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NOTE

GARCIA v. GOOGLE, INC.: THE NINTH CIRCUIT’S REFUSAL TO EXTEND COPYRIGHT PROTECTION TO AN ACTOR’S PERFORMANCE, REINFORCING THE LETTER OF COPYRIGHT LAW

ANNA NICOLOPULOS

INTRODUCTION

In the technological world we live in, becoming a worldwide phenomenon is happening more frequently. With the advent of YouTube,¹ accessible in more than seventy countries and with hundreds of hours of video uploaded every minute,² many actors and filmmakers hope their videos will emerge as worldwide internet sensations, perhaps overnight. Few people, however, want their videos to spark worldwide political controversy, which is exactly what happened with a user upload in the summer of 2012. *Innocence of Muslims* was released on YouTube on July 2, 2012, and its content was so controversial it sparked a political uproar in the Middle East.

Innocence of Muslims was an anti-Islamic film that depicted the Prophet Mohammed “as a homosexual son of undetermined patrimony, who rises to advocate child slavery and extramarital sex, for himself, in the name of religion.”³ Muslims throughout the world were outraged

¹ *About YouTube*, YOUTUBE, <https://www.youtube.com/yt/about> (last visited Sept. 28, 2015).

² *Statistics*, YOUTUBE, <http://www.youtube.com/yt/press/statistics.html> (last visited Sept. 28, 2015).

³ *The Obscure Anti-Islam Film that Sparked Egyptian and Libyan Riots: A guide*, THEWEEK.COM (Sept. 12, 2012), <http://theweek.com/article/index/233239/the-obscure-anti-muslim-film-that-sparked-egyptian-and-libyan-riots-a-guide>.

with this depiction and riots ensued throughout the Middle East, causing an Egyptian cleric to issue a fatwa⁴ calling for anyone involved in the film to be killed.⁵

In February 2014, the U.S. Court of Appeals for the Ninth Circuit⁶ issued an injunction against Google,⁷ the company that owns YouTube, to have the video permanently removed from the site.⁸ The court did not issue the injunction in response to the political upheaval or any lawsuit against the film's creator. Instead, this decision granted an actor, Cindy Lee Garcia, who appeared in the film for five seconds, a copyright interest in the film. This interest was so deeply rooted that Google was forced to remove the entire film from YouTube and take action to prevent any further uploads.

Copyright protection is rooted in the Intellectual Property Clause of the United States Constitution,⁹ which sets boundaries for the subject matter that can be protected by federal copyright law.¹⁰ The Ninth Circuit's 2014 decision in *Garcia v. Google, Inc.*,¹¹ marked the first time a court ruled that an individual actor with a minor role in a film has a copyright interest in her own performance.¹²

In *Garcia v. Google, Inc.*, the Ninth Circuit originally held that the actor likely had a copyright interest in the film because she was "duped into providing an artistic performance that was used in a way she never could have foreseen."¹³ The court reasoned that Garcia established she was likely to succeed on her copyright claim due to the serious threats against her life, and the balance of the equities and public interest that were in her favor.¹⁴ The Ninth Circuit applied the standard for a mandatory preliminary injunction and found that Garcia, as an actor, had

⁴ *Definition of Fatwa*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/fatwa> (last visited Sep. 28, 2015). A fatwâ is a legal opinion provided by an Islamic religious leader.

⁵ *Garcia v. Google, Inc.*, 766 F.3d 929, 932 (9th Cir. 2014), *vacated*, 786 F.3d 933 (9th Cir. 2015) (en banc).

⁶ 2-1- The U.S. Federal Judicial System, FDA, <http://www.fda.gov/ICECI/ComplianceManuals/RegulatoryProceduresManual/ucm176577.htm> (last visited Oct 3, 2015). The Ninth Circuit is the largest court of appeals in the nation with 28 active judgeships and comprising a fifth of the nation's states.

⁷ *About Google*, GOOGLE, <https://www.google.com/intl/en/about/> (last visited Nov. 25, 2014).

⁸ *Garcia*, 766 F.3d at 932.

⁹ U.S. CONST. art. I, § 8, cl. 8.

¹⁰ *Id.* ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

¹¹ *Garcia v. Google, Inc.*, 766 F.3d 929 (9th Cir. 2014), *vacated*, 786 F.3d 733 (9th Cir. 2015) (en banc).

¹² *The Annals of Copyright Number 1*, BOWLES LAW, <http://www.tbowleslaw.com/the-annals-of-copyright-no-1> (last visited Oct. 15, 2015).

¹³ *Garcia*, 766 F.3d at 940.

¹⁴ *Id.*

a copyright interest in the film because she evinced a minimal degree of creativity in her performance.¹⁵

The court should have only ruled that the district court abused its discretion by failing to grant Garcia's copyright interest, if the facts and law clearly favored issuing a preliminary injunction.¹⁶ The court assumed Garcia was an author and created its own law to provide her — as an actor — a copyright interest in a film. Nothing about Garcia's performance or what she demonstrated provide that the facts and the law "clearly favor her claim of a copyrightable interest" in her acting performance.¹⁷ The court demanded YouTube remove the film, a request that was subjected to the incorrect degree of scrutiny.¹⁸ The court should have applied a higher degree of scrutiny and reversed the district court's decision only if the decision was illogical or implausible.¹⁹ Garcia did not clearly satisfy the requirements to claim copyright infringement, thus the district court's decision was not illogical or implausible, and the district court did not abuse its discretion.

This Note focuses on the Ninth Circuit's original failure to apply the correct standard of review, its misapplication of the elements of copyright, its rectification of these failures, and possible remedies that exist outside of copyright. The Ninth Circuit originally decided that Garcia's performance in five seconds of a film was too minimally creative to provide her a copyright interest that warranted the removal of the entire film. The decision resulted in mixed opinions and several petitions to the Ninth Circuit to rehear the matter. The Ninth Circuit granted the en banc review in November 2014 and released its opinion in May 2015.²⁰ Upon review of the case, the en banc court restored the intention of copyright law and affirmed the district court's denial of the preliminary injunction, because the law and facts did not clearly favor Garcia's claim for a copyright interest in her acting performance as it appeared in *Innocence of Muslims*.²¹ The Ninth Circuit en banc opinion vacated its 2014 decision, and held that Garcia did not satisfy the requirements to establish a likelihood of success on the merits and that she was not entitled to a preliminary injunction.²²

Part I of this Note presents a background of the factual history of the case and the relevant history of copyright law. Part II focuses on the

¹⁵ *Id.* at 933-34.

¹⁶ *Id.* at 940 (Smith, J., dissenting).

¹⁷ *Id.* at 946.

¹⁸ *Id.* at 940-41.

¹⁹ *Id.* at 940.

²⁰ *Garcia v. Google, Inc.* 786 F.3d 733, 739 (9th Cir. 2015) (en banc).

²¹ *Id.* at 737.

²² *Id.* at 744.

procedural history of *Garcia v. Google, Inc.*, focusing on the Ninth Circuit's misapplication of copyright law and the en banc court's restoration of copyright law's intention. Part III presents possible remedies that Garcia may have had outside of an action asserted under copyright law. The Note concludes by emphasizing that the expansion of technology could have substantial implications for copyright interests, and that such expansion may force the United States to adopt more specific laws going forward.

I. FACTUAL HISTORY BEHIND *GARCIA V. GOOGLE, INC.* AND HISTORY OF COPYRIGHT

In July 2012, Mark Basseley Youssef uploaded a fourteen-minute trailer²³ of his film *Innocence of Muslims* to YouTube,²⁴ which sparked protests that generated worldwide news coverage.²⁵ The film aired on Egyptian television in the summer of 2012 and sparked protests throughout the country, ultimately leading to an Egyptian cleric issuing a fatwa, calling for all those involved in the film to be killed.²⁶

What could be so controversial in a fourteen-minute video to spark this worldwide controversy? Youssef hired several actors and cast members to work on the movie, which he represented as a film about "an ancient tribal villain named George" titled *Desert Warriors*.²⁷ Once the movie was completed, Youssef dubbed the name "Mohammad" anytime someone said the name "George."²⁸ According to his son, Youssef "fooled" the actors and cast members because he knew this would be a controversial film and he did not reveal the correct information "as a precaution for their safety."²⁹

This "safety concern" is exactly what prompted a controversial copyright case. Actor Garcia accepted a minor part with four pages of script,

²³ J. Alexander Lawrence, *Google Ordered to Remove All Copies of Anti-Islamic Film From YouTube; Decision Puzzles Copyright Attorneys*, MORRISON & FOERSTER LLP (Apr. 1, 2014), <http://www.mondaq.com/unitedstates/x/303656/Copyright/Google+Ordered+To+Remove+All+Copies+Of+AntiIslamic+Film+From+Youtube+After+Actress+With+Bit+Part+Threatened+By+Outraged+Muslims+Decision+Puzzles+Copyright+Attorneys>.

²⁴ *Id.*

²⁵ *Garcia v. Google, Inc.*, 766 F.3d 929, 932 (9th Cir. 2014), *vacated*, 786 F.3d 733 (9th Cir. 2015) (en banc).

²⁶ *Id.*

²⁷ Serge F. Kovaleski & Brooks Barnes, *From Man Who Insulted Muhammad, No Regret*, N.Y. TIMES (Nov. 25, 2012), <http://www.nytimes.com/2012/11/26/us/from-the-man-who-insulted-is-lam-no-retreat.html?pagewanted=1&r=0>.

²⁸ *Id.*

²⁹ *Id.*

in the film she thought was titled *Desert Warrior*.³⁰ Garcia was filmed for three and a half days and was paid about \$500.00 for her part.³¹ Garcia saw the film *Innocence of Muslims* for the first time on YouTube, though her five second performance was dubbed over so that her character asked, “Is your Mohammed a child molester?”³² Understandably, many Muslims around the world were offended, and after protests and riots ensued, Garcia received death threats.³³ In response, Garcia filed eight takedown orders pursuant to the Digital Millennium Copyright Act (DMCA).³⁴ Google refused to remove the trailer, and in September 2012, Garcia sued Google asserting that her copyright interest had been infringed.³⁵ In October 2012, she moved for a preliminary injunction to have all copies of the movie removed from YouTube.³⁶ In November 2012, the district court denied Garcia’s motion claiming her short performance was unlikely to lead to a copyright interest, she delayed too long in seeking the injunction after first viewing the trailer, and she did not meet the high standard necessary to obtain a mandatory preliminary injunction.³⁷

Although the district court refused to grant the injunction in *Garcia v. Google, Inc.*,³⁸ the Ninth Circuit ordered the video’s removal even though it found Garcia’s copyright interest was “doubtful.”³⁹ The Ninth Circuit reviewed the “denial of a preliminary injunction for abuse of discretion” of the district court, but it reviewed “the legal premises underlying a preliminary injunction” de novo.⁴⁰

³⁰ *Garcia v. Google, Inc.*, 766 F.3d 929, 932 (9th Cir. 2014), *vacated*, 786 F.3d. 733 (9th Cir. 2015) (en banc).

³¹ *Id.*

³² David Klufft, *Nine Thoughts On the Ninth Circuit’s “Innocence of Muslims” Copyright Decision*, TRADEMARK & COPYRIGHT LAW (Feb. 28, 2014), <http://www.trademarkandcopyrightlawblog.com/2014/02/nine-thoughts-on-the-ninth-circuits-innocence-of-muslims-copyright-decision/>.

³³ *Garcia*, 766 F.3d at 932.

³⁴ *Id.*; see generally 17 U.S.C. § 512.

³⁵ Alexander, *supra* note 23.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Garcia v. Google, Inc.*, 766 F.3d 929, 932 (9th Cir. 2014), *vacated*, 786 F.3d. 733 (9th Cir. 2015) (en banc).

³⁹ Corynne McSherry, *Ninth Circuit Doubles Down in Garcia v. Google*, ELEC. FRONTIER FOUND. (July 11, 2014), <https://www.eff.org/deeplinks/2014/07/ninth-circuit-doubles-down-in-garcia-v-google>.

⁴⁰ *Garcia*, 766 F.3d at 933 (quoting *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1096 (9th Cir. 2002)).

A. AVAILABILITY OF INJUNCTIVE RELIEF FOR COPYRIGHT
INFRINGEMENT

Plaintiffs in copyright suits may seek two different types of injunctions: preliminary and permanent.⁴¹ Preliminary injunctions are granted at an early stage in the lawsuit, to avoid any more conduct by the defendant that will harm the plaintiff.⁴² Courts must consider four factors to grant a preliminary injunction: “a plaintiff’s likely success on the merits, the likelihood that irreparable harm will result if an injunction doesn’t issue, the balance of equities and the public interest.”⁴³ At the close of a case, the court may grant a permanent injunction if the plaintiff has successfully proven infringement.⁴⁴ To obtain a permanent injunction, the plaintiff must show: (1) he/she has suffered an irreparable injury, (2) damages will not compensate for the injury, (3) the balance of the hardships demonstrates that equitable relief is warranted, and (4) the public interest would not be disserved by a permanent injunction.⁴⁵ The United States Supreme Court stated that in some situations, as with a parody, an injunction might not be appropriate because there may be sufficient creativity in the defendant’s work and a strong public interest in keeping that work available.⁴⁶

The district court in *Garcia* only considered the first two factors for preliminary injunction, and based on its analysis the court found against Garcia.⁴⁷ To succeed on the merits, Garcia needed to have an independent copyright interest in the film, and the writer and director could not own an interest in the film as a work for hire, nor could the writer and director have an implied license to use her performance.⁴⁸

By reversing the district court’s opinion, the Ninth Circuit provided Garcia with a mandatory injunction to remove the trailer from YouTube.⁴⁹ Mandatory preliminary injunctions go beyond the “status quo pendente lite” and are “particularly disfavored.”⁵⁰ Mandatory injunctions bear a higher degree of scrutiny and require courts to be “extremely

⁴¹ 17 U.S.C.A. § 502 (West 2015).

⁴² ROGER E. SCHECHTER & JOHN R. THOMAS, PRINCIPLES OF COPYRIGHT LAW 407 (West 2010).

⁴³ *Garcia*, 766 F.3d at 933.

⁴⁴ SCHECHTER & THOMAS, *supra* note 42 at 408.

⁴⁵ *Id.*

⁴⁶ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994); see also SCHECHTER & THOMAS, *supra* note 42 at 18.

⁴⁷ *Garcia*, 766 F.3d at 933.

⁴⁸ *Id.*

⁴⁹ See *Garcia*, 766 F.3d at 940.

⁵⁰ *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994).

cautious”⁵¹ and “deny such relief ‘unless the facts and law *clearly favor* the moving party.’”⁵² The court must review a district court’s decision for abuse of discretion and may only reverse the decision if it is found illogical or implausible.⁵³ The Ninth Circuit granted an en banc review and corrected its error in issuing a mandatory injunction because Garcia was not an author of her performance, and the irreparable harm she suffered was not the type for which a mandatory injunction was intended to remedy.

B. HISTORY OF COPYRIGHT INFRINGEMENT

The Intellectual Property Clause of the United States Constitution provides the basic subject matter protected by federal copyright law.⁵⁴ The 1976 Copyright Act (the Act) provides further guidelines for copyrightable material: “all works of authorship are protected under the federal copyright law from the moment they are fixed in a tangible medium of expression.”⁵⁵ To avoid numerous lawsuits over copyright interests, Congress enacted the DMCA in 1988, which gives online service providers a “safe harbor” from liability for copyright infringement caused by its users.⁵⁶ This “safe harbor” provides a “notice-and-takedown” system that places the burden on the copyright owner to notify service providers when a user commits copyright infringement.⁵⁷ The service provider is then supposed to intervene.⁵⁸ Congress intended to create a rule where users who upload infringing files are liable, and the web host is liable only if it fails to respond to the takedown.⁵⁹ The issue with this process is that nothing will be done if the web host does not think the person claiming infringement has a copyright interest or that any infringement has taken place. Google denied the eight notice-and-takedown orders Garcia filed because the company did not believe she was the owner of the copyright.

Before a person can file a suit for copyright infringement, he or she must first make an attempt to register for copyright. If that attempt is

⁵¹ *Id.* at 1319.

⁵² *Id.* at 1320 (citations omitted) (citing another source).

⁵³ *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009).

⁵⁴ SCHECHTER & THOMAS, *supra* note 42 at 18.

⁵⁵ *Id.* at 778.

⁵⁶ Eric Goldman, *How the DMCA’s Online Copyright Safe Harbor Failed*, TECH. & MKRT. BLOG (June 1, 2014), <http://blog.ericgoldman.org/archives/2014/06/how-the-dmcas-online-copyright-safe-harbor-failed.htm>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

unsuccessful, then the “owner” can proceed with the suit.⁶⁰ An exclusive copyright owner can sue for the infringement of that particular right.⁶¹ Copyright protection exists “in original works of authorship fixed in any tangible medium of expression, not known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁶²

Works of authorship, within the meaning of copyright law, includes literary, musical, dramatic, choregraphical, pictorial graphic, sculptural, audiovisual, architectural works, and sound recordings.⁶³ While these categories do not set the ultimate boundaries of what is copyrightable material, they are illustrative.⁶⁴ A work must be “original” for copyright to protect it, yet Congress did not provide a definition of what it is to be original.⁶⁵ Case law has indicated “original” means “the work was independently created by the author (as opposed to copied from other works), and it possesses at least some minimal degree of creativity.”⁶⁶ Thus, an independent creation is original if it is created “from scratch” and has some minimal degree of creativity.⁶⁷

II. PROCEDURAL HISTORY OF *GARCIA V. GOOGLE, INC.*

A. APPEAL TO THE NINTH CIRCUIT AND THE ERRORS IN ITS DECISION

Garcia centers on whether Garcia, as an actor, had a copyright claim at all. The Ninth Circuit’s 2014 opinion did not assess each of the elements correctly when it decided Garcia was likely to succeed on the merits of her case. A plaintiff must first “establish that he is likely to succeed on the merits” of her copyright claim to receive a preliminary injunction.⁶⁸ The district court and the Ninth Circuit’s 2014 opinion disagreed on the assessment of this factor and as a result, the district court’s decision was reversed.⁶⁹

⁶⁰ SCHECHTER & THOMAS, *supra* note 42 at 127.

⁶¹ *Id.* at 363.

⁶² 17 U.S.C.A. § 102 (West 2015). *See also* SCHECHTER & THOMAS, *supra* note 42 at 18–19.

⁶³ 17 U.S.C.A. § 102 (West 2015).

⁶⁴ SCHECHTER & THOMAS, *supra* note 42 at 19.

⁶⁵ *Id.* at 20.

⁶⁶ *Feist Publ’n, Inc. v. Rural Tel. Serv. Co. Inc.*, 499 U.S. 340, 345 (1991).

⁶⁷ SCHECHTER & THOMAS, *supra* note 42 at 20 and 26.

⁶⁸ *Winter v. Nat’l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

⁶⁹ *Garcia v. Google, Inc.*, 766 F.3d 929, 940 (9th Cir. 2014), *vacated*, 786 F.3d 733 (9th Cir. 2015) (en banc).

1. *Necessity of Work and Authorship to Invoke Copyright Interest*

One of the main elements necessary to claim a copyright interest is that the interest protected must be an “original work.”⁷⁰ To guide the assessment of what is a “work,” Congress named numerous examples of copyrightable works, such as architectural works, motion pictures, literary works, and pictorial or sculptural works.⁷¹ Thus, a film itself is a “work,” but is an actor’s role in that film a work? This is a central issue in the *Garcia* case. A movie producer is motivated by the right to create copies and movies, and is usually treated as creating works that exist because of the incentives of copyright. Actors, however, have different and less significant interests.⁷² A motion picture seems unlikely to be a “collective work,” which is a combination of “separate and independent” works.⁷³ When it comes to a motion picture, most independent contributions are not “separate and independent,” but are meant to be “merged into inseparable or independent parts of a unitary whole [of] joint work[s].”⁷⁴ Unfortunately, the *Garcia* court focused on the fact that because a film is typically a joint work, the Copyright Act is silent as to whether a “copyright interest in a creative contribution to a work simply disappears because the contributor doesn’t qualify as a joint author.”⁷⁵ While still not discussing whether her role in the film as an actor constituted a “work,” the court determined that if the contribution was fixed, then the question hinged on whether it was creative enough to warrant protection.⁷⁶

The Ninth Circuit panel presumed Garcia’s contribution was a “work,” and focused its discussion on whether she was an author and if her contribution was creative.⁷⁷ However, if her contribution was not a “work,” it should not be protected, and the analysis should end. When a contributor has a “separate and independent” copyright in only a portion of the film, it creates serious consequences for the owner of the copyright.⁷⁸ The Copyright Act does not clearly provide that an actor’s role in a film constitutes a copyrightable work, and as such, the law does not

⁷⁰ 17 U.S.C.A. § 102(a) (West 2015).

⁷¹ *Id.*

⁷² Rebecca Tushnet, *Performance Anxiety: Copyright Embodied and Disembodied*, 60 J. COPYRIGHT SOC’Y U.S. 209, 223–24 (2013).

⁷³ MARK S. LEE, ENTERTAINMENT AND INTELLECTUAL PROPERTY LAW § 12:8 (2015).

⁷⁴ *Id.*

⁷⁵ *Garcia v. Google, Inc.*, 766 F.3d 929, 933?34 (9th Cir. 2014), *vacated*, 786 F.3d 733 (9th Cir. 2015) (en banc).

⁷⁶ *Id.* at 934.

⁷⁷ *See generally Garcia*, 766 F.3d 929 (9th Cir. 2014).

⁷⁸ Lee, *supra* note 73.

clearly favor that Garcia's part in *Innocence of Muslims* is a copyrightable interest.⁷⁹

Authorship is a requirement of copyright that is not only provided by the Copyright Act, but it is also embedded in the U.S. Constitution.⁸⁰ An author is the person who began the work, "the 'master mind.' . . . [For a film, this] would generally limit authorship to someone at the top of the screen credits, sometimes the producer, sometimes the director, possibly the star, or the screenwriter—someone who has artistic control."⁸¹ Authors of a copyrighted work have certain rights that are not afforded to non-authors who have contributed to the work.⁸² A person must be an author before an intention, if any, to merge contributions will matter.⁸³

Courts have interpreted joint authorship narrowly to protect the threat of people claiming some ownership in a film or play.⁸⁴ Joint authors share the right to a work, no matter how unequal their contributions may be, and each person can license it without the consent of the other authors.⁸⁵ As a result, courts prefer to award authorship to one person.⁸⁶ Generally, "the author is the party who actually creates the work; that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection."⁸⁷ Authorship is the difference between what is within the subject matter of copyright and what is copyrightable.⁸⁸

If anyone was author or mastermind of this film, it was Youssef, not Garcia. He was the author who could accept or reject contributions from others.⁸⁹ The dissent in the 2014 opinion claimed that Garcia's interest, if any, was part of a joint work, while the majority maintained joint works only occur when authors intend for their works to be joined.⁹⁰ Garcia did not claim a copyright interest in *Innocence of Muslims* as a film, instead she claimed an interest in her performance in the film.⁹¹ Thus, Garcia disclaimed the intent required for joint works and there was no evidence that Youssef intended to create a joint work.⁹² The parties did not form a

⁷⁹ *Garcia*, 766 F.3d at 942 (Smith, J., dissenting).

⁸⁰ 17 U.S.C.A. § 102(a) (West 2015); U.S. CONST. art. I, § 8, cl. 8.

⁸¹ *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000).

⁸² Tushnet, *supra* note 72, at 225.

⁸³ *Id.* at 226.

⁸⁴ *Id.* at 225-26.

⁸⁵ *Id.* at 222.

⁸⁶ *Id.* at 223.

⁸⁷ *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

⁸⁸ Tushnet, *supra* note 72, at 234.

⁸⁹ *Id.* at 233.

⁹⁰ *Garcia v. Google, Inc.*, 766 F.3d 929, 942 (9th Cir. 2014) (Smith, J., dissenting), *vacated*, 786 F.3d 733 (9th Cir. 2015) (en banc).

⁹¹ *Garcia*, 766 F.3d at 933 (majority opinion).

⁹² *Id.*

mutual intent to create a joint work, so Garcia was just an actor in a larger production.⁹³ Even if Youssef had relinquished his ownership in the film, Garcia would not have gained that authorship.⁹⁴

The 2014 Ninth Circuit opinion wrote the authorship requirement out of copyright law and replaced it with creativity and intent requirements, which was not Congress' intent. The court asserted that "the author of a single poem does not necessarily become a co-author of the anthology in which the poem is published."⁹⁵ Only "a minimal creative spark [is] required by the Copyright Act and the Constitution."⁹⁶ Here, the court has not explained how Garcia is still an author in her five-second role if she is not an author of a joint work in her contribution to the film. Garcia's fraud claim does not give her a copyright interest, because she was not an author or a joint author.⁹⁷ It is strange that so long as the director did not intervene in the suit, Garcia could be entitled to claim sole ownership in a film in which she appeared for five seconds and did not author.⁹⁸

2. *Actors' Rights Under Copyright Protection*

Copyright protection should not extend to an actor's performance regardless of its embodiment in the original work.⁹⁹ The expansion of copyright has had a vast impact in the area of performance "as new technologies have made it possible to fix performances in records and films, and as cultural change has propelled recorded music and audiovisual works to the forefront of the copyright industries."¹⁰⁰ Before *Garcia*, the Ninth Circuit had never held that an actress's performance could be copyrightable.¹⁰¹ Indeed, "[t]here is little case law or statutory authority as to the position of performers as authors of an audiovisual work under U.S. law."¹⁰² The Copyright Act provides that "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or

⁹³ Tushnet, *supra* note 72, at 233.

⁹⁴ *Id.*

⁹⁵ *Garcia*, 766 F.3d at 934.

⁹⁶ *Garcia*, 766 F.3d 929, 934 (9th Cir. 2014) (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv., 499 U.S. 340, 363 (1991)).

⁹⁷ Tushnet, *supra* note 72, at 237.

⁹⁸ *Id.* at 235.

⁹⁹ *Garcia*, 766 F.3d at 942 (Smith, J., dissenting).

¹⁰⁰ Tushnet, *supra* note 72, at 209.

¹⁰¹ *The Annals of Copyright Number 1*, *supra* note 12.

¹⁰² *Garcia*, 766 F.3d at 941 (Smith, J., dissenting) (quoting F. Jay Dougherty, *Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 UCLA L. Rev. 225, 300 (2001)).

embodied” will not be included for protection for an original work of authorship.¹⁰³ An acting performance is most similar to what Congress outlined as a “‘procedure’ or ‘process’ by which ‘an original work’ is performed.”¹⁰⁴ The Copyright Act differentiates a “work” from the performance of a work and defines “perform a work” as “to recite, render, play, dance, or act it.”¹⁰⁵ Congress included a description of what it is to “perform a work,” which makes it difficult to imagine that they also intended that a performance also be protected by copyright.¹⁰⁶

The underlying questions regarding performance and copyright are how to identify the creative aspects that make the performance original, and thus protectable, and how to distinguish the works from the elements that make it fixed.¹⁰⁷ Copyright law protects dramatic works, musical works, movies, and audiovisual works; however, a performance itself is not a category of work protected by copyright law.¹⁰⁸ Although plays and scripts are considered literary works and not performances, it is understood that they are meant to be performed.¹⁰⁹ A performance is typically less fixed and less predictable than the categories for copyright allow.¹¹⁰ Courts classify performances as single authorship because performances are given less cultural value.¹¹¹

Authorship rights are unlikely to result from a person reading a script and performing it.¹¹² Who owns, or is the author of, a performance becomes an important question. To determine who is an author, courts often look to customary roles in which “dramaturges and actors” are not usually considered authors.¹¹³ While a person can have a copyright interest without recognition by the Copyright Office, Garcia attempted to register for a copyright as a performance, a category that the Copyright Office does not recognize.¹¹⁴ However, the court gave little consideration to this fact.

The Ninth Circuit in 2014 found that “an actor’s performance is based on a script, the performance is likewise derivative of the script, such that the actor might be considered to have infringed the screen-

¹⁰³ 17 U.S.C.A. § 102(b) (West 2015).

¹⁰⁴ *Garcia*, 766 F.3d at 942 (Smith, J., dissenting).

¹⁰⁵ 17 U.S.C.A. §101 (West 2015).

¹⁰⁶ *Garcia*, 766 F.3d at 942 (Smith, J. dissenting).

¹⁰⁷ Tushnet, *supra* note 72, at 210.

¹⁰⁸ *Id.* at 211.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 212.

¹¹² *Id.* at 228.

¹¹³ *Id.*

¹¹⁴ Complaint at 4, *Garcia v. Nakoula*, No. 2:12-cv-08315-MWF-VBK (C.D. Cal. Oct. 4, 2012).

writer's copyright" protection.¹¹⁵ It is hard to imagine how it is plausible for an actor like Garcia to have her own copyright interest, which is infringed by the very film that her performance is fixed in.¹¹⁶ Garcia had no creative control over the script from which she read or over her performance.¹¹⁷ Garcia was not the originator of any ideas or concepts because Youssef provided the script, the equipment, and gave direction.¹¹⁸ Garcia merely acted out another person's ideas and script, and "even if a valuable contribution to the film," her five-second appearance in the film "does not make her an author."¹¹⁹

An actor's contribution to a movie is similar to a vocalist's contribution to a musical recording.¹²⁰ Garcia followed the script, she did not write it, she did not add her words or thoughts to the film, and she used her voice to speak the word on the script and her body to act the part in the scene.¹²¹ An actor's performance in a film is more related to the act of singing than it is to a protected copyrightable work.¹²² "A voice is not copyrightable. The sounds are not 'fixed.' What is put forward . . . here is more personal than any work of authorship."¹²³ Though an entire song is copyrightable, the singing of that song is not.¹²⁴ Similarly, the recording of a movie is copyrightable, but the acting performance in the movie is not.¹²⁵

In a film, there are many people who evince more creativity than Garcia did, and by allowing her this right, the majority here created "an impenetrable thicket of copyright."¹²⁶ The Ninth Circuit concluded that it is not necessary to decide whether all actors have a copyrightable interest in his or her movie performance and that, while it recognizes Garcia's interest is debatable, she is still likely to prevail.¹²⁷ This decision creates potential consequences for film and copyright owners by recognizing that an actor who voluntarily performs in a film may possess a copyright interest in the film.¹²⁸ The decision set forth the idea that where there

¹¹⁵ *Garcia v. Google, Inc.*, 766 F.3d 929, 935 (9th Cir. 2014), *vacated*, 786 F.3d 733 (9th Cir. 2015) (en banc).

¹¹⁶ Greg Lastowka, RUTGERS INST. FOR INFO. POLICY, *Garcia v. Google: Works Within Works* (Mar. 19, 2014), <http://riipl.rutgers.edu/garcia-v-google-works-within-works/>.

¹¹⁷ *Garcia*, 766 F.3d at 943 (Smith, J., dissenting).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 945.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988).

¹²⁴ *Garcia*, 766 F.3d at 945 (Smith, J., dissenting).

¹²⁵ *Id.*

¹²⁶ Alexander, *supra* note 23.

¹²⁷ *Garcia*, 766 F.3d at 935 (majority opinion).

¹²⁸ Lee, *supra* note 73.

would have been an implied license to use an actor's performance, any notion of fraud can make that license disappear and the actor has control to affect the release or distribution of the film as a whole.¹²⁹

B. EN BANC HEARING AND DECISION

An order for a rehearing en banc was granted November 12, 2014¹³⁰ by a majority vote of the non-recused active judges of the Ninth Circuit.¹³¹ En banc reviews are “typically reserved for cases the appellate court finds particularly significant.”¹³² The order provides that the en banc decision will hold and the previous opinion of the three-judge panel will not be cited as precedent by any Ninth Circuit court.¹³³ Many of the arguments at the en banc hearing were made to the appeals court in February 2014 and were reviewed above. This portion of the Note will focus on the most notable, new arguments that were presented at the en banc hearing.

1. *Melding Works, Authorship, and Mandatory Injunction*

The en banc hearing lasted about an hour and focused on whether Garcia could have a copyright interest in her five-second performance in the film and if the preliminary injunction was proper, which were two issues that often melded.¹³⁴ The court had many questions about the “work” and “authorship” elements of copyright claims and the imposition of an injunction, which have been discussed in detail above.¹³⁵

Garcia argued that because she was receiving death threats, she would be irreparably harmed without an injunction.¹³⁶ The court conceded that even if this was so, irreparable harm was only one factor ad-

¹²⁹ *Id.*

¹³⁰ *Garcia v. Google, Inc.*, 771 F.3d 647 (9th Cir. 2014).

¹³¹ Alexandra Sadinsky, Note, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 *FORDHAM L. REV.* 2001, 2023 (2014). The Ninth Circuit is the only circuit to exercise the limited en banc review which does not actually consist of the full court. The Ninth Circuit consists of 27 active judges, though a limited en banc court only contains 11 of those judges.

¹³² Edvard Pettersson, *Google Says Death Threats Don't Trump Copyright, YouTube*, *BLOOMBERG* (Dec. 15, 2014), <http://www.bloomberg.com/news/print/2014-12-15/google-says-death-threats-don-t-trump-copyright-youtube.html>.

¹³³ *Garcia v. Google, Inc.*, 771 F.3d 647 (9th Cir. 2014) (en banc).

¹³⁴ Cathy Gellis, *Celine Dion and Human Cannonballs: The Garcia v Google En Banc Oral Argument*, *TECHDIRT* (Dec. 16, 2014), <https://www.techdirt.com/articles/20141216/10362129451/ce-line-dion-human-cannonballs-garcia-v-google-en-banc-oral-argument.shtml>.

¹³⁵ *Cindy Garcia v. Google, Inc., et al*, *Np. 12-57302*, UNITED STATES COURTS FOR THE NINTH CIRCUIT (Dec. 15, 2014), http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000006884.

¹³⁶ Gellis, *supra* note 134.

dressed by the district court.¹³⁷ In order to grant the injunction, the district court needed to find that Garcia was likely to succeed on the merits of her copyright claim against Google.¹³⁸ The court struggled with the question of how the district court was wrong when it decided that Garcia did not have a copyright claim.¹³⁹ Garcia had “expressly disclaimed having a copyright in the final movie as a joint author.”¹⁴⁰ Garcia argued that she owned a copyright interest in her performance alone, conducted over three and a half days of filming, and not that she owned a piece of the final film itself.¹⁴¹

The court rightfully struggled with the fact that Garcia claimed a copyright in three and a half days of a performance, only five seconds of which was fixed in a tangible medium of expression, as required by the Copyright Act.¹⁴² The panel expressed skepticism about an actor claiming copyright in her performance. Judge McKeown asked Garcia if any extra who was in the battle scene in *Lord of the Rings* could also claim to have an independent copyright interest in a performance in a particular scene.¹⁴³ Garcia claimed that in this example, those people had agreed expressly or impliedly that their performance would be part of the whole, but Garcia did not consent to participate in what turned out to be *Innocence of Muslims*.¹⁴⁴ Garcia claimed that she was deceived and that deception took away the agreement that her performance would be incorporated into the whole, and thus, she retained her copyright interest in her contribution.¹⁴⁵ The court rightfully had issues with this argument because it struggled to find the “work” needed for a copyright claim.

Garcia’s argument posed the question of whether actors could claim copyright in their performance, and then also issue takedown notices to intermediaries.¹⁴⁶ The court noted that intermediaries would be “at risk for thousands, millions of claims made after the fact” and intermediaries would have to determine whether to remove the content or risk being sued like Google.¹⁴⁷ Garcia argued that the DMCA protects intermediaries by removing them from the dispute, which is between the parties who posted the content.¹⁴⁸ This would cause immense implica-

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Pettersson, *supra* note 132.

¹⁴⁴ Gellis, *supra* note 134.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

tions for intermediaries who are not as large and as well-funded as Google, and the burden would be placed on intermediaries to judge whether a five-second clip is copyrightable and would, in turn, require the take-down of the entire content in order to properly protect the intermediary.¹⁴⁹

Google admitted that a person may have a separate copyright interest in a performance, but asserted that Garcia did not possess that interest.¹⁵⁰ Google described Celine Dion singing a song in the movie *Titanic* that was intended both to be a standalone work, as well as included in the larger work of the film.¹⁵¹ Google explained the difference between Dion and Garcia turns on the intent of the parties, “Garcia has never alleged she had intended her performance to be an independent, stand-alone work.”¹⁵² Garcia fought back on this example, claiming that in her situation, she gave permission for her performance to be used in one context, in *Desert Warrior*, but it was then used in another context for which she did not give permission, in *Innocence of Muslims*.¹⁵³ The court questioned this, as well as whether copyright is the correct law to recognize her injury.¹⁵⁴

Garcia argued that the appellate court’s decision was a prohibitory injunction because it restricted an action in the future by restricting further infringement.¹⁵⁵ Google argued, as Judge Smith did in the dissenting opinion in 2014, that by changing the status quo, the appellate court issued a mandatory injunction.¹⁵⁶ The injunction resulted in the removal of the speech and should require a stronger showing that removal was warranted than Garcia had shown.¹⁵⁷

The court acted out of sympathy in its original decision and misapplied copyright law to “fill a gap in legal remedies available in the U.S.”¹⁵⁸ If copyright in Garcia’s performance stands on deception by Youssef, then what could stop any actor from claiming fraud and mistake, thus having a copyrightable interest in their performance?¹⁵⁹ Garcia’s association with the film is already widely known and any damage the movie caused her has already been done.¹⁶⁰ If the original ruling

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Pettersson, *supra* note 132.

¹⁵³ Gellis, *supra* note 134.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Pettersson, *supra* note 132.

¹⁵⁹ Gellis, *supra* note 134.

¹⁶⁰ *Id.*

stood, it would have created “floodgates to demands by minor players in movies for the removal of their performances from the internet.”¹⁶¹ Without correction, this opinion would have confused the scope of copyright protection, and created the threat of an increase in meritless copyright claims and litigation by performers regardless of the size of their contribution to the copyrighted work.¹⁶²

2. *En Banc Decision to Vacate its Original Ruling and Uphold District Court’s Decision*

The Ninth Circuit issued its en banc opinion on May 18, 2015, opening its opinion with a direct message: “[t]he appeal teaches a simple lesson – a weak copyright claim cannot justify censorship in the guise of authorship.”¹⁶³ The court found that, based on the requirements of the Copyright Act, the Copyright Office’s rejection of Garcia’s application for copyright, and the difference in Garcia’s copyright claim and the actual relief sought, the district court did not abuse its discretion denying her request for a preliminary injunction.¹⁶⁴ Thus, the court vacated the 2014 mandatory injunction against Google.¹⁶⁵ The biggest issue with Garcia’s copyright claim in her performance in *Innocence of Muslims* was that she chose to bring a copyright-based claim.¹⁶⁶ Garcia sought “to impose speech restrictions under copyright laws meant to foster rather than repress free expression,” the court compared this to “copyright cherry picking” that would allow any person who minimally contributed to a film to claim copyright without actually meeting the requirements of the Copyright Act.¹⁶⁷

The court re-emphasized the standards required for a mandatory injunction, which requested Google take affirmative action to remove the film from YouTube.¹⁶⁸ Thus, it must be established, not that Garcia is likely to succeed, but more specifically, that the “law and the facts clearly favor her position.”¹⁶⁹ The district court should deny relief where the facts and law do not clearly favor the moving party, thus “mandatory injunctions should not issue in ‘doubtful cases.’”¹⁷⁰

¹⁶¹ Pettersson, *supra* note 132.

¹⁶² *Id.*

¹⁶³ Garcia v. Google, Inc., 786 F.3d 733, 736 (9th Cir. 2015) (en banc).

¹⁶⁴ *Id.* at 737.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 740.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 741

The en banc court found that the law and the facts did not clearly favor Garcia's claim to copyright in her five-second performance in *Innocence of Muslims*.¹⁷¹ Under the Copyright Act, the fixation must be done "by or under the authority of the author."¹⁷² As stated above, "works of authorship" is intentionally left undefined under the Copyright Act.¹⁷³ As the court describes, "*Innocence of Muslims* is an audiovisual work that is categorized as a motion picture and is derivative of the script" and Garcia makes no claim to the copyright of the film or to the script.¹⁷⁴ The sole copyright claim she made is in her five-second performance, which the Copyright Office rejected out of its longstanding practice to deny actors the right to a copyright claim in their performances within a motion picture.¹⁷⁵ The court further analyzed that a "work" based on "some minimal level of creativity" would "fragment copyright protection . . . into many little pieces."¹⁷⁶ If every acting performance was treated as an independent work, it would create a "logistical and financial nightmare," and "it would turn a cast of thousands into a new mantra: copyright of thousands."¹⁷⁷

The court further found that Garcia, herself, did not fix her performance into a tangible medium.¹⁷⁸ Regardless of how Garcia's performance is characterized, she played no role in its fixation.¹⁷⁹ More importantly, Garcia argues that she did not agree to the film as it aired as *Innocence of Muslims*, thus she cannot claim that the film or her brief appearance in it was fixed by her as an author or under her authority.¹⁸⁰ The en banc court correctly concluded that the district court made no error in its copyright analysis and the "issuance of the mandatory preliminary injunction requires more than a possible or fairly debatable claim; it requires a showing that the law 'clearly favor[s]' Garcia."¹⁸¹ Garcia has not shown that the law clearly favors her because the Copyright Office and the Copyright Act do not support her claim.¹⁸²

The en banc court acknowledged it could have affirmed the district court on the copyright issue alone, but it addressed the issue of irrepara-

¹⁷¹ *Id.* at 747.

¹⁷² 17 U.S.C.A. § 101 (West 2015).

¹⁷³ *Garcia*, 786 F.3d at 741.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 742.

¹⁷⁷ *Id.* at 743.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 744

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

ble harm because of the extreme danger Garcia faced.¹⁸³ The court recognized Garcia faced serious harms and threats, but it also recognized the difference between the danger she faced, and her desires to remedy her copyright claim.¹⁸⁴ The original intention of copyright as set forth in Article I, Section 8 of the U.S. Constitution was for copyright to drive free expression and to supply the “economic incentive to create and disseminate ideas.”¹⁸⁵ Copyright was meant to protect the author’s commercial interest, not to “protect secrecy, but to stimulate creation by protecting its rewards.”¹⁸⁶ There is no dispute Garcia faced emotional distress, harm to her reputation, and death threats.¹⁸⁷ This is the harm that she claimed would have been avoided by the issuance of an injunction.¹⁸⁸ The issue lies with her search for relief under copyright law.¹⁸⁹ Copyright law is meant to encourage public access to the author’s creative work, and those authors “cannot seek emotional distress damages under the Copyright Act, because such damages are unrelated to the value and the marketability of their works.”¹⁹⁰ The en banc court ultimately held that under the first two preliminary injunction factors, Garcia’s copyright claim was doubtful and she faced no irreparable harm to her interests as an author, thus the last two factors: the balance of equities and public interest were not evaluated.¹⁹¹ By granting the takedown order, the panel “deprived the public of the ability to view firsthand, and judge for themselves, a film at the center of an international uproar.”¹⁹² The court reiterated that the takedown order was a classic form of prior restraint, which is the “most serious and the least tolerable infringement on First Amendment rights.”¹⁹³

In June 2015, the U.S. Court of Appeals for the Second Circuit decided an issue of first impression and cited *Garcia*, finding that a director’s contribution to a film is not “separate and independent” from the film and the director’s contribution was not a “work of authorship” under the protection of copyright.¹⁹⁴ Even if there is disagreement on the outcome of Garcia’s copyright interest in this case, it is likely that after the

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 745 (quoting *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010)).

¹⁸⁷ *Garcia*, 786 F.3d at 745.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 746.

¹⁹² *Id.* at 747.

¹⁹³ *Id.*

¹⁹⁴ Lewis R. Clayton, *Controversial Film Tests Limits of Copyright Law*, NAT’L LAW J. (July 13, 2015).

Second Circuit's concurrence, it will be difficult for courts to recognize similar copyright claims.¹⁹⁵ As the Ninth Circuit en banc decision addressed, if Garcia is entitled to any relief, it could be through privacy or other tort law remedies, not copyright.¹⁹⁶ Garcia's real goal was to have her association with the film removed and forgotten, but the "right to be forgotten" is a right that the United States has yet to recognize, especially in the realm of copyright law.¹⁹⁷

III. POSSIBLE REMEDIES EXISTING OUTSIDE OF COPYRIGHT

The Ninth Circuit has made clear its decision regarding performers' rights: performers do not have copyright claims solely by the existence of their work in a film.¹⁹⁸ The en banc court suggests Garcia may have received the remedy she desired if the United States recognized the "right to be forgotten," as is recognized in foreign nations.¹⁹⁹ The European Union Commission included the "right to be forgotten" under its proposal for the General Data Protection Regulation (GDPR).²⁰⁰ The GDPR aims to strengthen an individual's control over their personal data and to create legal certainty while minimizing administrative burdens for corporations.²⁰¹ The "right to be forgotten" evolved from the idea that "privacy is fundamentally a personality right predicated on dignity, attached to a person rather than to his or her property."²⁰²

There are three interpretations of the "right to be forgotten:" (1) a person has the right to delete information that he or she posted online, (2) a person has the right to delete any information about his or herself that others have posted online, and (3) a person has the right to remove any information about his or herself regardless of its origin.²⁰³ The "right to be forgotten" requires a controller of the content to erase personal data and to urge third parties to remove links to the data in order to prevent it

¹⁹⁵ *Id.*

¹⁹⁶ *Garcia v. Google, Inc.*, 786 F.3d 733, 745 (9th Cir. 2015) (en banc).

¹⁹⁷ *Id.* at 746?47.

¹⁹⁸ Wayman Stodart, *Garcia v Google and the Future of Actor's Rights*, JETLAW (June 18, 2015), <http://www.jetlaw.org/2015/06/18/garcia-v-google-and-the-future-of-actors-rights/>.

¹⁹⁹ *Garcia*, 786 F.3d at 746?47.

²⁰⁰ Patricia Sanchez Abril & Jacqueline D. Lipton, *The Right to Be Forgotten: Who Decides What the World Forgets?*, 103 KY. L.J. 363, 367 (2015).

²⁰¹ Michael L. Rustad & Sanna Kulevska, *Reconceptualizing the Right to Be Forgotten to Enable Transatlantic Data Flow*, 28 HARV. J. L. & TECH. 349, 366 (2015).

²⁰² Abril & Lipton, *supra* note 200 at 366.

²⁰³ Ignacio Cofone, *Google v. Spain: A Right to Be Forgotten?*, 15 CHI.-KENT J. INT'L & COMP. L. 1, 2 (2015). *See also* Rustad & Kulevska, *supra* note 201 at 367 (explaining these three interpretations are described as the right to have information erased after a preset period, the right to a clean slate, and the right to be connected to present information and disconnected to outdated information).

from spreading further.²⁰⁴ Overall this right was meant to make sure the economic interests of private companies, such as Google, would not outweigh the privacy rights of an individual.²⁰⁵ Under this right, a person can request the removal of data based on a simple preference without proving the data is harmful and in violation of personal rights.²⁰⁶ This right does not distinguish between true and false information, so truthful data that does not fit within the statutory exceptions can be suppressed.²⁰⁷

There are four statutory exceptions meant to accommodate expression and the public's right to know.²⁰⁸ Exceptions are established for: (1) an exercise of freedom of expression, (2) public interest in the area of public health, (3) historical, statistical, and scientific research purposes, and (4) compliance with a legal obligation.²⁰⁹ If the United States developed a similar model, it is unlikely that Garcia would qualify for a legally-recognized right to be forgotten. As applied thus far, the "right to be forgotten" is applied in response to personal information. Garcia, on the other hand, was not acting as herself when the video was uploaded to YouTube, she was playing a part she was hired for. Even though that part was altered, it seems likely that given the above statutory exceptions *Innocence of Muslims* could easily classify as an exercise of freedom of expression or for historical purposes. The video created uproar worldwide and is now part of history. Allowing a "right to be forgotten" for her role would deny the world the ability to form opinions and ideas surrounding the matter.²¹⁰ This right would create a situation, which allows for the existence of the video, but would make "it unavailable for the public who look for it on search engines."²¹¹

It is unlikely the "right to be forgotten" or anything similar will be adopted in the United States.²¹² While the White House released the Consumer Privacy Bill of Rights (Privacy Bill) proposal shortly after the European Union Commission released the GDPR, the Privacy Bill does not extend to a "right to be forgotten."²¹³ The Privacy Bill aims to make stronger privacy protection for online users in order to stimulate eco-

²⁰⁴ Abril & Lipton, *supra* note 200 at 365.

²⁰⁵ *Id.* at 379.

²⁰⁶ Cofone, *supra* note 203 at 2–3.

²⁰⁷ Rustad & Kulevska, *supra* note 201 at 369.

²⁰⁸ *Id.* at 371.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 373.

²¹¹ Cofone, *supra* note 203 at 10.

²¹² Andrew R.W. Hughes, *Does the United States Have an Answer to the European Right to Be Forgotten?*, LANDSLIDE, Sept./Oct. 2014, at 19.

²¹³ Rustad & Kulevska, *supra* note 201 at 379.

conomic growth.²¹⁴ Under this bill, people have the right to control how companies use their personal data and how that data is accessed, disseminated, and secured.²¹⁵ This bill provides protection for how consumers' information and data are processed, but provides no guidance for how general information can be posted or re-posted among various domains. The "right to be forgotten" has not gained leverage in the United States due to its adverse relationship with the First Amendment.²¹⁶ Some states have made small steps toward the "right to be forgotten."²¹⁷ In California, there is a "right to be forgotten" for children, which allows children to delete posts they made about themselves online, however it does not extend to content written about them.²¹⁸

There is a remedy that service providers can provide which would give people the right to correct inaccurate, false, old, or inappropriate data.²¹⁹ Contextualization allows people to "correct and re-project their images to society."²²⁰ Under this model, Garcia could provide details updating or explaining the out-of-context YouTube post. She would not receive the result of erasing the information that she desired, but she could have added information explaining that she had no part in *Innocence of Muslims* as it was released. Unfortunately, this is a feature that separate host sites need to enact and Google has abandoned this option.²²¹ Though this would not have given Garcia her desired result, it could have provided her initial control over the video without the threat of censorship.

CONCLUSION

The Ninth Circuit en banc panel correctly lifted the injunction finding that Garcia did not have a copyright interest in her performance in *Innocence of Muslims*. Copyright law is deeply rooted in American history to protect individuals' unique creations. Injunctions should only be granted when monetary damages will be insufficient to protect an owner's interest. Before one can obtain an injunction, they must be the owner of the copyright interest. The Ninth Circuit correctly determined that Garcia's performance was not a work, that she was not an author of her performance, and that she ultimately did not retain a copyright inter-

²¹⁴ *Id.* at 377.

²¹⁵ *Id.* at 378.

²¹⁶ *Id.* at 379.

²¹⁷ *Id.*

²¹⁸ *Id.* at 380.

²¹⁹ *Id.* at 384.

²²⁰ *Id.*

²²¹ *Id.* at 385.

est that warranted removal of the entire film from the Internet. While there is no doubt Garcia suffered an injury, copyright protection is not the correct avenue. In today's technologically driven world, where anyone can become a filmmaker by uploading a video to the Internet, it is possible that more people will assert injury due to inaccurate or image-harming uploads. Unless the legislature amends copyright protection or adopts a variation of the "right to be forgotten," which seems unlikely, then claimants must seek redress through ordinary privacy and tort law in which monetary damages must suffice.