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Controversial Film Tests Limits of Copyright Law

En banc ruling in "Innocence of Muslims" case doesn't bode well for individual actors' claims.

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At a time when YouTube claims to have more than a billion visitors a month, any teenager with a digital camera can create a video with instant global exposure. Does copyright law give an actor (or a bystander) who appears on camera any right to block distribution of a film?

The U.S. Court of Appeals for the Ninth Circuit's May 18 en banc opinion in *Garcia v. Google*, which involved a notorious film that incited violence in the Middle East, indicates that copyright law will be of little use.

AP PHOTO/JASON REDMOND, FILE

FIGHT FOR RIGHTS: Cindy Lee Garcia, right, with her lawyer, M. Cris Armenta, alleged her small acting role led to threats.

Garcia concerned a 14-minute trailer for a film called "Innocence of Muslims" that was uploaded to YouTube in June 2012 by Mark Basseley Youssef, an obscure writer-director. The amateurish work portrayed the Prophet Mohammed as a murderer, pedophile and homosexual. Translated into Arabic, the film sparked violent protests in the Middle East and was linked to the deadly September 2012 attack on the U.S. consulate in Benghazi, Libya.

The plaintiff in the case was Cindy Lee Garcia, an actress in the film who responded to a casting call for a movie described as an action-adventure thriller set in ancient Arabia. Garcia spoke only two sentences on the set and appears for only five seconds in the trailer, where her lines are dubbed over with a voice asking "Is your Mohammed a child molester?"

Despite her extremely limited role, Garcia received death threats after a fatwa issued by an Egyptian cleric called for the murder of actors in the film. Garcia asked Google (YouTube's owner) to remove the video, filing eight takedown notices under the Digital Millennium Copyright Act.

When Google refused, she sued in federal court for a preliminary injunction, claiming that posting of the video infringed her copyright in her performance.

A federal district court denied the injunction, holding that Garcia's contribution to the film was not

copyrightable. But in July 2014, a split panel of the Ninth Circuit reversed, with the majority ruling that Garcia likely had a copyrightable interest in her performance. The panel issued an injunction requiring YouTube to remove the work and take steps to prevent further uploads.

SUBSTANTIAL CONTROVERSY

That opinion itself generated substantial controversy. The Ninth Circuit decided to hear the case en banc and received 13 amicus briefs. Internet providers and broadcasters worried that giving copyright protection to individual actors, or to participants in "mockumentaries" (fake documentaries done as parody), or reality-television programming would create confusion and encourage nuisance infringement suits.

Although established studios require that persons appearing onscreen and creative personnel sign agreements that relinquish copyright claims, small production companies may fail to do so, and errors will occur.

Civil liberties groups were concerned that the panel's injunction operated as an unconstitutional prior restraint, denying the public the right to see a video that was of great public interest.

On the other hand, unions such as the Screen Actors Guild and Actors' Equity argued that the broadcasters' concerns were overstated, and emphasized that even brief appearances in a film—such as Peter Finch's "mad as hell" speech in "Network"—can have lasting impact and should qualify as separate performances entitled to copyright protection.

Over only a single dissent, the en banc court rejected Garcia's claim: "In this case, a heartfelt plea for personal protection is juxtaposed with the limits of copyright law and fundamental principles of free speech. The appeal teaches a simple lesson—a weak copyright claim cannot justify censorship in the guise of authorship."

The Ninth Circuit agreed with the Copyright Office (which had rejected Garcia's copyright registration) that "Innocence of Muslims" is a single, integrated audiovisual work, and that Garcia had not shown that her performance could be separately copyrighted.

"Treating every acting performance as an independent work," the court found, would be a "logistical and financial nightmare." The court wrote, "Untangling the complex, difficult-to-access, and often phantom chain of title to tens, hundreds or even thousands of standalone copyrights [arguably connected to a feature film] is a task that could tie the distribution chain in knots."

Late last month, the U.S. Court of Appeals for the Second Circuit reached a similar conclusion in *16 Casa Duse v. Merkin*. Deciding an issue of first impression in its circuit, and citing *Garcia* with approval, *Merkin* held that a director's contribution to a movie that was not "separate and independent" from the film itself did not qualify as a "work of authorship" eligible for copyright.

TYPE OF HARM

Beyond its skepticism about the merits of Garcia's copyright claim, the Ninth Circuit identified a second reason why she was not entitled to an injunction: The irreparable harm she alleged, while serious, was not a copyright injury. Copyright protects an individual's legal interests as an author. According to the court, the personal and reputational injury she suffered was "untethered from—and incompatible with—copyright and copyright's function as the engine of expression."

One can debate the Garcia court's conclusion on copyright injury—arguably, the copyright laws give an author rights to control the distribution and exploitation of her work—but, particularly after the concurrence of the Second Circuit in *Merkin*, it will probably be difficult to convince a court to recognize a copyright claim such as Garcia's. Redress for the harm she suffered is likely to come, if at all, from privacy and tort law.

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