Garcia v. Google, Inc. and the Limited Rights of Motion Picture Actors Under American Copyright Law

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**Abstract:** The 9th Circuit’s Garcia v. Google decision accomplished little more than maintaining the status quo, further entrenching the notion that motion picture actors cannot claim copyright ownership in their individual performances. However, the virulent way in which Cindy Garcia’s performance in Innocence of Muslims was twisted and broadcast to the world begs the question of whether this aspect of copyright law should be revisited. The moral rights laws in other countries take into account the intimately personal nature of artistic expression, and recognize that creative expression is an extension of personhood. Furthermore, there are many aspects of modern technology that necessitate a fresh look at copyright ownership, characteristics that could not have even been fathomed when the Copyright Act was signed into law. Where Garcia has been less than helpful in its particular facts, it is useful as a starting point for refreshed attitudes about the potential for actors’ ownership of copyright in their performances. This article offers guidance for the next generation of copyright reform, pointing to foreign copyright regimes, privacy laws, and necessary alterations to the Copyright Act as a comprehensive starting point from which discussion and new legislation can evolve. What will hopefully follow is more predictability and security for motion picture actors whose performances are deserving of copyright protection.
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“It is remarkable that this late in our history we have still not learned that the First Amendment prohibits us from banning free speech in order to appease terrorists, religious or otherwise, even in response to their threats of violence.”

Introduction
Fear and a fatwa marked the posting on YouTube of what actress Cindy Lee Garcia originally thought would be her short role in an “Arabian adventure film” produced by Mark Youssef. What Youssef instead posted was a nearly fourteen-minute film entitled *Innocence of Muslims*, in which Garcia’s original lines were dubbed over with more controversial ones disparaging the prophet Mohammed. The relatively short film sparked international outrage in the Muslim community, and for a while was even cited as the catalyst for the September 11, 2012 Benghazi attacks. The legal saga that

1 *Garcia v. Google, Inc.*, 786 F.3d 727, 730 (9th Cir. 2015) (Reinhardt, J., dissenting)

2 Adrian Chen, *'It Makes Me Sick': Actress in Muhammed Movie Says She Was Deceived, Had No Idea It Was About Islam*, GAWKER (Sept. 12, 2012, 5:29 PM), http://gawker.com/5942748/it-makes-me-sick-actress-in-muhammed-movie-says-she-was-deceived-had-no-idea-it-was-about-islam?trending_test_three_c&utm_expid=66866090-68.NesmD4FSTbKroxps5qEjtVQ.3&utm_referrer=https%3A%2F%2Fwww.google.com (discussing deception of Garcia by Youssef in making of film); see also *Garcia*, 768 F.3d at 728-729 (describing how 9th Circuit ordered Google to take down all copies of *Innocence of Muslims* from YouTube “primarily because persons or groups offended by the film’s message made a threat—in the form of a fatwa—against everyone connected with the film.”).

3 Garcia’s original lines, “Is George crazy? Our daughter is but a child?,” were dubbed over to ask “Is your Mohammed a child molester?”


5 Michael Pearson, *What the Obama administration has said about the Libya attack*, CNN (May 8, 2013, 9:32 AM), http://www.cnn.com/2012/10/10/world/libya-attack-
followed was nearly as complex as the frustrations and tensions surrounding the film:

Garcia requested that the film be removed from YouTube and sent Google five takedown notices, claiming the broadcast infringed her “audiovisual dramatic performance” right. Google refused to take down the film from YouTube, after which Garcia sued for a preliminary injunction, arguing that her copyright had been infringed when the video was posted — an argument that the Central District of California rejected. The District Court concluded that Garcia’s argument for copyright ownership in her performance was unlikely to succeed, as she did not argue she was a sole or joint owner of the film itself and, even if she was, she granted Youssef an implied license to incorporate her performance into the larger work. The 9th Circuit then reversed and remanded this order, recognizing that Garcia’s performance in the film met the minimum requirements for copyright protection and instating both a temporary injunction and secret takedown notice allowing YouTube to post any version of the film not containing Garcia’s five-

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6 Garcia, 786 F.3d at 738. Garcia sued under the Digital Millennium Copyright Act, 17 U.S.C. § 512, which shields certain internet service providers from liability for copyright direct or secondary infringement if the infringing material is removed from their website after the service provider receives proper notice. See also 17 U.S.C. § 512 (2010).

7 Garcia v. Nakoula, CV 12-08315-MWF (VBKx) (Nov. 30, 2012) (chamber minutes). The District Court noted that Innocence of Muslims had been posted on YouTube for nearly five months by the time Garcia sought relief, weighing against her argument that a preliminary injunction would prevent harm. Id. Garcia’s original claim also alleged fraud, unfair business practices, libel, and intentional infliction of emotional distress, but she chose not to include these in her motion for a temporary injunction. Garcia, 786 F.3d at 738.

8 Id.
second performance. That opinion was then amended and superseded, and rehearing en banc was granted after much debate on the Court of Appeals panel. After en banc review, the 9th Circuit’s injunction was dissolved, and Innocence of Muslims returned to its controversial place on YouTube, where it has been ever since.

While the 9th Circuit’s original order requiring Google to take down all copies of the film from YouTube might have been motivated in part by sympathy for Garcia’s plight, there are legitimate legal reasons for granting copyright to individual actors’ film performances. The moral rights laws in other countries take into account the intimately personal nature of artistic expression, and recognize that creative expression is an extension of personhood. Furthermore, there are many aspects of modern technology that necessitate a fresh look at copyright ownership, characteristics that could not have even been fathomed when the Copyright Act was signed into law. Perhaps in this particular case, where Garcia’s performance consisted of only five seconds of a nearly

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9 *Garcia v. Google, Inc.*, 766 F.3d 929, 940 n.8 (9th Cir.) (“Concurrent with this opinion, we have issued an order directing Google to take down all copies of ‘Innocence of Muslims’ from YouTube and any other platforms within its control and to take all reasonable steps to prevent further uploads.”).

10 *Garcia*, 786 F.3d at 728 (discussing vote of panel regarding en banc hearing).

11 Id. at 747.


13 For a discussion of moral rights abroad, see infra notes 16-43 and accompanying text.

14 For example, the “viral” nature of the spread of Innocence of Muslims on a platform like YouTube allowed for potential infringement on an undeniably swift and widespread basis that would have seemed impossible decades ago.
fourteen-minute film, policy and the “Swiss cheese”\textsuperscript{15} argument would call for a restriction on copyright ownership. But where \textit{Garcia} has been less than helpful in its particular facts, it is useful as a starting point for refreshed attitudes about the potential for actors’ ownership of copyright in their performances. There will certainly be cases in the future where an actor sues for copyright infringement of a performance much more substantial and self-created than that of Garcia. And there is certainly room for expansion and improvement to accommodate the changing nature of copyrighted works today.

This article seeks to explore a new balance of fairness and predictability in copyright law regarding actors’ performance rights. Part II will discuss the history of these rights in the U.S. and abroad. \textit{Garcia v. Google}, which particularly highlights the tension between the current Copyright Act and the inevitable desire of many actors for confidence in ownership of copyright in their performances, will be the focus of Part III. Part IV offers justification for upholding actors’ rights to copyright ownership in certain performances under specific circumstances, thereby providing guidance and predictability for future cases. Part V concludes with a summary analysis and final offer of guidance for the next generation of cases concerning motion picture actors’ copyright ownership.

\footnote{Valentina Torelli, \textit{Swiss cheese, Innocence and a question of guilt: Garcia v Google explained}, \textit{The IPKat} (June 17, 2015, 7:41 AM), http://ipkitten.blogspot.com/2015/06/swiss-cheese-innocence-and-question-of.html (explaining the \textit{Garcia} court’s fear that granting Garcia copyright in her film performance “would pave the way to a dispersion of copyright interests by recognising as many works as the number of contributors involved in them, making ‘Swiss cheese’ of the copyright.”).}
Background and History

Moral Rights Abroad and The Right to be Forgotten

If Cindy Lee Garcia’s predicament had taken place in a country like France, the outcome likely would have been strikingly different. There, as in other foreign countries, a copyright focus on the integrity not only of a work’s economic potential, but on the artist’s personal connection to the work and the creative signature contributed to it, takes center stage. This extra layer of “moral rights” allows the artist to extend their control over the work past ordinary infringement issues, for example, to enforce their rights against those who defile their works or present them in a way that was not originally intended by the artist.

Inherent in this approach is the “principle of natural justice,” which provides that creators are “entitled to the fruits of their labor” and therefore should have some sort of control over what happens to the creative work in which they invested so much time and effort, even if their motivation comes only from a personal attachment to the work’s meaning.\(^\text{16}\) Contrary to this is the American approach to copyright, with a focus on economic incentive – if artists are not provided with a predictable way to enforce their copyright against others and reap the financial benefits of the work, their motivation to create new works will diminish.\(^\text{17}\)

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\(^{17}\) *Id.*
Moral rights have been slow to catch on in the U.S., but some progress has been made with the introduction of the Visual Artists Rights Act ("VARA"). Flexible copyright rights abroad, as well as the VARA framework already in place in the U.S., provide fertile ground for a revamped copyright regime in which artists, particularly actors in motion pictures, can gain more control over their significant contributions to creative works.

**Moral rights**

A focus on the economic, rather than creative, integrity of authors sets American copyright law apart from most foreign regimes. Consequently, moral rights, those recognizing the value inherent in a work outside its economic potential, play a much more minor role in the life of creative works in the United States than abroad.

It has been said that the original concept of moral rights, or the “ethical responsibility to recognize an individual's expression as an extension of their personality,” originated in ancient Greece and Rome under Emperor Justinian. Back then, moral rights were couched mainly as the right of attribution, or the “author's right to be recognized as the creator of his own work.” Plagiarism, in particular, was a great concern in ancient Rome, where the act of *plagium* was defined as “the crime of stealing

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19 *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 296 (7th Cir. 2011).

20 *Id.*


a human being.” From this definition it is clear that an artist’s work was synonymous with his actual being and personal integrity, an idea that was then woven into modern-day moral rights that grant artists control over the creative destiny of their works well past the point of an economic transaction. Later on, an artist’s right to protect his creative contributions from being “reshaped or reworked” was recognized by the Roman jurist Tribonianus, paving the path for rights enforceable against those who wished to twist the creative message or importance of a work in a way that was not originally intended by its author. 

Moral rights (le droit moral) as we currently know them originated in France. This concept recognizes that art exists for more than just its place in the economic market. Inherent in every creative work is a sliver of its creator’s personality and unique personal expression, which coexists with the creator’s economic interest in the work. This intimately personal stake in a work of art is practically perpetual, lasting well beyond when an artist sells his painting to a customer, for example. For this reason, these creative rights are seen as an extension of the artist’s person, therefore introducing abstract property rights that allow the artist some control over what is done to the work in

23 Id.

24 Id.

25 Kelley, 635 F.3d at 296.

26 Id.

27 Id. (These rights are “understood as rights inhering in the artist's personality, transcending property and contract rights and existing independently of the artist's economic interest in his work.”).
the future, not because of economic concerns, but because of a genuine interest in what
the artist holds is his still very much her personal property.\textsuperscript{28}

Moral rights in many European countries are inalienable, meaning they cannot be
waived.\textsuperscript{29} These rights generally include the right to integrity, meaning the interest in
protecting the work from mutilation, alteration, etc.; the right of attribution or paternity,
meaning the interest in consistently being recognized as the creator of the work; and the
right of divulgation, meaning the artist’s right to choose the moment at which she
considers her work complete and ready for presentation.\textsuperscript{30} In addition, countries like
France allow an artist to “repent or retake” a work for any reason and at any time, as long
as the artist pays the individual or entity from whom they are taking the work.\textsuperscript{31} France
also recognizes these rights in perpetual existence, lasting outside the natural life of the
artist and outside any economic copyright interest.\textsuperscript{32}

These moral rights became an integral part of the 1928 revision of the Berne
Convention for the Protection of Literary and Artistic Works.\textsuperscript{33} Signatories of the Berne

\textsuperscript{28} Burton Ong, \textit{Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity
Rights}, 26 \textit{COLUM. J.L. \\& ARTS} 297, 299 (2003) (“Under that system, any “assault” on
the personality of the artist through the medium of his work was viewed as actionable at
law in the same way as if an assault had been directed at his person.”).

\textsuperscript{29} Amy M. Adler, \textit{Against Moral Rights}, 97 \textit{CAL. L. REV.} 263, 268 (2009). However,
“[w]hen considering the inalienability of the moral right, French courts have generally
held valid those contractual provisions waiving an artist's moral rights.” Swack, \textit{supra}
note 22, at 380.

\textsuperscript{30} Adler, \textit{supra} note 29, at 268.

\textsuperscript{31} \textit{Id.}

\textsuperscript{32} \textit{Id.}

\textsuperscript{33} Ong, \textit{supra} note 28, at 299.
Convention are required “to provide a minimum level of legal protection consistent with all of its provisions.” The manifestation of European moral rights in the Berne Convention are found in Article 6bis:

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\text{Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his or her honor or reputation.}^{34}
\]

This section recognizes the perpetual right of authors to dictate the creative integrity of a work, and in its last line referring to the author’s “honor or reputation,” reflects the idea that an author’s creative works are an extension of her person; in other words, this section recognizes the rights of integrity and attribution.\(^35\) Given the striking differences between these moral rights and the U.S. copyright focus on economic interest in creative works, as well as resistance on the part of the American movie industry, in particular,\(^36\) the U.S. did not accede to the Berne Convention until 1989.\(^37\) Initially, the U.S. was so resistant to altering its laws to conform with the Convention that Congress proclaimed current American copyright law and the statutory law of certain states fulfilled the countries duties as a Berne signatory.\(^38\) However, this claim was not well


\[\text{35 Swack, supra note 22, at 383.}\]

\[\text{36 Id. at 382 ("The fiercest opposition to ratification of the Berne Convention came from the movie industry, ‘which viewed moral rights as a threat to the ability of studios to alter the works they had paid writers, directors, and producers to create.’").}\]

\[\text{37 Id.}\]

\[\text{38 Kelley, 635 F.3d at 297.}\]
received by legal scholars or other Berne signatories,\textsuperscript{39} and as part of its pledge to adhere to the Berne Convention’s standards, the U.S. enacted VARA in 1990.\textsuperscript{40} However, outside of VARA, which only applies to works of visual art, moral rights receive little recognition in the U.S.

In another attempt to purportedly align U.S. copyright interests with moral rights abroad, a U.S. delegation, which included the Register of Copyrights, signed the Beijing Treaty on Audiovisual Performances in 2012.\textsuperscript{41} The Treaty grants performers 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.”\textsuperscript{42} Similar to the statement made by Congress regarding U.S. law’s compatibility with the Berne Convention, the U.S. Patent Office declared that U.S. law is “generally compatible” with the Beijing Treaty because “actors and musicians are considered to be ‘authors' of their performances providing them with copyright rights.”\textsuperscript{43} Thus, no change in U.S. law took place.


\textsuperscript{40} For a further discussion of VARA, see \textit{infra} notes 58-64 and accompanying text.

\textsuperscript{41} Garcia, 786 F.3d at 751.

\textsuperscript{42} World Intellectual Property Organization, \textit{Beijing Treaty on Audiovisual Performances}, Art. 6(ii), 7 (2012).

The Right to be Forgotten

Almost antithetical to the right of attribution is the “right to be forgotten,” which acknowledges that, just as one wants to be associated with certain creative works, one might also want to retract certain personal information from the public sphere. This right has been recognized mainly in the European Union under Directive 95/46 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (“the Directive”).

The Directive regulates “data controllers” that collect and process personal data via automated means (i.e., a computer database) or non-automated means (i.e., paper files).

The rights given to individuals whose personal information is processed by data controllers are remarkably dissimilar to anything in the U.S. Individuals are offered a judicial remedy for any breach of the Directive, as well as economic compensation for any damages suffered. Furthermore, “it is forbidden to process personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life.” Those whose personal data is processed have the right to obtain information, access the data, and object to its processing. And above all, data processing is only lawful if “the data subject has unambiguously given his consent,” or processing is necessary: for the performance of a

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46 Id.

47 Id.

48 Id.
contract to which the subject is party; to comply with a legal obligation on the part of the data controller; to protect the vital interests of the data subject; for the public interest or exercise of official authority; or for the purpose of “legitimate interests . . . except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection.”

The Directive’s power was recently affirmed by the Court of Justice of the European Union (CJEU) in Google Spain SL v. Agencia Española de Protección de Datos, where the Court interpreted the Directive to require Google, at the request of a data subject, to take down personal information in search results, “unless a strong public interest suggests otherwise.” In that case, the data subject filed a claim with Agencia Española de Protección de Datos (AEPD), the agency responsible for receiving complaints under the Directive, when he discovered that searching his name on Google would lead to search results containing newspaper articles announcing his home’s foreclosure. After the AEPD held that Google would have to take down the search results, prompting Google to appeal to the Spanish high court, the CJEU was asked to issue a preliminary ruling interpreting the Directive. The Court held that Google came under the label of “data controller” and that a data controller’s “economic interests were

49 Id.


51 Id. at 736.

52 Id. at 736-37.
never sufficient to justify interference with privacy rights.” Privacy rights could only be overcome by a “preponderant [public] interest,” which was not present here, therefore requiring Google to remove the newspaper links from its search results. The Court noted that the information at the heart of the controversy need not be prejudicial to fall within the ambit of the Directive; rather, “a data subject may legitimately object if information is ‘inadequate, irrelevant or no longer relevant, or excessive in relation to [the] purposes [of the processing] and in the light of the time that has elapsed.’”

While the Directive provides an almost unprecedented amount of privacy protection for data subjects who might otherwise have no legal recourse, its scope has been questioned. For one, the definition of “data controller” used in Google Spain has been criticized as overbroad, laying claim to search engines when, in fact, the term should be interpreted much more narrowly in order to avoid unnecessary online censoring. Other critics argue that the right to privacy the CJEU so fiercely protected has inflated to near-sacred status, unnecessarily rising above the public’s fundamental right to knowledge and information.

**The Beginning of Moral Rights in the U.S. Under VARA**

As mentioned previously, VARA was passed in 1990 as a response to growing concern that U.S. copyright law did not properly conform to the Berne Convention and its

53 *Id.* at 738.

54 *Id.*

55 *Id.*

56 *Id.* at 739.

57 *Id.* at 739-40.
embrace of moral rights. VARA provides protection for works of visual art only, meaning “paintings, drawings, prints, sculptures, and photographs created for exhibition existing in a single copy or a limited edition of 200 or less.” Similar to European regimes, these rights of attribution and integrity exist independently of the rights provided in Section 106 of the Copyright Act, meaning they outlast the author’s physical possession of or title to copyright of the work itself. However, unlike in France, where moral rights extend to an author’s successors, VARA’s protection lasts only for the life of the author.

VARA provides that an author can lay claim to his or her work and, in a similar vein, prevent his or her name from being attributed to a work he or she did not create. The author may also prevent attribution of his or her name to works that have been distorted, mutilated, or modified, and that would be prejudicial to his or her honor or reputation. Likewise, the author has the right to prevent such prejudicial distortion, mutilation, or modification of the creative work, as well as the right to prevent destruction of “a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.” These rights cannot be transferred, but may be waived via a

58 See supra notes 38-40 and accompanying text.
60 §106A(a).
61 Id. subd. (d).
62 Id. subd. (a)(1).
63 Id.
64 Id. subd. (a)(3). There are exceptions. Modification resulting from the passage of time or the nature of a material itself does not fall under the umbrella of VARA; neither does
document signed by the author and specifying the use of the work to which the waiver applies.  

**A Review of Garcia v. Google**

As discussed in the Introduction, Garcia v. Google’s judicial history is complex and varied. This section will focus on the *en banc* analysis by the 9th Circuit in May of 2015, reviewing the decision of the District Court and rendering the temporary injunction against Google nonexistent.

**Copyright Analysis**

On rehearing *en banc*, the panel freely acknowledged the tension between its sympathy for Garcia – who was “bamboozled” into her unwitting role in *Innocence of Muslims* – and the longstanding principles of copyright law and free speech with which the court must shape its opinion. However, it also recognized first and foremost that copyright law, which Garcia was attempting to use to her advantage to escape the violent threats against her, exists to “foster rather than repress free expression.” Altering copyright doctrine to allow claims like Garcia’s to move forward would leave any semblance of stability and predictability in shambles, the panel concluded – perhaps

“[t]he modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement.” *Id.* subd. (c).

65 *Id.* subd. (e).

66 For a further discussion of the opinions below, see supra notes 6-9 and accompanying text.

67 Garcia, 786 F. 3d at 736 (“In this case, a heartfelt plea for personal protection is juxtaposed with the limits of copyright law and fundamental principles of free speech.”).

68 *Id.* at 737.
somewhat “dramatic[ally],” in much the same way it describes the case’s dissent. The Copyright Office’s decision to reject Garcia’s application for copyright in her performance also seemed to persuade the panel in its decision. When reviewing the District Court’s decision for abuse of discretion, the en banc panel noted that Garcia would have to demonstrate that the facts of the case “clearly favored” her position, given the fact that she was seeking a mandatory injunction that would require Google to take action in its removal of the film from YouTube.

The proverbial “Swiss cheese” issue inherent in Garcia’s argument was a main concern for the panel—if Garcia were to be granted copyright ownership of her five-second performance, the inevitable flood of copyright suits by actors, stagehands, and everyone in between who had played even a minor role in a motion picture would follow. The panel pointed to Aalmuhammed v. Lee—notably, a case regarding joint authorship, not the kind of individual performance Garcia was seeking to copyright here

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69 Id. (“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.”).

70 Id.

71 Id. at 740 (“As we have cautioned, a mandatory injunction ‘goes well beyond simply maintaining the status quo pendente lite [and] is particularly disfavored.’”) (quoting Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 879 (9th Cir. 2009)).

72 Id. at 742 (“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.’”)

73 202 F.3d 1227 (9th Cir. 2000).
– to back up its concerns regarding “splintered” works.\textsuperscript{74} It noted that the \textit{Aalmuhammed} court found a “minimal level of creativity or originality” too broad of a defining characteristic of “works” to be useful in deciding who can own copyrights in what portion of a motion picture, as often hundreds of individuals are involved in the production of a film.\textsuperscript{75} Furthermore, the District Court’s finding that Garcia granted Youssef an implied license to use her performance in \textit{Innocence of Muslims} was not clearly erroneous; after all, the panel noted, “[t]he reality is that contracts and the work-made-for-hire doctrine govern much of the big-budget Hollywood performance and production world,” and contractual support was lacking here.\textsuperscript{76} The panel filled this void with an implied license analysis, noting that Garcia did not condition her performance on any promises from Youssef.\textsuperscript{77}

To add to the “Swiss cheese” issue, there seemed to be no evidence that Garcia had played a role in fixation of her performance, as required by statute.\textsuperscript{78} Further weakening her claim were her incongruous contentions that (a) she was an author in the copyright sense, meaning she must have played a part in fixing the work in a tangible

\textsuperscript{74} Garcia, 786 F.3d at 742.

\textsuperscript{75} Id.

\textsuperscript{76} Id. at 743. Garcia might well have benefited from a contractual claim here, although she could not offer proof that such a contract between her and Youssef ever existed. \textit{Id.} at 741 n.5 (“She recalls signing some kind of document, though she cannot find a copy. We take no position on this claim.”).

\textsuperscript{77} Id. at 743.

\textsuperscript{78} See 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 to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”).
medium, and (b) she never signed off on the final version of the film or how her performance was portrayed, necessarily implying that she had not played a role in fixation.\textsuperscript{79} Therefore, the panel concluded, copyright law did not clearly favor Garcia as would be necessary to justify a mandatory injunction.\textsuperscript{80}

\textbf{Irreparable Harm}

Although its affirmation of Garcia’s nonexistent copyright ownership would have been enough to end its analysis, the \textit{en banc} panel went on to analyze Garcia’s claim of irreparable harm “because the grave danger Garcia claims cannot be discounted and permeates the entire lawsuit.”\textsuperscript{81} The panel noted the “mismatch” between Garcia’s copyright claim – which would protect her interests as an author – and the security issues she presented to the court – which could only be remedied through something like a tort claim, which has no relation to copyright.\textsuperscript{82} The aim of copyright law to inspire expression and creativity ran contrary to Garcia’s attempts to thwart expression by pulling \textit{Innocence of Muslims} from YouTube “because [damages like hers] are unrelated to the value and marketability of [the] work[].”\textsuperscript{83} Thus, the panel concluded that personal safety has no place in a copyright analysis and no bearing on the preservation of the work.
as a vehicle for creative expression.\footnote{Id. at 745.} The panel suggested that a case such as Garcia’s might fare better under privacy law, although a right to be forgotten completely does not exist in the U.S. like it does in other countries.\footnote{Id. at 745-746.} Similarly, Garcia could not argue for protection of the integrity of her performance, as one might be able to do in a country that recognizes moral rights in motion picture performances.\footnote{Id. at 746. For a further discussion of the right to be forgotten and moral rights abroad, see infra notes 16-57 and accompanying text.}

Also weighing against Garcia was the fact that she waited almost five months from the first posting of \textit{Innocence of Muslims} to seek legal protection, even though she brought suit almost immediately following the film’s translation into Arabic and the issuance of the fatwa against everybody involved in making the film.\footnote{Garcia, 786 F.3d at 746.} In fact, the panel noted that this time lapse cut against Garcia’s copyright claim as an author: she only brought suit once her personal safety – again, unrelated to copyright – was in danger, not once her performance was broadcast to the public in a manner that, under her case theory, should have been “infringing” beginning on the first day it was posted to YouTube.\footnote{Id. (“[T]he 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.”).}

Therefore, because Garcia could not show irreparable harm to her interests as an author
under copyright law, the court did not analyze the latter two injunction factors, the balance of equities and public interest.\textsuperscript{89}

**Free Speech Issues in the 9th Circuit’s Injunction**

First Amendment expression was a focus of the en banc panel’s analysis of the temporary injunction issued against Google demanding that all copies of *Innocence of Muslims*, save those that did not contain footage of Garcia’s performance, be removed from YouTube.\textsuperscript{90} The panel was particularly disturbed by the implications of the exception to the court’s order, namely that Google might be put in a position to edit uploads of the film so they would conform to the injunction.\textsuperscript{91} The fact that the public would be deprived access to the full version of a highly contentious film also struck a chord with the panel, which deemed the order a “classic prior restraint of speech,” a grave infringement of First Amendment expression.\textsuperscript{92} Because of the First Amendment dangers and Garcia’s shaky case given the factors discussed above, the court dissolved the injunction.\textsuperscript{93}

\textsuperscript{89} *Id.*

\textsuperscript{90} *Id.* at 746-747.

\textsuperscript{91} *Id.* at 747 ("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."). There is no indication that Google ever engaged in such editing, however.

\textsuperscript{92} *Id.*

\textsuperscript{93} *Id.*
Dissent

The dissenting opinion written by Judge Kozinski warned of the dangers the majority’s holding would impute into motion picture copyright. If individual scenes in a work cannot be considered “works” themselves, he argued, there will be a lack of copyright protection for unfinished films or portions of films – such as alternative endings or bloopers – leaked or released to the public before they are incorporated into the final film itself. Furthermore, the Aalmuhammed case the majority cited to support its proposition actually concerned joint authorship of an entire film, Malcolm X, and not a contribution to a work, like in Garcia’s case. In fact, the Aalmuhammed court concluded “a contributor of an expression may be deemed to be the ‘author’ of that expression for purposes of determining whether it is independently copyrightable.” The dissent also pointed to Effects Associates, Inc. v. Cohen, where the 9th Circuit held that an outside company retained copyright ownership in the special effects footage it had provided for a film, as evidence that a “standalone work[ ] that [was] separately fixed and

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94 Id. at 750 (Kozinski, J., dissenting).

95 Id.

96 Aalmuhammed v. Lee, 202 F.3d 1227, 1232 (9th Cir. 2000). However, the Aalmuhammed court later goes on to note that any mere creative contribution to a film is not enough to establish copyright ownership. Id. at 1233. Rather, “[i]n a movie [the definition of “author,”] in the absence of a contract to the contrary, would generally limit authorship to someone at the top of the screen credits, sometimes the producer, sometimes the director, possibly the star, or the screenwriter—someone who has artistic control.” Id. Therefore, authorship seems to hinge not on one’s title, but the amount of creative control implemented in the film.

97 908 F.2d 555 (9th Cir. 1990).
incorporated into a film,” like Garcia’s performance, can be eligible for copyright protection.98

Providing a more flexible definition of “fixation,” the dissent concluded that the phenomenon of acting out what is written in a script is an inherently creative act that is “fixed” both by an actor’s role in bringing the words to life and a cameraman’s role in filming the scene.99 This is further supported, the dissent contends, by the Beijing Treaty on Audiovisual performances, which was signed by a U.S. delegation of which the Register of Copyrights was a member, and which has been described by the Copyright Office as “an important step forward in protecting the performances of television and film actors throughout the world.”100 These legitimate copyright issues, combined with the threat of danger inherent in Garcia’s case, lead the dissent to conclude that Garcia was likely to succeed on her copyright claim and that she had demonstrated irreparable harm for purposes of the injunction.101

**Moving Forward**

Undoubtedly, the outcome of *Garcia v. Google* would have been different if the ownership rights of actors in their individual performances were recognized in American

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98 *Garcia*, 786 F.3d at 750 (Kozinski, J., dissenting) (“Why then are the seven shots ‘featuring great gobs of alien yogurt oozing out of a defunct factory’ interspersed in *The Stuff* any more a ‘standalone work’ than Garcia's performance?”) (citation omitted).

99 *Id.* at 750-751 (“But a performer need not operate the recording equipment to be an author of his own performance.”).


101 *Id.* at 753.
copyright law. Foreign copyright regimes and privacy laws, as discussed above, provide a comprehensive starting point from which discussion and new legislation can evolve, hopefully providing more predictability and security for motion picture actors whose performances are deserving of copyright protection. Although Garcia’s five-second performance might not be an example of one such performance, future actors will benefit from an overhaul of the current copyright scheme.

Recognizing the ownership rights of motion picture actors will require altering the Copyright Act’s definitions of a couple key terms, or at the very least the interpretation of these terms. A “work,” in the film context, for example, is currently interpreted to mean the film in its entirety.\textsuperscript{102} Motion pictures, under §101, are considered “audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.”\textsuperscript{103} Audiovisual works, in turn, are “works that consist of a series of related images which are intrinsically intended to be shown by the use of machines . . . with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.”\textsuperscript{104} In theory, there is nothing preventing individual cinematic scenes – “a series of related images . . . together with accompanying sounds” – from classification as audiovisual works, considered “whole” in their individual entirety. This would be particularly true in the case of longer scenes that encapsulate a particular theme, idea, or discrete set of creative expression. Similarly, the definition of “fixation” must be

\textsuperscript{102} Id. at 741 (“Thus, ‘[f]or copyright registration purposes, a motion picture is a single integrated work.’”) (quoting Copyright Office decision).

\textsuperscript{103} 17 U.S.C. §101 (defining “motion picture”).

\textsuperscript{104} Id. (defining “audiovisual work”).
revisited in its interpretation. The “Swiss cheese” problem articulated in Garcia – “splintering a movie into many different ‘works,’ even in the absence of an independent fixation – would look very different if “fixation” for motion picture purposes did not just include the actions taken by a film’s producer and a film crew in taping each scene.\textsuperscript{105} Heavy contribution to editing or production, for example, would bolster an actor’s claim to fixation, making it easier to overcome the initial barrier to copyright.

As evidenced by the Garcia court’s reliance on the Copyright Office’s decision to reject Garcia’s performance as a valid work, all eyes are on legislation.\textsuperscript{106} Changes in the interpretation or description of the above terms must start at the Copyright Office, not in common law, if they are to be consistently followed by courts and thus create new precedent. This change will be neither quick nor simple, particularly if a shift in copyright interpretation stems from a shift in philosophy from an economics-driven approach to a moral rights approach. Present alongside the difficulty inherent in changing an entire body of legislation’s attitude toward moral rights is the already hostile attitude of the film industry toward any kind of valid copyright ownership by individual actors and actresses.\textsuperscript{107} A collaborative approach between legal scholars, expanded rights

\footnote{Garcia, 786 F.3d at 744 (“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.”).}

\footnote{Id. at 741-42 (“The Copyright Office's well-reasoned position ‘reflects a ‘body of experience and informed judgment to which courts and litigants may properly resort for guidance.’”) (quoting Southco, Inc. v. Kanebridge Corp., 390 F.3d 276, 286 n. 5 (3d Cir. 2004) (en banc) (Alito, J.)).}

\footnote{See supra note 36 and accompanying text.}
advocates, actors, filmmakers, and legislators will be necessary if preliminary discussions are even to be broached.

Helping the situation, oddly enough, is America’s precarious track record conforming to the Berne Convention.\textsuperscript{108} Vast room for improvement, along with pressure from scholars and other Berne signatories, could be just the push needed by Congress to take proactive steps in expanding moral rights in the U.S. VARA, which provides limited moral rights to creators of works of visual art, was a hesitant step in the right direction, and its current framework will serve future moral rights legislation well. For example, the fact that rights provided under VARA can be waived would fit in well with the contract-heavy culture of motion picture production. If VARA’s scope was expanded to include motion pictures, and if the §101 definitions discussed above were slightly broadened, copyright legislation would already be well on its way to providing individual actors with significantly richer moral rights than those available before.

Opening the door for moral rights in the context of individuals’ motion picture performances will require a concrete set of instances when these performances will be considered copyright-eligible. Otherwise, allowing each and every performance, no matter how small, to claim copyright protection would undoubtedly lead to the “Swiss cheese” problem discussed above. For one, copyright ownership must be limited to individual scenes, rather than an ownership stake in the entire film. When determining which scenes are eligible for copyright protection, the most reliable measure will likely be how much the actor in question contributed to its creative expression. For example, if an actor wrote or edited a large portion of the script used in the scene, or contributed

\textsuperscript{108} See \textit{supra} notes 37-43 and accompanying text.
heavily to editing the scene afterward, or even improvised a large chunk of dialogue that added to the scene’s creative core, it might be enough to satisfy authorship standards. In rare instances, another measure like time could be useful – for instance, if a particular scene consists of a considerably long monologue that is made unique or even more compelling by the actor’s personal creative traits. When compiling factors such as these, it will be important to keep in mind the “cast of thousands” referred to by the Garcia court, in order to narrow down these eligibility factors to a manageable list.

Finally, once the seemingly insurmountable hurdle of copyright eligibility has been mounted, legislative attention should turn to the logistics of what will happen once actors begin to bring suit under the Copyright Act. Evidentiary standards must be taken into account – when trying to prove that an actor was intimately involved with the formation of the creative expression in a particular scene, it must be decided whether the evidentiary burden be on the plaintiff or the defendant. The specificity of court orders enjoining the use of certain copyrighted scenes will be particularly useful post-litigation or in the instance of a preliminary injunction. Given the varied and expanding nature of technology, as shown by the nearly instant “viral” status of Garcia’s film clip, judicial relief must provide pinpointed directives regarding exactly what infringing material must be taken down from the internet. The 95/46 Directive and its standards for what must be removed from cyberspace may prove helpful in designing a similar set of standards for the U.S. This framework could be used in specific cases, like that of Garcia, where privacy and personal security are at issue and where an expedited course of action is necessary. A piece of legislation similar to the Directive would benefit from distinguishing between the kind of personal data protected in Europe and the creative,
copyrighted “personal information” at issue in copyright-based cases. At the very extreme, a “right to be forgotten” might be implemented in order to secure the personal safety of an actor who finds himself or herself at the center of an international controversy, like Garcia.

Moral and privacy rights in foreign jurisdictions, like anything man-made, are imperfect, and certainly so when applied to U.S. legislation. The Directive, even stripped of its broad interpretation in *Google Spain*, runs contrary to First Amendment protections in the U.S. and would certainly raise the same, if not more, concerns here that it does abroad. However, its underlying philosophy – that certain personal information is an extension of an individual’s being and therefore deserving of privacy – combined with the protections available for creative works and their artists under moral rights regimes, provide a solid foundation on which to build future amendments to American copyright law designed to protect actors’ performances.

**Conclusion**

The countless plays, films, and other performances that have been the substance of American culture and entertainment for years have undoubtedly been enriched and made possible in part by the protection offered by the Copyright Act. Such creativity deserves an expansive, forward-thinking approach when formulating the next wave of copyright reform in response to the practical needs of modern creators. As foreign legislation shows, a balance of restriction and granting of copyright ownership, as well as flexibility in what is allowed to be “forgotten” or disappear from the public sphere, is possible and realistic. With the correct set of exceptions to current copyright law – for example, performances of a certain length or to which a certain amount of personal
creativity was contributed – the ownership rights of actors in the U.S. could expand and develop, leading to an influx of even greater creativity in the future. While “Swiss cheese” copyright is a legitimate concern if actors’ individual rights in their performances were to lead to a flood of litigation, a clearly delineated set of standards that identify exactly what kind of performances are copyright-eligible would go a long way in alleviating this concern and preventing frivolous lawsuits. Therefore, the next step in this progression would benefit greatly from a wide survey of similar rights that have already been implemented in other countries. The ever-changing nature of technology and performativity necessitates changes to American copyright law before the next Garcia-esque case, this time with a much more realistic copyright claim, is wrongly decided.