

August, 2015 Update
Communication Law in America (4th Edition)

AUTHOR'S NOTE: This update includes reference to Supreme Court decisions and other relevant data through early August. You can expect the next update at the end of 2015.

CHAPTER 1

OK to Pray in Greece, New York

Since it is in this chapter where readers are introduced to the Establishment Clause, it is worth noting that in early May, 2014, the Supreme Court handed down a much-awaited decision generally permitting official town meetings to be opened with a prayer.¹ This was a 5-4 decision, with Justice Kennedy writing for the majority. Kennedy understood that the plaintiff was upset at how often prayers preceding the business at the town's meetings were sectarian, invoking Jesus's name, but held that the Establishment Clause does not protect against this kind of discomfort, especially since there was no pattern of overt disparagement of other religious faiths, and no one had to actually participate in prayer.

OK to Prohibit Judicial Candidates from Asking for Money

Chapter 1 offers brief mention (see pp. 2-3) of state laws governing election and retention of state judges, as well as Supreme Court review of such practices. In its 2014-2015 Term, the Supreme Court again weighed into this area of the law.² Like most states that provide for the election of state judges, Florida has a rule of judicial conduct prohibiting candidates for judge-ships to "personally solicit" campaign funds (although they may establish committees to take care of such matters). In this case, candidate Lanell Williams-Yulee sent a letter to local voters (she was running for a position in the county that includes Tampa), in which she promised to "bring fresh ideas and positive solutions to the Judicial bench," and in which she then sought contributions of "\$25, \$50, \$100, \$250, or \$500" to "launch the campaign and get our message out to the public." As it turned out, she lost the primary election.

The state supreme court accepted an official recommendation that "Yulee" be reprimanded and ordered to repay the state for the cost of the proceedings against her. She appealed, arguing that the ban on personal solicitation was in violation of the First Amendment.

The Supreme Court, Chief Justice Roberts writing for the majority³ (portions of the

¹*Town of Greece, New York v. Galloway*, 134 S. Ct. 1811 (2014).

²*Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656 (2015).

³The portion of Roberts' opinion in which he concludes that the statute would have to survive "strict scrutiny" to be joined by only 3 other justices. But a majority of justices accepted the Chief's decision, and the concurrence-that-broke-the-majority (written by Justice Ginsburg) argued only that the state law could be struck down even using a more intermediate level of scrutiny.

opinion were only joined by three other justices) rejected the appeal, and upheld the state law. As the Chief Justice put it, “personal solicitation by a judicial candidate inevitably places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate.”

CHAPTER 2

They Never Mentioned the First Amendment by Name, But . . .

Even though the much-awaited 2015 Supreme Court decision holding that same-sex marriage is constitutionally protected was based on Fourteenth Amendment, equal protection grounds, there is a lot of First Amendment “texture” in the justices’ prose.⁴

Justice Kennedy’s majority opinion uses the word “association,” as in “intimate association,” 5 times. (Recall that “freedom of association” is one of the rights protected by the First Amendment). Several times in the opinion he emphasizes that the plaintiffs pursue the

marriage right ***Garcia v. Google, 786 F.3d 733 (9th Cir. 2015)***

Background: Actress who received death threats due to her performance for unreleased film that was modified and incorporated into anti-Islamic video uploaded to video-hosting website sued website, website’s owner, and film’s producers, alleging that posting of video infringed her copyright in her performance. Actress applied for temporary restraining order. Treating application as motion for preliminary injunction, the United States District Court for the Central District of California, [Michael W. Fitzgerald](#), J., denied motion. Actress appealed. The Court of Appeals, [Kozinski](#), Chief Judge, [766 F.3d 929](#), reversed and remanded.

Holdings: On rehearing en banc, the Court of Appeals, [McKeown](#), Circuit Judge, held that:

(1) actress was not likely to succeed on her claim that her performance in film was a copyrightable “work,” and

(2) actress could not establish irreparable harm.

Affirmed.

[Watford](#), Circuit Judge, filed opinion concurring in the judgment.

[Kozinski](#), Circuit Judge, filed dissenting opinion.

Appeal from the United States District Court for the Central District of California, [Michael W. Fitzgerald](#), District Judge, Presiding. D.C. No. 2:12–cv–08315–MWF–VBK.

Before: [SIDNEY R. THOMAS](#), Chief Judge, and [ALEX KOZINSKI](#), [M. MARGARET McKEOWN](#), [MARSHA S. BERZON](#), [JOHNNIE B. RAWLINSON](#), [RICHARD R. CLIFTON](#), [CONSUELO M. CALLAHAN](#), [N. RANDY SMITH](#), [MARY H. MURGUIA](#), [MORGAN CHRISTEN](#) and [PAUL J. WATFORD](#), Circuit Judges.

⁴ *Obergefell v. Hodges*, 135 S. Ct. ____ (2015).

Opinion by Judge [MCKEOWN](#); Concurrence by Judge [WATFORD](#); Dissent by Judge [KOZINSKI](#).

OPINION

[McKEOWN](#), Circuit Judge:

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.

By all accounts, Cindy Lee Garcia was bamboozled when a movie producer transformed her five-second acting performance into part of a blasphemous video proclamation against the Prophet Mohammed.^{[FN1](#)} The producer—now in jail on unrelated matters—uploaded a trailer of the film, *Innocence of Muslims*, to YouTube. Millions*737 of viewers soon watched it online, according to Garcia. News outlets credited the film as a source of violence in the Middle East. Garcia received death threats.

[FN1](#). We use the transliteration “Mohammed” because both parties use this spelling. We note that, according to the American Library Association–Library of Congress Arabic Romanization Table, *available at* <http://www.loc.gov/catdir/cpso/roman.html>, an alternate transliteration is “Muhammad.”

Asserting that she holds a copyright interest in her fleeting performance, Garcia sought a preliminary injunction requiring Google to remove the film from all of its platforms, including YouTube. The district court denied the injunction, finding that Garcia did not establish likely success on the merits for her copyright claim. Nor did she demonstrate that the injunction would prevent any alleged harm in light of the film’s five-month presence on the Internet. A divided panel of our court reversed, labeled her copyright claim as “fairly debatable,” but then entered a mandatory injunction requiring Google to remove the film. That injunction was later limited to versions of the film featuring Garcia’s performance.

As Garcia characterizes it, “the main issue in this case involves the vicious frenzy against Ms. Garcia that the Film caused among certain radical elements of the Muslim community.” We are sympathetic to her plight. Nonetheless, the claim against Google is grounded in copyright law, not privacy, emotional distress, or tort law, and Garcia seeks to impose speech restrictions under copyright laws meant to foster rather than repress free expression. Garcia’s theory can be likened to “copyright cherry picking,” which would enable any contributor from a costume designer down to an extra or best boy to claim copyright in random bits and pieces of a unitary motion picture without satisfying the requirements of the Copyright Act. Putting aside the rhetoric of Hollywood hijinks and the dissent’s dramatics, this case must be decided on the law.

In light of the Copyright Act’s requirements of an “original work[] of authorship fixed in any tangible medium,” [17 U.S.C. § 102\(a\)](#), the mismatch between Garcia’s copyright claim and the relief sought, and the Copyright Office’s rejection of Garcia’s application for a copyright in her brief

performance, we conclude that the district court did not abuse its discretion in denying Garcia's request for the preliminary injunction. As a consequence, the panel's mandatory injunction against Google was unjustified and is dissolved upon publication of this opinion.

BACKGROUND AND PROCEDURAL HISTORY

In July 2011, Cindy Lee Garcia responded to a casting call for a film titled *Desert Warrior*, an action-adventure thriller set in ancient Arabia. Garcia was cast in a cameo role, for which she earned \$500. She received and reviewed a few pages of script. Acting under a professional director hired to oversee production, Garcia spoke two sentences: "Is George crazy? Our daughter is but a child?" Her role was to deliver those lines and to "seem[] concerned."

Garcia later discovered that writer-director Mark Basseley Youssef (a.k.a. Nakoula Basseley Nakoula or Sam Bacile) had a different film in mind: an anti-Islam polemic renamed *Innocence of Muslims*. The film, featuring a crude production, depicts the Prophet Mohammed as, among other things, a murderer, pedophile, and homosexual. Film producers dubbed over Garcia's lines and replaced them with a voice asking, "Is your Mohammed a child molester?" Garcia appears on screen for only five seconds.

Almost a year after the casting call, in June 2012, Youssef uploaded a 13-minute-and-51-second trailer of *Innocence of Muslims* to YouTube, the video-sharing website owned by Google, Inc., which boasts a global audience of more than one *738 billion visitors per month.^{FN2} After it was translated into Arabic, the film fomented outrage across the Middle East, and media reports linked it to numerous violent protests. The film also has been a subject of political controversy over its purported connection to the September 11, 2012, attack on the United States Consulate in Benghazi, Libya.

^{FN2}. See YouTube.com Press Statistics, [https:// www. youtube. com/ yt/ press/ statistics. html](https://www.youtube.com/yt/press/statistics.html) (last visited May 13, 2015).

Shortly after the Benghazi attack, an Egyptian cleric issued a fatwa against anyone associated with *Innocence of Muslims*, calling upon the "Muslim Youth in America[] and Europe" to "kill the director, the producer[,], and the actors and everyone who helped and promoted this film." Garcia received multiple death threats.

Legal wrangling ensued. Garcia asked Google to remove the film, asserting it was hate speech and violated her state law rights to privacy and to control her likeness. Garcia also sent Google five takedown notices under the Digital Millennium Copyright Act, [17 U.S.C. § 512](#), claiming that YouTube's broadcast of *Innocence of Muslims* infringed her copyright in her "audio-visual dramatic performance." Google declined to remove the film.

On September 19, 2012, Garcia first sued Google, Youssef, and other unnamed production assistants in Los Angeles Superior Court. Her complaint alleged a compendium of torts and assorted wrongdoing under California law. As against Google, Garcia made claims for invasion of privacy, false light, and violating her right to publicity. She brought the same claims against Youssef and

added fraud, unfair business practices, slander, and intentional infliction of emotional distress. The state court denied Garcia's motion for a "temporary restraining order and for an order to show cause re preliminary injunction," because she had "not shown a likelihood of success on the merits." On September 25, 2012, Garcia voluntarily dismissed her state court suit.

One day later, Garcia turned to federal court. She filed suit in the United States District Court for the Central District of California and again named Google and Youssef as codefendants. Garcia alleged copyright infringement against both defendants and revived her state law claims against Youssef for fraud, unfair business practices, libel, and intentional infliction of emotional distress.

Garcia then moved for a temporary restraining order and for an order to show cause on a preliminary injunction—but only on the copyright claim. She sought to bar Google from hosting *Innocence of Muslims* on YouTube or any other Google-run website.

On November 30, 2012, the district court denied Garcia's motion for a preliminary injunction. As an initial matter, the court concluded that "Garcia ha[d] not demonstrated that the requested relief would prevent any alleged harm," because, by that point, the film trailer had been on the Internet for five months. Nor did Garcia establish a likelihood of success on the merits. In particular, the district court found that the nature of Garcia's copyright interest was unclear, and even if she could establish such a copyright, she granted the film directors an implied license to "distribute her performance as a contribution incorporated into the indivisible whole of the Film."

A divided panel of our court reversed. More than a year and a half after the film was first uploaded, the panel majority first *739 issued a secret takedown order, giving Google twenty-four hours to remove all copies of *Innocence of Muslims* from YouTube and other Google-controlled platforms. The panel embargoed disclosure of the order until it issued its opinion. The panel later amended the order to allow YouTube to post any version of the film that did not include Garcia's performance.

In its later-issued opinion, the panel majority reversed the district court and granted Garcia's preliminary injunction. *Garcia v. Google, Inc.*, 743 F.3d 1258, amended by [Garcia v. Google, Inc., 766 F.3d 929 \(9th Cir.2014\)](#). Despite characterizing Garcia's copyright claim as "fairly debatable," the panel majority nonetheless concluded that Garcia was likely to prevail on her copyright claim as to her individual performance in [Innocence of Muslims. 766 F.3d at 935](#). In contrast to the district court's factual finding of an implied license from Garcia to Youssef, the panel opinion held that the license ran in the opposite direction: "Youssef implicitly granted [Garcia] a license to perform his screenplay," and that Garcia did *not* grant Youssef an implied license to incorporate her performance into the film. *Id.* at 935–38. Finally, the panel majority held that, because of the death threats against her, Garcia had established irreparable harm and the equities and public interest favored an injunction. *Id.* at 938–40. The opinion did not address the First Amendment consequences of the mandatory takedown injunction, beyond stating that the First Amendment does not protect copyright infringement.

Judge N.R. Smith dissented. He wrote that Garcia had not met the high burden required for a

mandatory preliminary injunction because she was unlikely to succeed on her copyright claim. [*Id.* at 941](#) (N.R. Smith, J., dissenting). Specifically, Garcia was not likely to prove her performance was a “work,” nor would she likely meet the copyright requirements of authorship and fixation, among other shortcomings with her claim. *Id.* at 946. In sum, “[b]ecause the facts and law do not ‘clearly favor’ issuing a preliminary injunction to Garcia, the district court did not abuse its discretion in denying Garcia’s requested relief.” *Id.* at 940.

We granted rehearing en banc.^{FN3} [*Garcia v. Google, Inc.*, 771 F.3d 647 \(9th Cir.2014\)](#).

[FN3](#). In connection with en banc proceedings, we received thirteen amicus briefs from a broad array of interested parties, including copyright and Internet law scholars; content, Internet service, and technology providers; actors; media organizations; and nonprofit groups. The briefs were helpful to our understanding of the implications of this case from various points of view. We thank amici for their participation.

ANALYSIS

I. THE DISTRICT COURT’S DECISION

Garcia sued under a slew of legal theories, but she moved for a preliminary injunction on just one of them: the copyright claim. Hence, copyright is the only basis for the appeal. Garcia’s tort allegations—and claimed harm resulting from those torts, such as emotional distress—do not figure into our analysis.

We begin with the basics.

[1] The district court’s order denying Garcia’s motion for a preliminary injunction is reviewed for abuse of discretion. [*Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 \(9th Cir.2011\)](#). Because our review is deferential, “[w]e will not reverse the district court where it ‘got the law right,’ even if we ‘would have arrived at a different result,’ so long as the district court did not clearly err in its factual determinations.” *Id.* (internal citation omitted).

*740 [2] The Supreme Court has emphasized that preliminary injunctions are an “extraordinary remedy never awarded as of right.” [*Winter v. NRDC*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 \(2008\)](#). The district court correctly identified that Garcia must satisfy *Winter*’s four-factor test. “A plaintiff seeking a preliminary injunction must show that: (1) she is likely to succeed on the merits, (2) she is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in her favor, and (4) an injunction is in the public interest.” [*Farris v. Seabrook*, 677 F.3d 858, 864 \(9th Cir.2012\)](#) (citing *Winter*, 555 U.S. at 20, 129 S.Ct. 365).

[3] The first factor under *Winter* is the most important—likely success on the merits. [*Aamer v. Obama*, 742 F.3d 1023, 1038 \(D.C.Cir.2014\)](#) (“We begin with the first and most important factor: whether petitioners have established a likelihood of success on the merits.”). Because it is a threshold inquiry, when “a plaintiff has failed to show the likelihood of success on the merits, we ‘need not consider the remaining three [*Winter* elements].’ ” [*Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937, 944 \(9th Cir.2013\)](#) (quoting [*DISH Network Corp. v. F.C.C.*, 653](#)

[F.3d 771, 776–77 \(9th Cir.2011\)](#)).

Garcia’s burden here is doubly demanding: Because Garcia seeks a mandatory injunction, she must establish that the law and facts *clearly favor* her position, not simply that she is likely to succeed.

[\[4\]\[5\]\[6\]\[7\]](#) Why? Garcia’s requested injunction required Google to take affirmative action—to remove (and to keep removing) *Innocence of Muslims* from YouTube and other sites under its auspices, whenever and by whomever the film was uploaded. This relief is treated as a mandatory injunction, because it “orders a responsible party to ‘take action.’” [Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.](#), 571 F.3d 873, 879 (9th Cir.2009) (citation omitted). As we have cautioned, a mandatory injunction “goes well beyond simply maintaining the status quo *pendente lite* [and] is particularly disfavored.” ^{FN4} [Stanley v. Univ. of S. Cal.](#), 13 F.3d 1313, 1320 (9th Cir.1994) (internal citations omitted). The “district court should deny such relief ‘unless the facts and law clearly favor the moving party.’” *Id.* (quoting [Anderson v. United States](#), 612 F.2d 1112, 1114 (9th Cir.1979)). In plain terms, mandatory injunctions should not issue in “doubtful cases.” [Park Vill. Apartment Tenants Ass’n v. Mortimer Howard Trust](#), 636 F.3d 1150, 1160 (9th Cir.2011).

^{FN4}. “The status quo means the last, uncontested status which preceded the pending controversy.” [N.D. ex rel. Parents v. Haw. Dep’t of Educ.](#), 600 F.3d 1104, 1112 n. 6 (9th Cir.2010) (internal citation and quotation marks omitted). The status quo preceding this litigation was that *Innocence of Muslims* was uploaded to and available for viewing on YouTube. The preliminary injunction issued by the panel majority disrupted that status quo by ordering Google to remove the film.

As we shall see, the district court did not abuse its discretion in concluding that Garcia was not likely to succeed on her copyright claim—much less that the law and facts *clearly* compel suppression of a controversial and politically significant film.

A. COPYRIGHT

[\[8\]](#) The central question is whether the law and facts clearly favor Garcia’s claim to a copyright in her five-second acting performance as it appears in *Innocence of Muslims*. The answer is no. This conclusion does not mean that a plaintiff like Garcia is without options or that she *741 couldn’t have sought an injunction against different parties or on other legal theories, like the right of publicity and defamation.^{FN5}

^{FN5}. Down the road, Garcia also may have a contract claim. She recalls signing some kind of document, though she cannot find a copy. We take no position on this claim. Nor do we consider whether Garcia’s performance was a work made for hire. See [17 U.S.C. § 101](#) (defining “work made for hire” as work “prepared by an employee within the scope of his or her employment” or, where both parties sign a written agreement, a work “specially ordered or commissioned ... as a part of a motion picture ...”); see also § 201(b) (in case of work made for hire, the employer or person for whom the work is prepared is the author, subject to express agreement otherwise). In district court proceedings, the parties disputed

whether Garcia signed a work-made-for-hire agreement, and the issue is not before us on appeal.

Under the Copyright Act, “[c]opyright protection subsists ... in original works of authorship fixed in any tangible medium of expression ... [including] motion pictures.” [17 U.S.C. § 102\(a\)](#). That fixation must be done “by or under the authority of the author.” [17 U.S.C. § 101](#). Benchmarked against this statutory standard, the law does not clearly favor Garcia’s position.

The statute purposefully left “works of authorship” undefined to provide for some flexibility. *See* 1 Nimmer on Copyright § 2.03. Nevertheless, several other provisions provide useful guidance. An audiovisual work is one that consists of “a series of related images which are intrinsically intended to be shown” by machines or other electronic equipment, plus “accompanying sounds.” [17 U.S.C. § 101](#). In turn, a “motion picture” is an “audiovisual work [] consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.” *Id.* These two definitions embody the work here: *Innocence of Muslims* is an audiovisual work that is categorized as a motion picture and is derivative of the script. Garcia is the author of none of this and makes no copyright claim to the film or to the script.^{FN6} Instead, Garcia claims that her five-second performance itself merits copyright protection.

^{FN6}. In another odd twist, one of Garcia’s primary objections rests on the words falsely attributed to her via dubbing. But she cannot claim copyright in words she neither authored nor spoke. That leaves Garcia with a legitimate and serious beef, though not one that can be vindicated under the rubric of copyright.

In the face of this statutory scheme, it comes as no surprise that during this litigation, the Copyright Office found that Garcia’s performance was not a copyrightable work when it rejected her copyright application. The Copyright Office explained that its “longstanding practices do not allow a copyright claim by an individual actor or actress in his or her performance contained within a motion picture.” Thus, “[f]or copyright registration purposes, a motion picture is a single integrated work.... Assuming Ms. Garcia’s contribution was limited to her acting performance, we cannot register her performance apart from the motion picture.”

We credit this expert opinion of the Copyright Office—the office charged with administration and enforcement of the copyright laws and registration.^{FN7} *See* [Inhale, Inc. v. Starbuzz Tobacco, Inc.](#), [755 F.3d 1038, 1041–42 \(9th Cir.2014\)](#). The Copyright Office’s well-reasoned position *742 “reflects a ‘body of experience and informed judgment to which courts and litigants may properly resort for guidance.’ ” [Southco, Inc. v. Kanebridge Corp.](#), [390 F.3d 276, 286 n. 5 \(3d Cir.2004\)](#) (en banc) (Alito, J.) (quoting [Yates v. Hendon](#), [541 U.S. 1, 3, 124 S.Ct. 1330, 158 L.Ed.2d 40 \(2004\)](#)).

^{FN7}. As Nimmer notes, when “the question as to copyrightability forms the core of the dispute between the parties, ... input from the Copyright Office—the governmental agency that possesses special expertise in determining the bounds of copyright protection—[can] be of great value.” 2 Nimmer on Copyright § 7.16[B][3][b][vi].

[FN8](#). The dissent’s suggestion that this case is somehow governed by the Beijing Treaty on Audiovisual Performances is misplaced. *See* Dissent at 38–39. At present, the treaty is aspirational at best. It has yet to take effect because only six countries have ratified or acceded to the treaty—well short of the thirty it needs to enter into force. *See* World Intellectual Property Organization, *Summary of the Beijing Treaty on Audiovisual Performances (2012)*, available at www.wipo.int/treaties/en/ip/beijing/summary_beijing.html (last visited May 13, 2015). Although the United States signed the treaty in 2012, it has not been ratified by the U.S. Senate. [Article II, Section 2 of the Constitution](#) requires the concurrence of a two-thirds majority of that body. The dissent’s reference to the fact sheet from the Patent and Trademark Office, which unlike the Copyright Office lacks legal authority to interpret and administer the Copyright Act, is similarly inapposite. *See* Dissent at 751.

In analyzing whether the law clearly favors Garcia, [Aalmuhammed v. Lee, 202 F.3d 1227 \(9th Cir.2000\)](#), provides a useful foundation. There, we examined the meaning of “work” as the first step in analyzing joint authorship of the movie *Malcolm X*. The Copyright Act provides that when a work is “prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary *whole*,” the work becomes a “joint work” with two or more authors. [17 U.S.C. § 101](#) (emphasis added). Garcia unequivocally disclaims joint authorship of the film.

In *Aalmuhammed*, we concluded that defining a “work” based upon “some minimal level of creativity or originality ... would be too broad and indeterminate to be useful.” [FN9 202 F.3d at 1233](#) (internal quotation marks omitted). Our animating concern was that this definition of “work” would fragment copyright protection for the unitary film *Malcolm X* into many little pieces:

[FN9](#). Although the ultimate issue in *Aalmuhammed* pertained to joint authorship, the definition of “work” was essential, just as in our case, to the analysis. 202 F.3d at 1233–34; *see also* [Richlin v. Metro–Goldwyn–Mayer Pictures, Inc., 531 F.3d 962, 968 \(9th Cir.2008\)](#) (relying on *Aalmuhammed* in reasoning that to determine authorship, the court must first determine the “work” to be examined).

So many people might qualify as an “author” if the question were limited to whether they made a substantial creative contribution that that test would not distinguish one from another. Everyone from the producer and director to casting director, costumer, hairstylist, and “best boy” gets listed in the movie credits because all of their creative contributions really do matter.

Id.

Garcia’s theory of copyright law would result in the legal morass we warned against in *Aalmuhammed*—splintering a movie into many different “works,” even in the absence of an independent fixation. Simply put, as Google claimed, it “make[s] Swiss cheese of copyrights.”

Take, for example, films with a large cast—the proverbial “cast of thousands” [FN10](#)—such as

Ben-Hur or *Lord of the Rings*.^{FN11} *743 The silent epic *Ben-Hur* advertised a cast of 125,000 people. In the *Lord of the Rings* trilogy, 20,000 extras tramped around Middle-Earth alongside Frodo Baggins (played by Elijah Wood). Treating every acting performance as an independent work would not only be a logistical and financial nightmare, it would turn cast of thousands into a new mantra: copyright of thousands.

^{FN10}. The term “cast of thousands” originated as a Hollywood “[a]dvertising come-on referring to the crowds of background players in a spectacular epic film.” Blumenfeld’s Dictionary of Acting and Show Business 48 (Hal Leonard Corp. 2009).

^{FN11}. For information on *Ben-Hur*, see *Ben-Hur*, IMDb, <http://www.imdb.com/title/tt0052618/> (last visited Jan. 21, 2015), and *Ben-Hur: A Tale of the Christ, Trivia*, IMDb, <http://www.imdb.com/title/tt0016641/trivia> (last visited Jan. 30, 2015). For information on *Lord of the Rings*, see *Lord of the Rings: The Fellowship of the Ring*, IMDb, <http://www.imdb.com/title/tt0120737/> (last visited Jan. 21, 2015), and *Lord of the Rings: The Fellowship of the Ring, Trivia*, IMDb, <http://www.imdb.com/title/tt0120737/trivia> (last visited Jan. 30, 2015).

The dissent spins speculative hypotheticals about copyright protection for book chapters, movie outtakes, baseball games, and Jimi Hendrix concerts. See Dissent at 749–50, 751. This hyperbole sounds a false alarm. Substituting moral outrage and colorful language for legal analysis, the dissent mixes and matches copyright concepts such as collective works, derivative works, the requirement of fixation, and sound recordings. The statutory definitions and their application counsel precision, not convolution. See, e.g., [17 U.S.C. §§ 101, 103, 114, 201](#). The citation to [Effects Associates, Inc. v. Cohen, 908 F.2d 555 \(9th Cir.1990\)](#) (Kozinski, J.), is particularly puzzling. There, neither party disputed the plaintiff’s copyright, and the plaintiff independently fixed the special-effects footage and licensed it to the filmmakers. See *id.* at 556 n. 2

The reality is that contracts and the work-made-for-hire doctrine govern much of the big-budget Hollywood performance and production world. See 1 Nimmer on Copyright § 6.07[B][2]. Absent these formalities, courts have looked to implied licenses. See [Effects Assocs.](#), 908 F.2d at 559–60. Indeed, the district court found that Garcia granted Youssef just such an implied license to incorporate her performance into the film.^{FN12} But these legal niceties do not necessarily dictate whether something is protected by copyright, and licensing has its limitations. As filmmakers warn, low-budget films rarely use licenses. Even if filmmakers diligently obtain licenses for everyone on set, the contracts are not a panacea. Third-party content distributors, like YouTube and Netflix, won’t have easy access to the licenses; litigants may dispute their terms and scope; and actors and other content contributors can terminate licenses after thirty five years. See [17 U.S.C. § 203\(a\)\(3\)](#). Untangling the complex, difficult-to-access, and often phantom chain of title to tens, hundreds, or even thousands of standalone copyrights is a task that could tie the distribution chain in knots. And filming group scenes like a public parade, or the 1963 March on Washington, would pose a huge burden if each of the thousands of marchers could claim an independent copyright.

^{FN12}. Any copyright claim aside, the district court found that Garcia granted Youssef a

non-exclusive implied license to use her performance in the film. Although Garcia asked Youssef about *Desert Warrior*'s content, she in no way conditioned the use of her performance on Youssef's representations. On this record, we cannot disturb the district court's finding as clearly erroneous. [Pom Wonderful LLC v. Hubbard](#), 775 F.3d 1118, 1122–23 (9th Cir.2014) (noting that factual findings reviewed for clear error).

Garcia's copyright claim faces yet another statutory barrier: She never fixed her acting performance in a tangible medium, as required by [17 U.S.C. § 101](#) ("A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, *by or under the authority of the author*, is sufficiently permanent or stable *744 to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.") (emphasis added). According to the Supreme Court, "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." [Cmt. for Creative Non-Violence v. Reid](#), 490 U.S. 730, 737, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989). Garcia did nothing of the sort.^{FN13}

FN13. The Copyright Office draws a distinction between acting performances like Garcia's, which are intended to be an inseparable part of an integrated film, and standalone works that are separately fixed and incorporated into a film. We in no way foreclose copyright protection for the latter—any "discrete work in itself that is later incorporated into a motion picture," as the Copyright Office put it. See [Effects Assocs.](#), 908 F.2d at 558–59 (recognizing independent copyrightability of special effects footage incorporated into film).

For better or for worse, Youssef and his crew "fixed" Garcia's performance in the tangible medium, whether in physical film or in digital form. However one might characterize Garcia's performance, she played no role in fixation. On top of this, Garcia claims that she never agreed to the film's ultimate rendition or how she was portrayed in *Innocence of Muslims*, so she can hardly argue that the film or her cameo in it was fixed "by or under [her] authority." [17 U.S.C. § 101](#).

In sum, the district court committed no error in its copyright analysis. 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. See [Stanley](#), 13 F.3d at 1320. Because neither the Copyright Act nor the Copyright Office's interpretation supports Garcia's claim, this is a hurdle she cannot clear.

B. IRREPARABLE HARM

Although we could affirm the district court solely on the copyright issue, see *DISH Network*, 653 F.3d at 776–77, we address irreparable harm because the grave danger Garcia claims cannot be discounted and permeates the entire lawsuit.

At first blush, irreparable harm looks like Garcia's strongest argument. Garcia understandably takes seriously the fatwa and threats against her and her family, and so do we. The difficulty with Garcia's claim is that there is a mismatch between her substantive copyright claim and the dangers she hopes to remedy through an injunction. Garcia seeks a preliminary injunction under copyright

law, not privacy, fraud, false light or any other tort-based cause of action. Hence, Garcia's harm must stem from copyright—namely, harm to her legal interests *as an author*. [Salinger v. Colting, 607 F.3d 68, 81 & n. 9 \(2d Cir.2010\)](#) (“The relevant harm is the harm that ... occurs to the parties’ legal interests....”).

Looking to the purpose of copyright underscores the disjunction Garcia's case presents. Article 1, Section 8 of the U.S. Constitution provides that copyrights “promote the Progress of Science and useful arts.” Hence, the “Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.” [Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558, 105 S.Ct. 2218, 85 L.Ed.2d 588 \(1985\)](#); *see also* [Eldred v. Ashcroft, 537 U.S. 186, 219, 123 S.Ct. 769, 154 L.Ed.2d 683 \(2003\)](#) (noting that “copyright's purpose is to *promote* the creation and publication of free expression”) (emphasis in original). In keeping with copyright's function, “the justification of the copyright law is the protection of the *commercial**745 interest of the []author. It is not to ... protect secrecy, but to stimulate creation by protecting its rewards.” [Salinger, 607 F.3d at 81 n. 9](#) (quoting [New Era Publ'ns Int'l, ApS v. Henry Holt & Co., 695 F.Supp. 1493, 1526 \(S.D.N.Y.1988\)](#)).

As Garcia frames it, “the main issue in this case involves the vicious frenzy against Ms. Garcia that the Film caused among certain radical elements of the Muslim community,” which has caused “severe emotional distress, the destruction of her career and reputation” and credible death threats. With respect to irreparable harm, she argues that “[t]he injuries she seeks to avoid—damage to her reputation, unfair[,] forced promotion of a hateful Film, and death—will be avoided if any injunction issues.”

[9] This relief is not easily achieved under copyright law. Although we do not take lightly threats to life or the emotional turmoil Garcia has endured, her harms are untethered from—and incompatible with—copyright and copyright's function as the engine of expression.

[10] In broad terms, “the protection of privacy is not a function of the copyright law.... To the contrary, the copyright law offers a limited monopoly to encourage ultimate *public access* to the creative work of the author.” [Bond v. Blum, 317 F.3d 385, 395 \(4th Cir.2003\)](#); *see also* [Monge v. Maya Magazines, Inc., 688 F.3d 1164, 1177 \(9th Cir.2012\)](#) (quoting *Bond* and “pointedly” noting copyright cases are analyzed “only under copyright principles, not privacy law”).

[11] Likewise, authors cannot seek emotional distress damages under the Copyright Act, because such damages are unrelated to the value and marketability of their works. *See In re Dawson, 390 F.3d 1139, 1146 n. 3 (9th Cir.2004)* (noting that “ ‘actual damages’ in the context of the Copyright Act ... cover only economic damages” (internal citation omitted)); [Mackie v. Rieser, 296 F.3d 909, 917 \(9th Cir.2002\)](#) (rejecting copyright damages where “the infringement did not in any way influence the market value” of a piece of outdoor artwork but instead boiled down to the author's “personal objections to the manipulation of his artwork”).

By way of example, erstwhile professional wrestler and reality TV star Hulk Hogan wanted to

enjoin Gawker.com from posting a sex tape of Hogan with a mistress, claiming copyright infringement. [*Bollea v. Gawker Media, LLC*, 913 F.Supp.2d 1325, 1327 \(M.D.Fla.2012\)](#). The district court found an absence of irreparable harm because Hogan “produced no evidence demonstrating that he will suffer irreparable harm in the copyright sense absent a preliminary injunction. The only evidence in the record reflecting harm to [Hogan] relates to harm suffered by him personally and harm to his professional image due to the ‘private’ nature of the Video’s content. This evidence does not constitute irreparable harm in the context of copyright infringement.” *Id.* at 1329; cf. [*New Era Publ’ns*, 695 F.Supp. at 1499](#) (denying injunction sought “not in good faith for its intended purpose of protecting the value of publication rights, but rather to suppress a derogatory study of the founder of the Church of Scientology”).

Privacy laws, not copyright, may offer remedies tailored to Garcia’s personal and reputational harms. On that point, we offer no substantive view. Ultimately, Garcia would like to have her connection to the film forgotten and stripped from YouTube. Unfortunately for Garcia, such a “right to be forgotten,” although recently affirmed by the Court of Justice for the European Union, is not recognized in the United States. See Case C–131/12, *Google *746 Spain SL v. Agencia Española de Protección de Datos* (AEPD), ECLI:EU:C:2014:616 (May 13, 2014) (requiring Google to consider individual requests [to remove personal information from its search engine](#)); [*Internet Law—Protection of Personal Data—Court of Justice of the European Union Creates Presumption that Google Must Remove Links to Personal Data Upon Request*, 128 Harv. L.Rev. 735 \(2014\)](#).

Nor is Garcia protected by the benefits found in many European countries, where authors have “moral rights” to control the integrity of their works and to guard against distortion, manipulation, or misappropriation. See [*Kelley v. Chicago Park Dist.*, 635 F.3d 290, 296 \(7th Cir.2011\)](#) (describing differences in moral rights in American copyright law versus other countries). Except for a limited universe of works of visual art, such as paintings and drawings protected under the Visual Artists Rights Act of 1990, United States copyright law generally does not recognize moral rights. [17 U.S.C. § 106A](#). Motion pictures specifically are excluded from moral rights protection. [§ 106A](#); [§ 101](#) (“[W]ork of visual art does not include ... any ... motion picture or other audiovisual work....”).

In short, Garcia’s harms are too attenuated from the purpose of copyright. We do not foreclose that in a different circumstance with a strong copyright claim, a court could consider collateral consequences as part of its irreparable harm analysis and remedy. [17 U.S.C. § 502](#) (providing that the court may grant injunctions “as it may deem reasonable to prevent or restrain infringement of a copyright”). But such a case is not before us.

Garcia waited months to seek an injunction after *Innocence of Muslims* was uploaded to YouTube in July 2012; she did not seek emergency relief when the film first surfaced on the Internet. The district court did not abuse its discretion by finding this delay undercut Garcia’s claim of irreparable harm. See [*Oakland Tribune, Inc. v. Chronicle Publ’g Co.*, 762 F.2d 1374, 1377 \(9th Cir.1985\)](#) (“Plaintiff’s long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.”); 4 Nimmer on Copyright § 14.06[A][3][c] (noting unreasonable delay can defeat irreparable injury and the length of time “need not be great”). Garcia notes that she moved swiftly once the film was translated into Arabic and sparked death threats against her. But that proves

the point: the gravamen of Garcia's harm is untethered from her commercial interests as a performer, and instead focuses on the personal pain caused by her association with the film.

The district court did not abuse its discretion in determining that Garcia failed to muster a clear showing of irreparable harm. See [Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.](#), 654 F.3d 989, 999–1000 (9th Cir.2011) (“Harm must be proved, not presumed.” (quoting 4 Nimmer on Copyright § 14.06[A] [5])).

In the face of a doubtful copyright claim and the absence of irreparable harm to Garcia's interests as an author, we need not consider the final two *Winter* factors, the balance of equities and public interest.

II. THE PANEL'S INJUNCTION

In February 2014, the panel majority issued the following injunction: “Google, Inc. shall take down all copies of ‘**Innocence of Muslims**’ from YouTube.com and from any other platforms under Google's control, and take all reasonable steps to prevent further uploads of ‘**Innocence of Muslims**’ to those platforms.” Soon after, the panel amended the order to state that the prohibition did “not preclude the posting or display of any version of ‘**Innocence *747 of Muslims**’ that does not include Cindy Lee Garcia's performance.”

Although the first order was more sweeping, the second cast the court in the uneasy role of film editor. The amendment only mattered if Google assumed authority to change the content of someone else's copyrighted film. To no one's surprise, the end result was the same: the entire film remained removed from YouTube.

The takedown order was unwarranted and incorrect as a matter of law, as we have explained above. It also gave short shrift to the First Amendment values at stake. The mandatory injunction censored and suppressed a politically significant film—based upon a dubious and unprecedented theory of copyright. In so doing, the panel deprived the public of the ability to view firsthand, and judge for themselves, a film at the center of an international uproar.

Although the intersection between copyright and the First Amendment is much-debated,^{FN14} the Supreme Court teaches that copyright is not “categorically immune from challenges under the First Amendment.” [Eldred](#), 537 U.S. at 221, 123 S.Ct. 769 (internal citation omitted). To be sure, this is not a case of garden-variety copyright infringement, such as seeking to restrain the use of copyrighted computer code. The panel's takedown order of a film of substantial interest to the public is a classic prior restraint of speech. [Alexander v. United States](#), 509 U.S. 544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993) (“Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints.”). Prior restraints pose the “most serious and the least tolerable infringement on First Amendment rights,” [Hunt v. NBC](#), 872 F.2d 289, 293 (9th Cir.1989) (citation omitted), and Garcia cannot overcome the historical and heavy presumption against such restraints with a thin copyright claim in a five-second performance.

FN14. See, e.g., Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 Wash. & Lee L.Rev. 831 (2010); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147 (1998).

The amended injunction issued February 28, 2014 is dissolved immediately and has no force or effect.

CONCLUSION

At this stage of the proceedings, we have no reason to question Garcia's claims that she was duped by an unscrupulous filmmaker and has suffered greatly from her disastrous association with the *Innocence of Muslims* film. Nonetheless, the district court did not abuse its discretion when it denied Garcia's motion for a preliminary injunction under the copyright laws.

AFFIRMED.

WATFORD, Circuit Judge, concurring in the judgment:

We don't have to craft new rules of copyright law to resolve this appeal. We just have to follow the law we established a few years ago, without controversy, on the subject of irreparable harm. The majority's decision to do more is a mistake in my view, and not just because much of what the majority says about copyright law may be wrong. See Dissent at 749–51. We are usually well advised to decide no more than we need to, even when resolving routine appeals typical of those we're likely to see in the future. We should be all the more cautious when resolving an appeal like this one, a case that could not be more atypical as far as copyright infringement *748 actions go and one that is highly charged on both sides to boot. Because the risk of making bad law in these circumstances is particularly high, we should aim to decide as narrowly as we can, leaving the task of crafting broad new rules for a case in which it is actually necessary to do so. See Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. Chi. L.Rev. 883, 916 (2006).

Had we chosen to decide narrowly here, we could have affirmed the district court's denial of a preliminary injunction by focusing solely on the irreparable harm prong. Garcia bore the burden of showing that "irreparable injury is *likely* in the absence of" the requested injunction. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). The only form of injury Garcia has alleged that could qualify as irreparable is the risk of death she faces as a result of the fatwa issued against her. Unlike the majority, I'm willing to assume that the risk of death qualifies as irreparable injury in this context. But under our decision in *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976 (9th Cir.2011), Garcia also had to prove a "causal connection" between the irreparable injury she faces and the conduct she hopes to enjoin. *Id.* at 982. In other words, she had to show that removing the film from YouTube would likely eliminate (or at least materially reduce) the risk of death posed by issuance of the fatwa.

The district court did not abuse its discretion by concluding, albeit for reasons different from those I offer here, that Garcia failed to satisfy the irreparable harm prong. The sad but unfortunate truth is that the threat posed to Garcia by issuance of the fatwa will remain whether *The Innocence*

of *Muslims* is available on YouTube or not. Garcia is subject to the fatwa because of her role in making the film, not because the film is available on YouTube. The film will undoubtedly remain accessible on the Internet for all who wish to see it even if YouTube no longer hosts it. Bottom line: Garcia's requested injunction won't change anything about the content of the film or the part, however limited, she played in its making.

Of course, Garcia's role in making the film has been completely misunderstood. She never actually uttered the highly offensive words her character speaks in the film. She had no idea that the scenes in which she appeared would later be used as part of an anti-Islam diatribe, and she strongly opposes the film's message. Correcting these misperceptions might well eliminate or reduce the threat Garcia faces, but she has already taken numerous steps to do just that. She has publicly denounced the film and done everything within her power—including bringing this lawsuit—to disassociate herself from the film's hateful message.

The declaration submitted by Garcia's expert on Islamic and Middle Eastern law—the only evidence she offered that addresses causation directly—candidly describes the tenuous causation theory Garcia relies on. Garcia's expert did not assert that removing the film from YouTube would likely cause the fatwa against her to be lifted. He instead noted that Garcia's "public statements condemning the film here have been received in the Muslim world with controversy," and opined that removing the film from YouTube would cause others to believe that Garcia's condemnations are sincere: "If she is successful in pulling the content down from the internet, it will likely help her in terms of *believability of her message* condemning the film and its message." (Emphasis added.)

In my view, this sparse evidence does not show that removing the film from YouTube would be likely to mitigate the risk of *749 death Garcia faces. At most, the expert's bare assertion establishes that granting the requested injunction will have an incremental but impossible-to-measure effect on Garcia's credibility. The declaration notably stops short of suggesting that the injunction would have any impact (let alone a likely impact) on the actions of the necessary audience: the cleric who issued the fatwa and those who would be inclined to carry it out. Nor is it obvious why *success* in getting the district court to order the film's removal from YouTube would be critical to bolstering the believability of Garcia's message. Demanding the take-down injunction seems to speak loudly and clearly in its own right about the sincerity of her views on the film.

The district court did not abuse its discretion in concluding that, on this record, Garcia failed to satisfy the irreparable harm prong. Under our decision in *Perfect 10*, that alone requires us to affirm the district court's denial of a preliminary injunction. [653 F.3d at 982](#). I concur in the judgment for that reason only.

[KOZINSKI](#), Circuit Judge, dissenting:

Garcia's dramatic performance met all of the requirements for copyright protection: It was copyrightable subject matter, it was original and it was fixed at the moment it was recorded. So what happened to the copyright? At times, the majority says that Garcia's performance was not copyrightable at all. And at other times, it seems to say that Garcia just didn't do enough to gain a

copyright in the scene. Either way, the majority is wrong and makes a total mess of copyright law, right here in the Hollywood Circuit. In its haste to take internet service providers off the hook for infringement, the court today robs performers and other creative talent of rights Congress gave them. I won't be a party to it.

I

Youssef handed Garcia a script. Garcia performed it. Youssef recorded Garcia's performance on video and saved the clip. Until today, I understood that the rights in such a performance are determined according to elementary copyright principles: An "original work[] of authorship," [17 U.S.C. § 102\(a\)](#), requires only copyrightable subject matter and a "minimal degree of creativity." [Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.](#), 499 U.S. 340, 345, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991). The work is "fixed" when it is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." [17 U.S.C. § 101](#). And at that moment, the "author or authors of the work" instantly and automatically acquire a copyright interest in it. [17 U.S.C. § 201\(a\)](#). This isn't exactly String Theory; more like Copyright 101.

Garcia's performance met these minimal requirements; the majority doesn't contend otherwise. The majority nevertheless holds that Garcia's performance isn't a "work," apparently because it was created during the production of a later-assembled film, *Innocence of Muslims*. Maj. Op. 741–43. But if you say something is not a work, it means that it isn't copyrightable by anyone. Under the majority's definition of "work," no one (not even Youssef) can claim a copyright in any part of Garcia's performance, even though it was recorded several months before *Innocence of Muslims* was assembled. Instead, *Innocence of Muslims*—the ultimate film—is the only thing that can be a "work." If this is what my colleagues are saying, they are casting doubt on the copyrightability of vast swaths of material created during production of a film or other composite work.

***750** The implications are daunting. If Garcia's scene is not a work, then every take of every scene of, say, *Lord of the Rings* is not a work, and thus not protected by copyright, unless and until the clips become part of the final movie. If some dastardly crew member were to run off with a copy of the Battle of Morannon, the dastard would be free to display it for profit until it was made part of the final movie. And, of course, the take-outs, the alternative scenes, the special effects never used, all of those things would be fair game because none of these things would be "works" under the majority's definition. And what about a draft chapter of a novel? Is there no copyright in the draft chapter unless it gets included in the published book? Or if part of the draft gets included, is there no copyright in the rest of it?

This is a remarkable proposition, for which the majority provides remarkably little authority. [Aalmuhammed v. Lee](#), 202 F.3d 1227 (9th Cir.2000), the only case that the majority cites, says just the opposite. In *Aalmuhammed*, we considered a claim by a contributor to the movie *Malcolm X* that he was a joint author of the entire movie. *Id.* at 1230. Everyone in *Aalmuhammed* agreed that the relevant "work" was *Malcolm X*. The only question was whether the contributor was a joint author of *that* work. We went out of our way to emphasize that joint authorship of a movie is a "different question" from whether a contribution to the movie can be a "work" under [section 102\(a\)](#). *Id.* at 1233. And we clearly stated that a contribution to a movie *can* be copyrightable (and thus can be a

“work”). *Id.* at 1232.

The majority’s newfangled definition of “work” is directly contrary to a quarter-century-old precedent that has never been questioned, [Effects Associates, Inc. v. Cohen, 908 F.2d 555 \(9th Cir.1990\)](#). There, we held that a company that created special effects footage during film production retained a copyright interest in the footage even though it became part of the film. *Id.* at 556–58; see also [Oddo v. Ries, 743 F.2d 630, 633–34 \(9th Cir.1984\)](#). The majority tries to distinguish *Effects Associates* by arguing that the footage there was a “standalone work[] that [was] separately fixed and incorporated into a film.” Maj Op. 744 n. 13. But Garcia’s performance was also “separately fixed and incorporated into” *Innocence of Muslims*. Why then are the seven shots “featuring great gobs of alien yogurt oozing out of a defunct factory” interspersed in *The Stuff*, 908 F.2d at 559, any more a “standalone work” than Garcia’s performance? Youssef wasn’t required to use any part of Garcia’s performance in the film; he could have sold the video clip to someone else. The clip might not have had much commercial value, but neither did the special effects scenes in *Effects Associates*. Nothing in the Copyright Act says that special effects scenes are “works” entitled to copyright protection but other scenes are not. And what about scenes that have actors *and* special effects? Are those scenes entitled to copyright protection (as in *Effects Associates*), or are they denied copyright protection like Garcia’s scene?

II

A. The majority also seems to hold that Garcia is not entitled to copyright protection because she is not an author of the recorded scene. According to the majority, Garcia can’t be an author of her own scene because she “played no role in [her performance’s] fixation.” Maj. Op. 744.

But a performer need not operate the recording equipment to be an author of his own performance. See [H.R.Rep. No. 94–1476, at 56](#) (1976); [S.Rep. No. 94–473, at 53–54](#) (1975); see also 1 *Nimmer on Copyright**751 § 2.10[A][3] at 2–178.4 to 2–178.5. Without Garcia’s performance, all that existed was a script. To convert the script into a video, there needed to be both an actor physically performing it and filmmakers recording the performance. Both kinds of activities can result in copyrightable expression. See 1 *Nimmer on Copyright* § 2.09[F] at 2–165 to 2–171 (discussing [Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n, 805 F.2d 663 \(7th Cir.1986\)](#)).^{FN1} Garcia’s performance had at least “some minimal degree of creativity” apart from the script and Youssef’s direction. See [Feist, 499 U.S. at 345, 111 S.Ct. 1282](#). One’s “[p]ersonality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something which is one man’s alone.” [Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250, 23 S.Ct. 298, 47 L.Ed. 460 \(1903\)](#). To dispute this is to claim that *Gone With the Wind* would be the same movie if Rhett Butler were played by Peter Lorre.

^{FN1}. Professor Nimmer agrees with the first premise of *Baltimore Orioles*, namely, that a contributor of a copyrightable expression that’s captured on video may retain a copyright interest in it. 1 *Nimmer on Copyright* § 2.09[F] at 2–166. That’s because both the underlying human activity and the creative aspects of the video itself may be copyrightable. *Id.* Professor Nimmer disagrees with the Seventh Circuit’s decision in *Baltimore Orioles* on the basis that the underlying human activity in that case (the baseball game) didn’t contain any creative

elements. 1 *id.* § 2.09[F] at 2–167 to 2–171. But Garcia’s acting performance is clearly copyrightable subject matter. See [Laws v. Sony Music Entm’t, Inc.](#), 448 F.3d 1134, 1142 (9th Cir.2006) (citing [Fleet v. CBS, Inc.](#), 50 Cal.App.4th 1911, 58 Cal.Rptr.2d 645, 651 (1996)); 1 *Nimmer on Copyright* § 2.09[F] at 2–170 n. 85.

Actors usually sign away their rights when contracting to do a movie, but Garcia didn’t and she wasn’t Youssef’s employee. I’d therefore find that Garcia acquired a copyright in her performance the moment it was fixed. When dealing with material created during production of a film or other composite work, the absence of a contract always complicates things. See [Effects Associates](#), 908 F.2d at 556 (“Moviemakers do lunch, not contracts.”). Without a contract the parties are left with whatever rights the copyright law gives them. It’s not our job to take away from performers rights Congress gave them. Did Jimi Hendrix acquire no copyright in the recordings of his concerts because he didn’t run the recorder in addition to playing the guitar? Garcia may not be as talented as Hendrix—who is?—but she’s no less entitled to the protections of the Copyright Act.

B. While the Copyright Office claims that its “longstanding practices” don’t recognize Garcia’s copyright interest, it doesn’t seem that the Register of Copyrights got the memo. The Register was a member of the U.S. delegation that signed the Beijing Treaty on Audiovisual Performances. See U.S. Copyright Office, *Annual Report of the Register of Copyrights* 8 (2012). The Treaty would recognize Garcia’s rights in her performance. It provides that “performers” have the “exclusive right of authorizing ... the fixation of their unfixed performances,” and “reproduction of their performances fixed in audiovisual fixations, in any manner or form.” World Intellectual Property Organization, *Beijing Treaty on Audiovisual Performances*, Art. 6(ii), 7 (2012).

The Patent Office, which led the delegation, states that U.S. law is “generally compatible” with the Treaty, as “actors and musicians are considered to be ‘authors’ of their performances providing them with copyright rights.” U.S. Patent & Trademark Office, *Background and Summary of the 2012 WIPO Audiovisual Performances Treaty* 2 (2012). Although *752 the Copyright Office hasn’t issued a statement of compatibility, it’s hard to believe that it would sign on if it believed that the Treaty’s key provisions are inconsistent with U.S. copyright law. In fact, the Copyright Office praised the Treaty as “an important step forward in protecting the performances of television and film actors throughout the world.” U.S. Copyright Office, *NewsNet: Beijing Audiovisual Performances Treaty* (2012), <http://copyright.gov/newsnet/2012/460.html>. Except in the Ninth Circuit.

The Copyright Office’s position is thus inconsistent at best. And, in any event, neither the Copyright Office’s reasoning nor the authority it relies on in its letter to Garcia fare any better than the majority’s. The Copyright Office would refuse copyright registration to an actor like Garcia because “an actor or an actress in a motion picture is either a joint author in the entire work or, as most often is the case, is not an author at all by virtue of a work made for hire agreement.” However, Garcia isn’t a joint author of the entire movie and didn’t sign any agreements. She doesn’t fit into either category. Like the majority, the Copyright Office would wish this problem away by refusing registration unless the copyright claimant personally recorded his performance. But nothing in the legislative history relied on by the Copyright Office (which concerned joint authorship of an entire film) suggests that a non-employee doesn’t retain any copyright interest in a video clip of his acting

performance because it's recorded by the film's producer. See [H.R.Rep. No. 94-1476, at 120](#).

III

The harm the majority fears would result from recognizing performers' copyright claims in their fixed, original expression is overstated. The vast majority of copyright claims by performers in their contributions are defeated by a contract and the work for hire doctrine. See 1 *Nimmer on Copyright* § 6.07 [B][2] at 6-28 to 6-29; 2 William F. Patry, [Patry on Copyright § 5:17 \(2010\)](#). And most of the performers that fall through the cracks would be found to have given an implied license to the film's producers to use the contribution in the ultimate film. See [Effects Associates, 908 F.2d at 558](#). Very few performers would be left to sue at all, and the ones that remain would have to find suing worth their while. They wouldn't be able to claim the valuable rights of joint authorship of the movie, such as an undivided share in the movie or the right to exploit the movie for themselves. See 1 *Nimmer on Copyright* § 6.08 at 6-34 to 636. Rather, their copyright claims would be limited to the original expression they created. See [Aalmuhammed, 202 F.3d at 1232](#); [Effects Associates, 908 F.2d at 559](#). Which is why filmmaking hasn't ground to a halt even though we held a quarter-century ago that "where a non-employee contributes to a book or movie, ... the exclusive rights of copyright ownership vest in the creator of the contribution, unless there is a written agreement to the contrary." [Effects Associates, 908 F.2d at 557](#).

Regardless, the Supreme Court has reminded us that "speculation about future harms is no basis for [courts] to shrink authorial rights." [N.Y. Times Co. v. Tasini, 533 U.S. 483, 505-06, 121 S.Ct. 2381, 150 L.Ed.2d 500 \(2001\)](#). In *Tasini*, freelance authors argued that the inclusion in databases of their articles that originally appeared in periodicals infringed their copyrights in the works. *Id.* at 487, 121 S.Ct. 2381. Publishers warned that " 'devastating' consequences," including massive damages awards, would result if the Court were to hold for the freelancers. *Id.* at 504, 121 S.Ct. 2381. The Court nonetheless*753 held for the freelancers, turning back the parade of horrors deployed by the publishers. The Court explained that there are "numerous models for distributing copyrighted works and remunerating authors for their distribution." *Id.* at 504-05, 121 S.Ct. 2381. *Tasini* is a powerful reminder that movie producers, publishers and distributors will always claim that the sky is falling in cases that might recognize an individual contributor's copyright interest in material he created.^{FN2} They will always say, as Google says here, that holding in the contributor's favor will make "Swiss cheese" of copyrights. Maj. Op. 742.

^{FN2}. Ditto in [Community for Creative Non-Violence v. Reid, 490 U.S. 730, 109 S.Ct. 2166, 104 L.Ed.2d 811 \(1989\)](#), which concerned the scope of a "work made for hire." *Id.* at 738, 109 S.Ct. 2166. Amici representing, among others, publishers and technology companies advocated for a broad definition of "employee." They predicted "ever-increasing interference with the dissemination of creative works" if the Court didn't adopt their definition of "employee." Brief of the Computer & Business Equipment Manufacturers' Ass'n et al. in Support of Petitioners at 4-5, [Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 109 S.Ct. 2166, 104 L.Ed.2d 811 \(1989\)](#) (No. 88-293). But the Court adopted the narrower definition of "employee" used in agency law. [Reid, 490 U.S. at 750-51, 109 S.Ct. 2166](#). It appears that creative works have been disseminating just fine in spite of *Reid*.

But under our copyright law, the creators of original, copyrightable material *automatically* acquire a copyright interest in the material as soon as it is fixed. There's no exception for material created during production of a film or other composite work. When modern works, such as films or plays, are produced, contributors will often create separate, copyrightable works as part of the process. Our copyright law says that the copyright interests in this material vest initially with its creators, who will then have leverage to obtain compensation by contract. The answer to the "Swiss cheese" bugbear isn't for courts to limit who can acquire copyrights in order to make life simpler for producers and internet service providers. It's for the parties to allocate their rights by contract. *See Effects Associates*, 908 F.2d at 557. Google makes oodles of dollars by enabling its users to upload almost any video without pre-screening for potential copyright infringement. Google's business model, like that of the database owners in *Tasini*, assumes the risk that a user's upload infringes someone else's copyright, and that it may have to take corrective action if a copyright holder comes forward.

The majority credits the doomsday claims at the expense of property rights that Congress created. Its new standard artificially shrinks authorial rights by holding that a performer must personally record his creative expression in order to retain any copyright interest in it, speculating that a contrary rule might curb filmmaking and burden the internet. But our injunction has been in place for over a year; reports of the internet's demise have been greatly exaggerated. For the reasons stated here and in the majority opinion in *Garcia v. Google, Inc.*, 766 F.3d 929, 933–36 (9th Cir.2014), I conclude that Garcia's copyright claim is likely to succeed. I'd also find that Garcia has made an ample showing of irreparable harm. It's her *life* that's at stake. *See id.* at 938–39. at least in part because of what the marriage "communicates." He adds that the act of marriage helps people "to define and express their identity." Also that marrying "is among life's momentous acts of self-definition."

Kennedy also speaks of weddings, as a time when society is invited to "offer symbolic recognition" of the couple. (Recall again that symbolic conduct is a First Amendment issue).

And there is more. The lead plaintiff's grievance had to do with being listed as the surviving spouse on his deceased partner's death certificate, simply to "honor [his] spouse's memory," with no tangible benefits associated with that expression.

Even the dissenting justices showed an awareness of the First Amendment implications. Chief Justice Roberts, for example, even while recognizing that the case before him involved gays' desire for "an expression of commitment to a partner," wrote that same sex couples do not have a right "to make a state change its definition of marriage" (i.e., to force the state to speak?). Roberts goes on to suggest he might have voted with the majority, had this been a case involving only the "ancillary legal benefits that accompany marriage," rather than forcing the state to change how it "expresses" its views through its preferred definition of marriage. Justice Thomas too votes against the couples' claimed right "to receive the state's imprimatur on their marriages on state issued marriage licenses . . . and other official forms." And dissenting Justice Scalia likely prompted chuckles—he loves doing that—when he admitted that "expression is freedom," but added that, over time, long-standing marriages "constrict, rather than expand, what one can prudently say [to one's spouse]."

States Given Much Leeway in Rejecting Offensive Vanity Plates

Brief mention is made in Chapter 2 (see p. 65, n. 100, and accompanying text) of the case law tying the hands of states to make content-based and especially viewpoint-based distinctions among proposals for vanity automobile license plates.

Toward the end of its 2014-2015 Term, the Supreme Court, in a 5-4 vote, weighed into this area of the law, giving states much more freedom to reject license plate designs, finding that messages on license plates are government speech,⁵ not speech by individual vehicle owners.⁶ At issue was a design proposed by the Texas affiliate of the Sons of Confederate Veterans, a design which included a confederate battle flag. The state had rejected the design, finding it “offensive,” and that “a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups.” Writing for the majority, Justice Breyer points to how the notion of states using automobile license plates to send messages dates back many decades.⁷

In 1917, Arizona became the first State to display a graphic on its plates. The State presented a depiction of the head of a Hereford steer. In the years since, New Hampshire plates have featured the profile of the “Old Man of the Mountain,” Massachusetts plates have included a representation of the Commonwealth’s famous codfish, and Wyoming plates have displayed a rider atop a bucking bronco.

In 1928, Idaho became the first State to include a slogan on its plates. The 1928 Idaho plate proclaimed “Idaho Potatoes” and featured an illustration of a brown potato, onto which the license plate number was superimposed in green. The brown potato did not

⁵The eloquent dissent, penned by Justice Alito, argues that specialty license plates are more appropriately viewed as individual speech, not government speech. His reasoning:

Here is a test. Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. You would see, in addition to the standard Texas plates, an impressive array of specialty plates. (There are now more than 350 varieties.) You would likely observe plates that honor numerous colleges and universities. You might see plates bearing the name of a high school, a fraternity or sorority, the Masons, the Knights of Columbus, the Daughters of the American Revolution, a realty company, a favorite soft drink, a favorite burger restaurant, and a favorite NASCAR driver.

As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars? If a car with a plate that says “Rather Be Golfing” passed by at 8:30 am on a Monday morning, would you think: “This is the official policy of the State—better to golf than to work?” If you did your viewing at the start of the college football season and you saw Texas plates with the names of the University of Texas’s out-of-state competitors in upcoming games—Notre Dame, Oklahoma State, the University of Oklahoma, Kansas State, Iowa State—would you assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns’ opponents? And when a car zipped by with a plate that reads “NASCAR—24 Jeff Gordon,” would you think that Gordon (born in California, raised in Indiana, resides in North Carolina) is the official favorite of the State government?

⁶*Walker v. Texas Division, Sons of Confederate Veterans*, 135 S. Ct. ____ (2015).

⁷For this history, Breyer relies chiefly on a 1997 illustrated reference book by James K. Fox titled *License Plates of the United States*. One wonders if media attention to this Court decision has increased sales in the book.

catch on, but slogans on license plates did. Over the years, state plates have included the phrases “North to the Future” (Alaska), “Keep Florida Green” (Florida), “Hoosier Hospitality” (Indiana), “The Iodine Products State” (South Carolina), “Green Mountains” (Vermont), and “America’s Dairyland” (Wisconsin). States have used license plate slogans to urge action, to promote tourism, and to tout local industries.

Breyer explains that Texas too has used its license plates to send specific messages, and the state must be given leeway to engage in what would be view-point based discrimination were government speech not involved. “Texas offers plates celebrating the many educational institutions attended by its citizens. But it need not issue plates deriding schooling. Texas offers plates that pay tribute to the Texas citrus industry. But it need not issue plates praising Florida’s oranges as far better. And Texas offers plates that say ‘Fight Terrorism.’ But it need not issue plates promoting al Qaeda.”

The majority also makes clear that the Sons of Confederate Veterans are hardly without alternative outlets for dissemination of their views, including, of course, on bumper stickers.

Court Gives Public Employees a Bit More Free Speech Rights

Mention is made in Chapter 2 (see page 75) of *Garcetti v. Ceballos*,⁸ in which the Supreme Court held that public employees can be subject to sanctions flowing from their speech, if that speech is in the work setting (not aimed at the larger public) and if it is, as the Court put it, “pursuant to their official duties.” At the end of its 2013-2014 Term, the Court narrows that holding a bit.⁹

At issue was the firing of a community college administrator whose research into his unit’s financial woes uncovered the existence of what they used to call on *The Sopranos* a “no show” employee, someone on the payroll, but not doing much of anything, and hardly ever showing up for work. The individual, a state legislator, was eventually convicted of fraud, and the administrator was a material witness against her (brought in to the grand jury with a subpoena). When he was later fired, the administrator sued, alleging that his dismissal was in retaliation for his speech.

In upholding Lane’s termination, the Eleventh Circuit Court of Appeals “read *Garcetti* far too broadly,” Justice Sotomayor wrote for a unanimous Supreme Court. Yes, it is true that Lane learned about the government corruption about which he eventually testified while doing research pursuant to his job duties. But that fact does not make his actual testimony into job-related speech. His testimony was offered as a private citizen, and on a matter of clear public interest.

AZ Town Law Governing Sign Sizes Under Review

In Chapter 2 we learn that “time, place and manner” restrictions are generally permitted, but that those which are or seem to be triggered by the content of speech are much less likely to be upheld as constitutional. In January, 2015, the Supreme Court heard a case from Arizona, where the town of Gilbert had passed a law governing the size of signs. The law would allow a fairly large and permanent sign expressing an “ideology,” but signs announcing events (including regularly sponsored church services), would have to be much smaller, and removed right after the “event.” At oral argument, the justices seemed amused and bewildered at the notion that the church bringing

⁸547 U.S. 410 (2006).

⁹*Lane v. Franks*, 134 S. Ct. 2369 (2014).

the suit would be subject to the law's stricter provisions if the sign gave viewers directions to the church building. Expect a decision by late June.¹⁰

Shocked! SHOCKED! (Political Speech Includes Lies!)

Chapter 2 makes brief mention of the fact that political speech is deemed so very important in our system of freedom of expression, even knowing falsehoods are sometimes explicitly protected (see reference to *U.S. v. Alvarez*, the “Stolen Valor Act” case, on page 29). In 2014 the Supreme Court had occasion to take a first look at a case involving false political campaign speech more generally.¹¹ A pro-life group calling itself the Susan B. Anthony List was having trouble placing ads accusing then-Congressman Steve Driehaus of having voted “for taxpayer-funded abortions” (when he voted for Obamacare). Driehaus filed a complaint with an Ohio state elections commission charged with enforcing a state law prohibiting knowing falsehoods in ads seeking to elect or defeat a candidate for office. The commission decided that there was enough evidence to warrant an investigation, but when Driehaus lost his re-election bid, he decided not to pursue his action any further.

So this is the posture in which the case reaches the Supreme Court: The pro-life group seeks a ruling that the state law is unconstitutional, not only as applied to its own advertising, but on its face, in general. The Court had to decide whether the challenge was mooted by the fact of Driehaus' having dropped his complaint. Writing for a unanimous Court, Justice Thomas concludes that the pro-life plaintiff has suffered a real and likely repeatable harm (the election commission in Ohio handles several dozen allegations of untrue campaign rhetoric each election cycle), and instructs a lower court to adjudicate the matter further. There is a good chance the case will be back in front of the Supreme Court in a few years.

CHAPTER 5

A Right to be Forgotten?

It has often been suggested that one way courts should balance competing interests in Public Disclosure privacy cases is to consider that a revelation that was once newsworthy might not be so forever. This “passage of time” test had been embraced in some early 20th Century decisions, but as was pointed out in chapter 5, the “newsworthiness” defense has made it very difficult for Public Disclosure plaintiffs to prevail.

In Europe, a very different philosophy seems to be embraced. The European Court of Justice held in 2014 that there is a right to “practical obscurity,” what the French call “le droit à l-oubli” (a right to be forgotten, a “right to oblivion.”)¹² Using this reasoning, the court held that Google and other search engines can be forced to remove damaging but true information about folks on request; as a result Google has had to hire many new employees to begin the process of deleting access to

¹⁰The lower court decision, upholding the town statute, is *Reed v. Town of Gilbert, Arizona*, 707 F.3d 1057 (9th Cir. 2013).

¹¹*Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334 (2014).

¹²*Google Spain SL v Agencia Espanola de Proteccion de Datos (AEPD)*. Case C-131/12 (European Grand Chamber, 2014).

some web sites from its search engine, at least when accessed in Europe.¹³

NY Med Forces Widow to Re-Live Husband's Death

Brief mention is made in this chapter (see pages 182-183) of a case involving automobile accident victim Ruth Shulman's successful suit against a TV program that aired video of her conversations with an attending nurse while she was being placed on a helicopter journey to a hospital. A similar dispute emerged in New York City when an ABC program called "NY Med" showed footage of Mark Chanko's treatment at New York-Presbyterian Hospital. Chanko had been run over by a sanitation truck, and was declared dead at the hospital a few hours later. Surviving family members sued several entities involved in the incident, including the TV network. In late 2014, a state appellate court dismissed the suit,¹⁴ finding that the pixelated images of Mr. Chanko were not identifiable, and that not breach of confidentiality thus occurred. The case was being appealed as of early 2015.¹⁵

An Oldie But Goodie– the Joe Montana case

Here we have a reference to a case from the 90s that had been discussed in previous editions, but that had been deleted from the text to make room for newer examples. The reason for re-inserting mention here, and likely in the next edition of the text, is that I finally tracked down the relevant visual artifact.

Former San Francisco 49ers' quarterback Joe Montana sued the *San Jose Mercury News* for having reprinted a page from the newspaper which had celebrated the teams' phenomenal performance in the Super Bowl, and then selling that reprint, which boasted a drawing of Montana, as a stand-alone poster for five dollars. An appellate court in California held that Montana's claims had no merit, in part because, as we know from the textbook's discussion of the Booth rule (see pages 174-176), a media outlet is free to reprint without permission anything from its prior issues to publicize the magazine or newspaper. The Montana court also made much of the fact that the original photo and story accompanying it were on a highly newsworthy topic.¹⁶

[CLICK HERE](#) to see the poster at issue in the case.

CHAPTER 6

***Innocence of Muslims* Actress's Copyright Claim Denied**

Brief mention is made in the textbook (in Chapter 2, actually) of the controversy surrounding online release of a trailer for the film, *Innocence of Muslims*. The title was intended ironically, in that the film depicts Muhammad in the most unflattering ways. Budding actress Cindy Lee Garcia

¹³ Maureen Dowd, "Remember to Forget," *New York Times*, May 21, 2014, A23

¹⁴ *Chanko v. ABC*, 122 A.D. 3d 487 (Appel. Div. 1st Dept. 2014).

¹⁵ Charles Ornsetin, "Dying in the E.R., and on TV," *New York Times*, January 4, 2015, A22.

¹⁶ *Montana v. San Jose Mercury News*, 34 Cal. App. 4th 790 (Court of Appeals, 6th Dist., 1995).

had a bit part in the film, which she had been led to believe was a desert war/action film. Her relatively innocuous lines had been later dubbed over so as to have her accusing Muhammad of being a child molester. Garcia had received death threats, and sued the film's producer, as well as Google, because it had not removed the trailer from its YouTube site.

An en banc Ninth Circuit ruled against Garcia's copyright claims. She had not been responsible for setting the film down in a finished form, and thus had no copyright interests in the film. The court expressed much sympathy for her plight, and even while pointing out that other claims of hers might succeed (such as suing the producer for lying to her about the film, a violation of contract claim), but none of these would likely result in governmental action to stop distribution of the trailer, or of the full film.¹⁷ [CLICK HERE](#) to see the very short segment of the trailer that include's Garcia's part.

CHAPTER 7

Reveal Guidelines on How/When to Use Drones to Kill Americans?

In April, 2014, the Second Circuit Court of Appeals ruled on an FOIA request from the New York Times and the ACLU for documents concerning how the administration went about deciding when it was legitimate to use unmanned drones to kill two American citizens operating in Yemen.¹⁸ Writing for the 3-0 judge panel, Judge Jon Newman generally upholds a lower court opinion that the various government agencies involved appropriately withheld the requested documents. He does allow that some of the relevant FOIA exemptions claimed by the CIA and the Office of Legal Counsel might have been waived by formal testimony and public speeches on the topic of drone-conducted warfare by a handful of administration officials. And with respect to some of the documents, Judge Newman requires either disclosure of at least redacted versions to the plaintiffs, or disclosure in camera to the district court a detailed "Vaughn index" of available documents. Interestingly, "redacted" is one of the most frequently appearing words in the Newman text, because the official court's opinion itself manifests dozens of redactions.

A couple of months later, the government released much of the memoranda justifying use of drones to kill targeted Americans overseas, having decided not to appeal the Second Circuit's decision.¹⁹

CHAPTER 8

Ferguson Grand Juror Wants to Talk

In early 2015, a member of the grand jury from Ferguson, Missouri— the one that refused to indict police officer Darren Wilson in the shooting death of 18-year-old Michael Brown, filed a suit against the county prosecutor, seeking the lifting of a lifetime gag order imposed on the jurors. According

¹⁷*Garcia v. Google*, 786 F.3d 733 (9th Cir. 2015).

¹⁸*New York Times v. US Dept of Justice*, 756 F.3d 100 (2nd Cir. 2014).

¹⁹Charlie Savage, "Court Releases Large Parts of Memo Approving Killing of American in Yemen," *New York Times*, June 24, 2014, A17.

to press accounts, the thus far anonymous juror seeks to speak out for “legislative change” governing grand juries, and more specifically to raise questions about the conduct of this particular grand jury, which seemed to the plaintiff to have “a stronger focus on the victim” than one might expect.²⁰

CHAPTER 9

Supreme Court Strikes Down Billboard Law

In this chapter (see especially p. 361), a short explanation is offered as to how the First Amendment applies to local statutes regulating or prohibiting all or some categories of signage, especially on the highways. Key to the litigation is the Court’s having insisted that regulations be content-neutral.

Failure to meet this requirement led the Court to strike down unanimously a Gilbert, Arizona law that provided different rules for various categories of signs.²¹ “Political” signs (those concerned with candidates for upcoming elections) were governed by one set of rules concerning size and number of signs, and duration of placement, while “Ideological” signs (dealing with broader political issues, but not specific elections), and “Temporary Directional Signs Relating to a Qualifying Event” (bear with me on this one for a moment) are subject to the most strict regulations. Concerning this last category, it was originally (until the court challenge) labeled “Religious Assembly Temporary Direction Signs.” Thus is it no surprise that the group challenging the law were folks associated with an impoverished local church which, lacking a building, felt it needed to post lots of signs around town to publicize where they would be meeting on any given week.

In striking down the law, Justice Thomas demonstrated first that the town’s ordinance was content-related:

If a sign informs its reader of the time and place a book club will discuss John Locke’s Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke’s followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke’s theory of government.

Later finding that the town failed to offer any compelling state’s interest to justify such content-based restriction, the Court struck down the law.

Risen Off the Hook; Not Necessarily Future Reporters

On page 336, we learned that New York Times reporter James Risen had lost a federal appellate decision, and thus had no privilege against being forced to testify at the trial of former CIA agent Jeffrey Sterling. (The Supreme Court had since refused to hear the case). Sterling himself stands accused of revealing classified government information about US attempts to disrupt Iran’s nuclear program. But in January, 2015, the Justice Department decided not to seek Risen’s testimony at all, perhaps in part because Risen made clear he would rather go to jail than to answer any questions that

²⁰Mitch Smith, “Grand Juror in Ferguson Sues to End Silence Rule,” *New York Times*, January 6, 2015, A12.

²¹*Reed v. Town of Gilbert, AZ*, 135 S. Ct. ____ (2015).

might lead to revelation of his confidential sources.²²

CHAPTER 10

No More to Each, But More to All

Toward the end of chapter 10, the text offers a brief explanation of how the First Amendment has been applied to campaign finance regulations. The book's preface mentions that a Supreme Court decision was expected soon that would address whether federal limits on how much money we may contribute to individual campaigns and how much we can contribute overall during a campaign season are constitutional. The case was handed down shortly after the text went to press.²³

The to-an-individual-campaign-limit amounts, referred to as "base limits," were most recently set by Congress at \$2,600 per election per candidate. (We could thus actually contribute up to \$5,200 to a candidate, one-half for the primary election, and one-half for the general election). The "aggregate limits," the total we may give in an election cycle, had been set at \$123,000. Within that total, the relevant statutes provided how much could be given directly to candidates and how much to local and national party committees and political action committees (PACs).

In a 5-4 ruling, the Court upheld the base limits but struck down the aggregate limits. The main plaintiff in the case indicated she had given the maximum contributions allowable to each of 16 candidates, and was prevented from giving to an additional dozen or so candidates of her liking by the aggregate limits. Offering the decision of the Court (there was no majority opinion), Chief Justice Roberts said of the aggregate limits that "the Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse."

Would Knowing that my Opponent is a Terrorist . . . ?

"Push polling" is a dirty campaign trick that has become so commonplace to almost not be thought of as dirty anymore. Typically the procedure is that the phone bank for one candidate calls voters in the district, assuming a tone as if one were conducting a scientific poll. The purpose of the call, however, is to spread some negative information, sometimes misinformation, about an opponent. "If you knew that Candidate X had been charged with tax fraud, would that fact make you less likely to vote for him, more likely to vote for him, or would it make no difference?" The state of New Hampshire passed a law prohibiting push polling, but the state's supreme court in 2014 held that the law could not be applied to elections for federal offices, that the Federal Election Campaign Act pre-empted any actions by the individual states.²⁴

CHAPTER 11

Limits on Damages for Viewing Child Pornography

²²Matt Apuzzo, "Times Reporter Won't Be Called in Trial on Leak," *New York Times*, January 13, 2015, A1.

²³*McCutcheon v. Federal Election Commission*, 134 S.Ct. 1434 (2014).

²⁴*New Hampshire Attorney General v. Bass Victory Committee*, ___ A. 3d ___ (N.H. 2014).

Child pornography harms its victims not only because its production is part and parcel of sexual abuse of children. Rather, the harm is perpetuated by the continued existence of the offensive images even after a child “actor” becomes an adult. The relevant federal statutes not only provide for fine and lengthy imprisonment, but also permit victims to sue persons who produced, distributed, or who own images of their abuse as children. At issue in *Paroline v. U.S.*²⁵ was if and how damages should be assessed to any single viewer of digital images of a child’s sexual abuse when those same images have been and will be viewed by thousands of others online. The child victim argued that each possessor of the relevant images should be fully liable for the totality of her damages. In this case, the victim sought over \$3 million from one such individual.

Writing for the Court’s majority, Justice Kennedy provides an illuminating discourse on the notion of causality in the law, and emerges with a decision sending the case back to a lower court to determine what lessor, but not “token” or “nominal” damages, should be assessed to this individual viewer of the disturbing images.

Wrap it First

A federal appellate court has refused to grant a preliminary injunction against Los Angeles’ County’s ordinance requiring the “talent” in sexually-explicit films wear condoms whenever engaged in vaginal or anal intercourse. The law imposes only minimal restrictions on freedom of expression, while offering the chance to greatly reduce the spread of venereal disease. (Statistics cited by the court showed that persons working in the X-rated movie industry were over ten times more likely to be infected than was the county’s general population). The court adds that if a full trial is held on the First Amendment claims, it is possible that a trial court would discover that it is possible for “special effects” to make it appear as if the protected actors were not actually wearing condoms, thus preserving whatever extra measure of “eroticism” the law seemed to be infringing.²⁶

CHAPTER 12

Supreme Court Puts an End to Aereo

Brief mention is made of *WNET v. Aereo* in both chapter 6 (p 235, n. 45) and chapter 12 (p. 457, n. 59). Aereo is (perhaps we should now say “was”) an start-up company whose service was available in only a few cities, including New York. Aimed at the market of folks who have already cut their ties with their cable or satellite TV provider, Aereo offered convenient access to over-the-air broadcasts (“as would any old-fashioned antenna!” you say?), also making it easy for subscribers to arrange for the recording and later playback of programs on their computers or mobile devices. The Second Circuit Court of Appeals had held that Aereo was no more guilty of copyright infringement than would be individual users giving themselves access to free, over-the-air broadcasts with their own individual antennas, because the defendant’s business model actually had each individual subscriber assigned a tiny antenna of his or her own at the company’s headquarters. But the Supreme Court held that, collectively, the use of all those tiny

²⁵134 Sup. Ct. ____ (2014).

²⁶*Vivid Entertainment v. Fielding*, ____ F.3d ____ (9th Cir. 2014).

antennae constituted unauthorized²⁷ “public performance” of the protected TV programming, in violation of copyright law.

Yelp Contributors’ Anonymity Attacked

Have you ever uploaded comments on local businesses to websites like Angie’s List or TripAdvisor? You likely know that Yelp is a site that invites customers to comment on all sorts of businesses. A carpet cleaning company in Virginia, rather upset with a few negative comments on Yelp, sued the company to unmask the anonymous contributors, and a state appellate court held in 2014 that Yelp should comply. The case turned in part on the plaintiff’s allegation that some of the contributors’ narratives suggested they had not actually ever availed themselves of the company’s services. That alone would be, if nothing else, a violation of Yelp’s “Terms of Service” with its contributors.²⁸

Ongoing Saga of Net Neutrality

The very last paragraph in Chapter 12 is about the issue of “net neutrality,” the notion that Internet Service Providers should not be permitted to relegate some customers to slower online connections. In 2014 the D.C. Circuit Court of Appeals struck down the FCC’s latest decisions in furtherance of that goal. But the decision was also seen as an invitation by the court for the commission to re-define ISP’s as “common carriers,” akin to old fashioned land-line phone companies and indeed the Post Office. Such entities have long been required to treat all clients equally. And the court was suggesting that if the FCC first re-defined the Internet in this way, the “net neutrality” rules or something like them may very well survive judicial scrutiny.

In early 2015 the FCC published new rules defining ISPs as common-carriers, thus subject to rules prohibiting them from giving some clients higher transmission speeds than others. The rules were promptly challenged in court by industry trade group USTelecom and by Alamo Broadband. More to come.

ERRATA

● P. 336, n. 16. The citation to *U.S. v. Sterling* is incomplete; it should have been cited as 724 F.3d 482 (4th Cir. 2013), with a later *en banc* request denied at 732 F.3d 292 (4th Cir. 2013), and the Supreme Court having denied review, 134 S.Ct. 2696 (2014).

● p. 365, n. 14– reference to *Housing Opportunities Made Equal v. Cincinnati Enquirer* is wrong reference. The case described is ***Pittsburgh Press Company v. Pennsylvania Human Rights Commission***, 376 A. 2d 263 (Pa. 1977). The Housing Opportunities case deals also with advertising, but for housing, not employment. Specifically, it considered if a newspaper can be liable for accepting illustrated housing ads where photos are of only or almost only white

²⁷ *ABC v. Aereo*, 134 Sup. Ct. 2498 (2014).

²⁸ *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 752 S.E. 2d 554 (Va. App. 2014).

individuals.

●P. 383, in the “And I can Prove it!” graf, line 11. I hope the Fleischmann’s margarine folks will forgive my misspelling on their brand name. Also, since going to press, I was able to make an Ebay purchase of one of the magazine ads the FTC criticized. It is now up on my website, both under “Additional Images” for chapter 10, and in the Power Point slide show for the chapter.

●p. 403, very first line– Colin McEnroe’s radio program is aired Monday through Friday, not “weekly.”