question remains: What can new media do despite the uncertainty created by *Garcia* to avoid landing a starring role in their own copyright drama? Fortunately, new media companies can take steps to protect themselves, regardless of how the 9th Circuit rules. As Judge Kozinski pointed out at the oral argument, "a producer is always able to avoid these problems by producing an agreement." Traditionally,

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established producers and actors have well-vetted independent work-for-hire or guild agreements that define the parties' copyright rights. However, new and innovative players may not be as familiar as established media companies with the formalities of retaining acting talent. These companies can, however, avoid similar copyright controversies by following Judge Kozinski's guidance and clearly defining copyright ownership on the front-end by formalizing copyright ownership with unambiguous written contractual agreements.

Editor›s Note: *Robins Kaplan LLP filed an amicus brief on behalf of Volunteer Lawyers for the Arts in Garcia v. Google.*

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