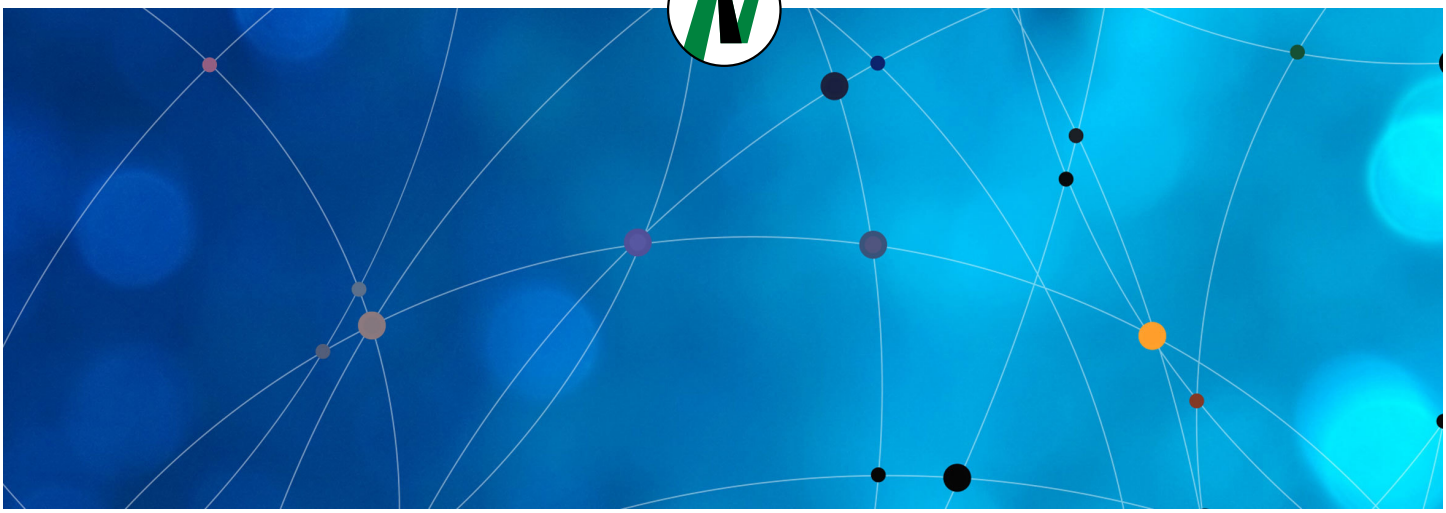

Ninth Circuit Says Film Actor has Copyright in Performance

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Both the intellectual property and creative communities are aghast at the recent decision from two of three judges of the United States Court of Appeals, Ninth Circuit. In *Garcia v. Google, Inc*., No. 12-57302, 2014 U.S. App. LEXIS 3694 (9th Cir. Feb. 26, 2014), the court reversed the trial court and held that an actor owns a copyright interest in his or her performance, however small, in a film. Plaintiff actress received $500 for three and a half days of filming in a movie which never materialized. Instead, plaintiff's scene was inserted into an anti-Islamic film with her voice partially dubbed over so that she appeared to be asking, "Is your Mohammed a child molester?" The film aired on Egyptian television resulting in protests, including one Egyptian cleric issuing a fatwa calling for the killing of everyone involved with the film. Plaintiff also received death threats. The film was available on YouTube. Plaintiff requested that Google (the parent company of YouTube) remove the video. Plaintiff then sought a preliminary injunction in the federal district court which the court denied.

Disagreeing with the district court, two of a panel of three appellate judges ruled that plaintiff had established a likelihood of success on the action such that she was entitled to injunctive relief. They did so by holding that plaintiff had a protectable copyright interest in her brief performance: "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'." (Some internal quotes omitted.)

The dissenting judge took the majority to task for creating a right out of whole cloth. Under the Copyright Act ("Act"), something must be a "work" in order to be copyrightable. According to the dissent, under the Act, a "work" is something different from the performance of the work. The Act "differentiates a work from the performance of it. It defines 'perform a work' to mean 'to recite, render, play, dance or *act it*.'" (Emphasis of the dissent.) Given this, the dissent concluded that Congress could not have intended to extend copyright protection to an acting performance. The dissent conceded that a motion picture is a work; but asserted that the Act does not clearly place an acting performance inside the film within the sphere of copyrightable

works.

Moreover, the Act protects "authorship." Relying on analogous case law, the dissent noted that the word "author" is traditionally used to mean the originator or the person who causes something to come into being. "[T]he 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." Here, the dissent found that the producer and writer was the one that provided the script, the equipment and the direction. ."[Plaintiff] was not the originator of any idea or concept. She simply acted out other's ideas or script." According to the dissent, plaintiff did not qualify as an author subject to copyright protection.

Additionally, in order for there to be copyright protection, the subject matter must also be "fixed in a tangible medium of expression" Relying upon case law that states that the human voice, regardless of how particular it may be, is not copyrightable, the dissent asserted that an acting performance similarly should not be protected. Sounds are not "fixed" within the ambit of the Act. If sounds are not "fixed," so too visual performances by analogy should not constitute fixed works: "[J]ust as the *singing* of a song is not copyrightable, while the entire song recording is copyrightable, the *acting* in a movie is not copyrightable, while the movie recording is copyrightable." (Original emphasis.)

The Ninth Circuit also ruled that plaintiff's performance was not a work-for-hire because there was no written agreement and because plaintiff "simply doesn't qualify as a traditional employee on this record." The dissent disagreed and concluded that the writer and producer was an employer because he controlled both the manner and means of making the firm including the scenes involving plaintiff.

The court also rejected the argument that plaintiff had given an implied license regarding her performance which permitted the use of her scene in a movie different than originally proposed. "[T]he [implied] license [plaintiff] granted [the writer and director] wasn't so broad as to cover the use of her performance in any project." According to the court, the film at issue was radically different than anything plaintiff could have imagined such that an implied license could not be said to have existed.

There were a number of other issues with the Ninth Circuit opinion, including the propriety otherwise of injunctive relief and prior restraint implicating the First Amendment issues. Whether the full panel of the Ninth Circuit rehears this case and whether the Supreme Court reviews the decision remains to be seen. Suffice it to say that this decision inserts a great deal of uncertainty into the filmmaking and artistic marketplace.

Comment
The case, if it stands, presents a number of issues:

- Will an actor be able to claim copyright infringement if she asserts the film, for example, through editing, depicts her performance in a manner she claims is different than a producer or director allegedly represented to her, whether or not there is a written agreement for a work-for-hire or a license.?
- Will producers now be forced to obtain broad work-for-hire agreements or licenses in every instance?
- Did the Ninth Circuit effectively create an additional non-statutory avenue for an actor to vindicate "moral rights," namely, the rights of attribution and integrity?
- Why did the court not address the transformative nature of the use of the scene in the film in which it was used? Was it sufficiently transformative to constitute fair use? (See *Seltzer v. Green Day, Inc*., 725 F.3d 1170 (9th Cir. 2013); see also *Cariou v. Prince*, 714 F.3d 694 (2d Cir.), cert. denied, ___ U.S. ___, 134 S.Ct. 618, 187 L.Ed.2d 411 (2013).)

- Will persons who are the subject of a photograph or a painting have copyright protections independent of the photograph or painting that could limit how the work might be displayed, for example in a collection that may be unflattering to the subject of the photograph? In the *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1994), the Supreme Court found that a photograph of Oscar Wilde was a copyrightable "writing" because, even though it was a mechanical reproduction of a real person's physical features, it included original expression by the author. The photographer posed Wilde, choosing his costume and backdrop, arranged the scene with lighting and angle and thus imposed his own expression and creativity onto the photograph. Would the Ninth Circuit hold that Wilde possessed a copyright interest in his individual image different than that of the photographer's interest in the whole photograph?