

## For Once, Hollywood and Tech See Eye To Eye On Copyright

By **Bill Donahue**

*Law360, New York (May 18, 2015, 9:53 PM EDT)* -- The Ninth Circuit's decision Monday on an anti-Islam video posted to YouTube was highly unusual, and not just because it involved a fatwa: It was also that oh-so-rare copyright ruling that could please both Hollywood and Silicon Valley.

Media companies and Web companies have long been enemies in the copyright realm, and it's easy to see why: One creates and monetizes content, and the other develops disruptive ways to use it. Tech firms — most of all Google — have sparred with studios and labels over copyright issues for years, often resulting in high-profile court cases and messy legislative battles.

But the peculiar case of Cindy Lee Garcia, which culminated in Monday's ruling, was different. The underlying ruling was so unusual, and would have created so many problems, that when it was entirely overturned, film studios and Web companies were left in an unusual situation: agreement.

"Most copyright experts viewed the [underlying] decision as an outlier and something that needed to be fixed," said J. Alexander Lawrence, a partner with Morrison & Foerster LLP. "While filmmakers and the online video providers seldom see eye to eye, this is one of the rare occasions where they did."

"After the decision, we heard an audible sigh of relief in Hollywood and Silicon Valley," Lawrence said.

Garcia, an actress, received death threats after being duped into appearing in the virulently anti-Islam film "Innocence of Muslims," the incendiary video that sparked riots in the Middle East in 2012. Though her case sounds like more of a privacy or right of publicity claim, Garcia used copyright law to try to get Google to pull the video, likely because the Web giant was immunized against most other claims under federal Internet laws.

A trial court tossed the case, but a Ninth Circuit panel said in February 2014 that it would "err on the side of life" by forcing Google to pull the video from YouTube. The injunction, issued in secret and with a gag order, was based on the idea that Garcia owned an independent copyright in her seconds-long performance in the movie.

On Monday, after 15 months of criticism, the en banc Ninth Circuit wiped the slate clean — saying Garcia's "heartfelt plea" couldn't trump "the limits of copyright law and fundamental principles of free speech." The court said not only that she had no copyright in her brief performance but also that the injunction based on that claim had been an improper prior restraint of speech.

It's a big win for Google and other similar online hosts, because the panel's ruling had the potential to be a heavy burden for any website with user-generated content, such as Tumblr, Vimeo, Twitter or Facebook.

Think of it this way: If a user posts "The Avengers" to YouTube and the Walt Disney Co. files a takedown notice under the Digital Millennium Copyright Act, it's fairly easy for Google to verify that Disney has a valid claim of infringement of an enforceable copyright.

Not so, though, if every bit actor like Garcia can claim separate copyrights in each scene in the movie — especially since the Copyright Office has said it won't register performances like Garcia's. Hosts such as YouTube would be put in the tough position of either leaving up potentially infringing content and risking liability, or pulling it without much evidence.

"How on earth does the online host verify that this is the same person, that they own the separate 'work,' that it was not a work for hire or an implied license, and so on?" said David Kluff, a partner with Foley Hoag LLP.

"Then extend that to nonacting contributions — a lighting designer or costume designer. The chain of title gets virtually impossible to prove, and that's an untenable position" for an Internet service provider, he said. "The DMCA just wasn't designed to handle this level of complexity."

Add to that the troubling First Amendment precedent the case would have set for hosts of online speech if it had been affirmed. Google had been ordered, in secret, to pull down a video at the center of a national news story, all based on a plaintiff's novel theory of copyright law, which the court acknowledged was debatable.

So it's obviously a big win for tech companies. But, unlike many other copyright decisions, it's also a win for movie and TV studios.

For one thing, while most movies and TV shows try to get contracts signed with their performers that would preclude separate copyright claims like Garcia's, not every bit actor and production assistant signs one — particularly in low-budget films or movies with thousands of extras.

"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," the court wrote in Monday's ruling.

And even if all those performers sign contracts, they might still file claims saying otherwise that would then need to be disproved.

"While they don't want pirated copies of their videos on YouTube, [studios] certainly don't want actors demanding that licensed content be pulled down from YouTube," said Lawrence. "The content owners want exclusive control."

Momentarily aligned interests aside, Monday's ruling is likely to remain the rare instance of big media companies getting along with Web companies on copyright. Remember: Google is currently suing the Motion Picture Association of America for allegedly lobbying a state attorney general to harass the company over online piracy, and the two are also likely to trade blows over intellectual property provisions in upcoming free trade agreements.

No, the initial ruling in Garcia's case seems to have been just a bizarre outlier born of bad facts, one that pretty much everyone in the realm of copyright law — Hollywood or tech — wanted to see corrected.

"This is a classic example of bad cases making bad law, in this case a very sympathetic actress who is duped into making a movie and gets a death threat," said Neil Smith, a partner at Rimon PC. "The copyright law can't be stretched this far, and in doing so the earlier decision had greatly messed up the copyright law concepts of what is a work and who is an author."

--Editing by Kat Laskowski and Brian Baresch.

---

All Content © 2003-2018, Portfolio Media, Inc.