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New Court Ruling Suggests Actors Hold A Copyright Interest In Their Performances: Some Practical Tips for Performance Agreements and Appearance Releases

Legal Alert
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Case Background

In a case titled *Garcia v. Google, Inc.*, 12-57302, the recent ruling of the 9th Circuit Court of Appeals (which covers nine states, including California) suggests that an actor has a protectable copyright in the recording of his or her performance. In this case, Cindy Lee Garcia was hired and paid to act in a film entitled "Desert Warrior." Ms. Garcia's role was minimal. She was given only 4 pages of script and filmed for 3 ½ days. While "Desert Warrior" was never released, the film's writer and producer dubbed over Ms. Garcia's performance and included it in a different film called "Innocence of Muslims." "Innocence of Muslims" was posted on YouTube. The context in which Ms. Garcia's performance appeared in the film was interpreted as anti-Muslim by the Muslim community. Following the film's release and posting on YouTube, Ms. Garcia received death threats. Despite Ms. Garcia's numerous requests to Google that it remove "Innocence of Muslims" from YouTube, Google refused.

Copyright Interest

In Ms. Garcia's lawsuit, Ms. Garcia claimed that she was entitled under the Digital Millennium Copyright Act ("DMCA") to demand that Google take down "Innocence of Muslims" because she held a copyright interest in her performance in "Desert Warrior." On this issue, the court ruled that Ms. Garcia was likely to prevail. In the court's decision, it stated that a performance is protected by copyright when it meets the requirements for copyright protection – fixation and "some minimal degree of creativity." Although Ms. Garcia's contribution to the original film was

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minimal, the court found that her performance in “Desert Warrior” met these minimum requirements. Ms. Garcia did not execute a work for hire agreement, and the court determined that her role was too minimal for her to be construed as an employee of the producer, and so she retained the copyright in her performance.

Implied License

The court went on to review whether Ms. Garcia had granted a license to the producer to use her performance in “Innocence of Muslims.” While the court agreed that Ms. Garcia had granted the producer an implied license to use her performance in “Desert Warrior,” the implied license was not broad enough to grant the producer rights to use Ms. Garcia’s performance in “Innocence of Muslims.” While implied licenses are construed broadly, such that an actor would not have any rights to prevent a change in the name of a film or to sue for bad editing, implied licenses are not unlimited. In this case, the implied license was not broad enough to cover use of Ms. Garcia’s performance in “Innocence of Muslims."

Tips for Protecting Your Interest

It remains to be seen where the case will go from here. Google may appeal, and the verdict may or may not be upheld if it does. An earlier Ninth Circuit decision had held that the right of publicity is, at least in some circumstances, preempted by copyright, and so the Court’s decision did not address publicity rights. Other courts might approach this issue differently. However, regardless of where this case ends up, it illustrates a couple of important points. First, if an actor does not sign a work for hire agreement in connection with a performance, he or she may still be construed to have granted the producer a license to use his or her performance, at least in the original production. Second, from a producer’s perspective any agreement or release should address both publicity rights and copyright (as most typically do), and be broadly tailored to allow use for other productions. Actors, on the other hand, may want to include provisions restricting use for unrelated productions, especially where the performance is used in a different context than that of the original production.