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# Copyright and Performance Rights in an Online Video World

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In a world of ubiquitous videos, will performance rights become the next intellectual property frontier? People have been performing for one another for centuries. But suddenly courts are grappling with performance copyright claims, including two quite unusual cases that led to decisions by two of the country's most prominent judges.

Performances, at least live performances, generally fall outside of copyright protection. A copyrighted work must be fixed in a tangible medium of expression, and live performances are dynamic and ephemeral, not fixed. But there's an Internet twist—everyone has video cameras these days, and the resulting videos frequently end up online. In this way, performances often are fixed (usually by someone else's video), and those videos often are made widely available.

Under these circumstances, it is not surprising that two quite different cases recently reached federal appellate courts, alleging violations of performance rights. In both *Garcia v. Google* and *Conrad v. AM Community Credit Union*, it was the act of posting a video on the Internet that concerned the plaintiffs.

## ***Garcia v. Google***

The case that has received the most attention, and clearly the more serious of the two, concerned an amateur actress, Cindy Lee Garcia. She agreed to perform a minor role in an historical adventure film. But the producer apparently misled her, for her scene was used in an anti-Islamic film titled "Innocence of Muslims," and her brief performance was partly dubbed so that she appeared to be asking: "Is your Mohammed a child molester?" Not surprisingly, Islamic groups were offended by the film. An Egyptian cleric even issued a fatwa against everyone involved with the film. Garcia soon began receiving death threats.

The film had been posted on the Internet, and Garcia sought to have it taken down. But under the Digital Millennium Copyright Act (DMCA), only copyright owners can demand takedown of a work. The film was the producer's copyrighted work, not hers. She claimed, however, that in the unique circumstances of this film, she owned an independent copyright in her performance, as it was fixed in tangible form in the film.

The trial judge rejected Garcia's claim, but on appeal, a three-judge panel of the US Court of Appeals for the Ninth Circuit reversed in a 2-1 decision written by Chief Judge Alex Kozinski, who has written many key decisions in Internet, intellectual property and entertainment law.<sup>1</sup> Judge Kozinski acknowledged that the case was unusual. Actors do not own copyrights in their performances in Hollywood films. But that is at least partly due to the fact that film contracts, at least at major studios, clearly delineate the rights of each person and entity involved, and include comprehensive grants of right by actors in favor of the studio. In Garcia's case, there was no contract and, thus, the unusual ("rarely litigated," in Judge Kozinski's words) issue arose as to whether she owned a copyright in her performance.

Before the 1976 Copyright Act, the copyright law specified just what kinds of works qualified for copyright. The original Copyright Act of 1790, for example, was limited to "books, charts, and maps." But Section 102 of the 1976 act employed a new, wide-open definition, meant to embrace works of many different kinds; all that is required is "an original work of authorship fixed in any tangible means of expression, now known or later developed." It is a broad definition, and it gave an opening for Garcia's performance rights claim.

Judge Kozinski held that there was a plausible case that Garcia acted creatively, and that her acting contributed to the film beyond the mere lines and directions in the script. He stated:

[A]n actor does far more than speak words on a page; he must "live his part inwardly, and then...give to his experience an external embodiment." That embodiment includes body language, facial expression and reactions

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to other actors and elements of a scene. Otherwise, “every shmuck...is an actor because everyone... knows how to read.”

An actor’s performance, when fixed, is copyrightable if it evinces “some minimal degree of creativity... ‘no matter how crude, humble or obvious’ it might be.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (quoting 1 Nimmer on Copyright § 1.08[C][1]). That is true whether the actor speaks, is dubbed over or, like Buster Keaton, performs without any words at all. Cf. 17 U.S.C. § 102(a)(4) (noting “pantomimes and choreographic works” are eligible for copyright protection). It’s clear that Garcia’s performance meets these minimum requirements. (Most citations omitted).

Additionally, because these independent creative actions were filmed, they were fixed in tangible form and hence protectable as copyright. The court acknowledged that it may be important *who* fixes the work in tangible form (“whether the author of a dramatic performance must personally fix his work in a tangible medium”), but it did not address that issue because the parties had not raised it.

The court’s finding of a copyrightable performance is the crux, and most controversial aspect, of the decision. (It should be noted, however, that the court stressed the preliminary injunction setting, and expressly stated, “Nothing we say today precludes the district court from concluding that Garcia doesn’t have a copyrightable interest, or that Google prevails on any of its defenses.”) Critics point to the somewhat cursory analysis (the assumption that the actresses’ acting contains creative content beyond the script she followed) and the lack of precedential cases on copyrightability of acting performances.

Having found a copyright in the performance, the court went on to examine who owned the copyright and who had rights to use it. Ownership inquiry in copyright is relatively simple: the artist/creator owns it, unless it is a work for hire or is legally transferred. Here, the producer was not Garcia’s employer and had no written agreement with her, so the work-for-hire doctrine did not apply, and thus Garcia, not the producer, owned the performance copyright, the court held. There was no suggestion that she had transferred the copyright, and under Section 204(a) of the Copyright Act, a transfer would require a written agreement, of which there was none.

In an earlier case, involving Spike Lee’s movie *Malcolm X*, the Ninth Circuit had rejected an individual consultant’s copyright claim, and engaged

in a lengthy analysis of copyright ownership with respect to movies. But the analysis in that case, *Aalmuhammed v. Lee*,<sup>2</sup> focused on joint works, and Judge Kozinski noted that just because Garcia was not a joint author with the movie producer didn’t mean that she didn’t have a copyright of her own. He did not directly address, however, the suggestion in *Aalmuhammed* that movies were unitary works, that is, that the final movie is the only copyrighted work, and all subsidiary contributions, such as the performances of actors, are subsumed within that final work.

## The Issue of Consent

Didn’t the producer at least have rights to use Garcia’s filmed performance? Consent to use a copyrighted work often is implied from circumstances, and by participating in the filming, Garcia clearly consented to some use of her performance before the camera. But the unusual circumstances of the case came into play here, and the court found that while she clearly consented to the producer’s use of her performance in the historical adventure film, that consent doesn’t extend to the anti-Islamic diatribe, which “differs so radically” from what she originally understood to be her role.

Putting together all of its conclusions—and acknowledging that they were tentative due to the nature of the preliminary injunction hearing record—the court concluded that Garcia owned a copyright and could claim that its Internet distribution, distorted by being placed in “Innocence of Muslims,” was unauthorized.

The ruling has sparked considerable criticism, and the court revised its opinion, though not its outcome, in response. Judge N.R. Smith dissented, relying on standard copyright dogma that mere performances by actors and actresses are not intended to be copyrightable. He essentially identified the script to which Garcia performed, and the resulting movie informed by creative decisions of the photographer and director, as the relevant creative works, particularly given the minimal aspect of her performance compared to the entire work.

## Implications of the Two Decisions

### *Garcia*

The *Garcia* decision, scheduled for rehearing by the Ninth Circuit *en banc* on December 15, 2014,

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is clearly controversial, and raises many concerns, including disruption to DMCA procedures if every participant in collective multimedia work has a right to demand it be taken down. The *Garcia* ruling cannot be separated from its unique facts, including the apparent deception in how *Garcia*'s performance was obtained, and the fatwa and death threats that resulted from the posting of the video.

Perhaps most disappointing is the decision's lack of full discussion on the threshold issue of the copyrightability of performances. Generally plays and scripts are considered creative works, and acting performances merely representations of those works, not independently copyrightable works. Indeed, one of Judge Kozinski's notable prior opinions stressed that at least in traditional films, when one purchases the rights to a film, the images of the actors and the actions in the film go with it. Identifying severable independently copyrightable performance copyrights is a big step that deserves full discussion.

### ***Conrad v. AM Community Credit Union***

Far different circumstances were presented by Catherine Conrad, a/k/a the "Banana Lady," who puts on private performances while wearing a costume in the shape of a giant banana.

One of her cases, *Conrad v. AM Community Credit Union*,<sup>3</sup> reached the US Court of Appeals for the Seventh Circuit. Conrad had performed at a credit union trade association event, and despite her desire to forbid photos and videos, videos of her performances were posted to the Internet. She claimed that those videos infringed her performance.

The appeals court unanimously rejected her claim, in a decision written by Judge Richard Posner, another intellectual property thought leader. Judge Posner held that Conrad's performance "was not copyrighted or even copyrightable," because it was not fixed in a tangible medium.

In fact, however, it *was* fixed in the tangible and ubiquitous media of today—cell phone videos. Without directly addressing the issue, Judge Posner indicated that these videos did not matter. His thinking appears to be that the videos portrayed nothing copyrightable. We know this because he addressed the ancillary point of whether the videos infringed Conrad's rights; he concluded they did not, because they merely portrayed non-copyrightable material.

In this regard, the Court could have advanced the performance rights issue, particularly in light of the questions raised by *Garcia*, by providing more analysis. Why didn't the court find Conrad's performance copyrightable? Was it too simple, too unscripted,

too banana-silly? What about those emotions and creative expressions that Judge Kozinski found dispositive in *Garcia*? Did Conrad's banana suit hide them, did Judge Posner (who has expertise in art; he authored a book on art and the law) find her expressions insufficiently creative, or did the court simply view performances as non-copyrightable?

Finally, could the spectator videos provide the necessary tangibility required for copyright, or did the court implicitly assume an affirmative answer to one of the issues expressly left open in *Garcia*: Whether the recording in tangible means must be done personally by the author? The definition of fixation in Section 101 of the Copyright Act requires that the fixation occur "by or under the authority of the author," and whether that requirement is satisfied may depend on the facts.

Further performance rights cases may have to directly address when "fixation" may be viewed as under the authority of the author. When, for example, does a professor's lecture become fixed? Presumably not when students record it secretly, but are student recordings sufficiently made under the author's authority when they make the recordings with the professor's implicit permission (by placing recorders on the podium)? Should copyright protection arise only from fixations expressly authorized or conducted by the professor or his or her agent?

As in *Garcia*, contracts could have made a difference for Conrad. Conrad alleged that the event organizer was contractually obligated to prohibit posting of videos of her performance—but the record showed that the organizer did make that announcement, and therefore cannot be claimed to have induced any copyright violations.

Finally, as in *Garcia*, the factual circumstances colored Conrad's case. Conrad had a record of making frivolous claims, so much so that the appeals court even suggested that trial courts should consider barring her from filing further cases until she pays the sanctions awarded to her adversaries in several previous cases. Also, no one was making death threats over silly "Banana Shake" performances.

## **Conclusion**

*Garcia* and *Conrad* both suggest that in today's world of ubiquitous video, we are likely to see more claims of performance rights, especially if cases such as *Garcia* keep the door open to them, and if third-party videotaping can be found implicitly authorized by the author, thereby satisfying the fixation requirement. In these circumstances, both performers and producers of performances should take special care

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to use contracts to clarify the ownership of performance rights.

That, at least, is the primary lesson for performance rights. But *Garcia* and *Conrad* raise the broader concern that the wide-open definition of copyright under Section 102 (any work of “authorship” that is fixed

in a current or future tangible medium) inevitably leads to creative copyright claims. In a system where claims are made (and rejected) for copyright in transitory food creations,<sup>4</sup> it is likely that even more creative (or outrageous, depending on your perspective) copyright theories will be forthcoming.

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1. *Garcia v. Google, Inc.*, 2014 WL 3377343, 111 U.S.P.Q.2d 1748 (9th Cir. July 11, 2014).

2. *Aalmuhammed v. Lee*, 202 F.2d 1227 (9th Cir. 2000).

3. *Conrad v. AM Community Credit Union*, 750 F.3d 634 (7th Cir. 2014).

4. *Kim Seng Co. v. J&A Importers, Inc.*, No. CV10-742 CAS (C.D.Cal. Aug. 30, 2011).