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Garcia v. Google: The Impracticalities of Awarding Copyright Authorship for Five Seconds of Fame

Joe Ferrari

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**GARCIA V. GOOGLE: THE IMPRACTICALITIES OF
AWARDING COPYRIGHT AUTHORSHIP FOR FIVE
SECONDS OF FAME**

Joe Ferrari*

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* Senior Managing Editor, Santa Clara University Law Review, Volume 56. J.D./M.B.A. candidate, Santa Clara University, December 2016. B.A. Political Science, B.A. Sociology, *cum laude*, University of Arizona, 2011. I would like to thank the entire Santa Clara University Law Review, my family, and my friends.

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INTRODUCTION

Only one thing is impossible for God: To find any sense in any copyright law on the planet – Mark Twain, American Author

Copyright is a type of intellectual property that is granted to “original works of authorship fixed in any tangible medium of expression.”¹ In *Garcia v. Google Inc.*,² the United States Court of Appeals for the Ninth Circuit (“the Ninth Circuit”) improperly held that Cindy Lee Garcia (“Garcia”), an ordained Christian minister turned aspiring actress, was “likely to prevail”³ on a copyright claim for authorship of the controversial trailer for *Innocence of Muslims* (“the Film”), which she appeared in for a mere five seconds as a supporting

1. 17 U.S.C. § 102(a) (2014).

2. *Garcia v. Google, Inc., et al.*, 743 F.3d 1258 (9th Cir. 2014), *rev’d* 766 F.3d 929.

3. *Id.* at 935.

actress.⁴ The *Garcia* opinion, as it stood prior to an *en banc* opinion that reversed the Ninth Circuit, threatened to create a new category of copyright interest that transforms a motion picture, which is a unitary work, into a patchwork of overlapping property claims.⁵ Moreover, the Ninth Circuit's decision created uncertainty and increased liability for companies engaged in content streaming.

This Comment will begin with an overview of United States Copyright law, focusing on authorship requirements and rights of owners.⁶ Next, this Comment will discuss the background of *Garcia*,⁷ the Ninth Circuit's original holding and *en banc* reversal,⁸ and an analysis of the legal and business issues arising from that holding.⁹ This Comment will then propose a new test for analyzing whether an actor/actress should be declared an author of a motion picture based on his or her performance in said motion picture.¹⁰ This test places the burden upon the actor/actress to prove more than a minimal form of contribution to the motion picture and suggests an analysis of the following factors: (1) the role of the actor/actress within the motion picture; (2) the significance of that role within the motion picture; (3) the level of control and discretion afforded to the actor/actress in conveying his or her role; and (4) the level of control afforded to the actor/actress in production of the motion picture as a whole. Lastly, the proposed test will be applied to three hypothetical authorship claims.¹¹

4. Although *Garcia* only appeared for five seconds, her appearance was arguably the most controversial. *See infra* notes 121–22.

5. Oral Argument at 20:30, *Garcia v. Google Inc., et al.*, 766 F.3d 929 (9th Cir. 2014), available at https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000725

6. *See infra* Part I.A–B.

7. *See infra* Part I.C.

8. *See infra* Part I.D–E. The opinion at the center of this Comment is the Ninth Circuit's original opinion, 796 F.3d 929. Although the Ninth Circuit reversed its original opinion, making the issues raised in that opinion moot, the discussion of authorship in the context of motion pictures remains relevant and could be challenged in the future. Moreover, the Ninth Circuit is not the only circuit to have faced this issue. *See, e.g.*, 16 *Casa Duse, LLC v. Merkin*, No. 13-3865, 2015 WL 3937947 (2d Cir. June 29, 2015).

9. *See infra* Part II–III.

10. *See infra* Part IV.A.

11. *See infra* Part IV.B–D.

I. BACKGROUND

A. *Historical Development of United States Copyright Law*

The evolution of copyright law in the United States is one of “gradual expansion”¹² that begins with the Constitution and is followed by three important pieces of legislation.

1. *Constitutional Grant*

Article I, Section 8, Clause 8 of the United States Constitution (“the Copyright Clause”) empowers Congress: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.”¹³ The Supreme Court has identified the Copyright Clause as both a “grant of power and a limitation.”¹⁴ To be deemed an author under the Copyright Clause, an individual must prove: (1) originality; and (2) some minimal degree of human intellectual labor or creativity.¹⁵ The term “Writings” is construed broadly to mean a tangible, physical embodiment of authorship.¹⁶ Copyright relief stems strictly from statutory authorization and not from a common law right.¹⁷

2. *1790 Copyright Statute (“the 1790 Statute”)*

The first United States Copyright statute was enacted in 1790 and was influenced primarily by the English Statute of Anne.¹⁸ The 1790 Statute granted copyright protection to maps, charts, and books for a term of fourteen years.¹⁹ Congress slowly added various works to the 1790 Statute, including prints in 1802, musical compositions in 1831, dramatic compositions in 1856, photographs in 1865, and

12. H.R. REP. NO. 94-1476, at 51 (1976).

13. U.S. CONST. ART. I, § 8, cl. 8.

14. *Eldred v. Ashcroft*, 537 U.S. 186, 212 (quoting *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5 (1966)).

15. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). For a discussion of *Feist* and the originality element, see *infra* Part I.A.4.c.

16. *Goldstein v. California*, 412 U.S. 546, 561 (1973).

17. *Wheaton v. Peters*, 33 U.S. 591, 657–58, 661–62 (1834).

18. Donald S. Chisum, Tyler T. Ochoa, Shubha Ghosh & Mary LaFrance, *UNDERSTANDING INTELLECTUAL PROPERTY LAW* 256 (Matthew Bender & Company, Inc., 2nd ed. 2011).

19. Copyright Act of May 31, 1790, 1 Stat. 124.

works of fine art in 1870.²⁰

3. *Copyright Act of 1909 (“the 1909 Act”)*

The 1909 Act granted copyright to “all the writings of an author.”²¹ Unlike the broad constitutional interpretation of “Writings,”²² the term “writings” in the 1909 Act came with limitation.²³ Section 5 of the 1909 Act listed eleven categories of copyrightable work, including, among others: books, periodicals, dramatic compositions, musical compositions, works of art, photographs, and pictorial illustrations.²⁴ In 1912, “motion picture photoplays” and “motion pictures other than photoplays” were incorporated into the 1909 Act.²⁵ The 1909 Act provided copyright protection for a term of twenty-eight years, commencing upon publication, which could be renewed once for a total of fifty-six years.²⁶

Congress believed that awarding an exclusive right to an author for a limited time achieved the ultimate goal of fostering the growth of learning and culture for the public welfare.²⁷ The 1976 Report of the Register of Copyrights, which was prepared in anticipation of the revisions ultimately enacted in the Copyright Act of 1976, argued that although public interest must coincide with authors’ rights, public interest nonetheless outweighs authors’ rights.²⁸ The 1909 Act remains relevant today because it continues to govern copyrights that were obtained by publication or registration

20. Margreth Barrett, *INTELLECTUAL PROPERTY CASES AND MATERIALS* 406 (West Publishing Co., 4th ed. 1995).

21. 17 U.S.C. § 4 (1909) (current version at 17 U.S.C. § 102 (1994)).

22. See *supra* text accompanying note 16.

23. Chisum, *supra* note 18, at 257.

24. *Id.*

25. Jay F. Dougherty, *Not A Spike Lee Joint? Issues In The Authorship Of Motion Pictures Under U.S. Copyright Law*, 49 *UCLA L. REV.* 225, 233 (2001).

26. 17 U.S.C. § 24 (1909).

27. See H.R. REP. NO. 2222, 60th Cong., 2d Sess., 6–7 (1909) (recognizing that: “[t]he Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. In enacting the copyright law Congress must consider . . . how much the monopoly granted will be detrimental to the public.”).

28. See House Comm. on the Judiciary, 87th Cong., 1st Sess., Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 90 (Comm. Print 1961) (explaining an “author’s interests [must] coincide with those of the public. Where they conflict, the public interest must prevail.”).

prior to 1978.²⁹

4. *Copyright Act of 1976 (“the 1976 Act”)*

Under the 1976 Act, which governs most copyrights granted today, copyright exists in “original works of authorship fixed in any tangible medium of expression.”³⁰ The House Reports for the 1976 Act indicate that Congress purposely left undefined the phrase “original works of authorship.”³¹ Instead, Congress sought to maintain the standard of originality established by courts under the 1909 Act.³² Congress also recognized that authors would continue to find new ways of expressing themselves, and that the 1976 Act could not limit those expressive forms which may be discovered nor allow unlimited expansion.³³

The 1976 Act expressly preempted state copyright protection.³⁴ The 1976 Act unified the law by extending federal copyright protection to both published and unpublished works, commencing on the date the work is fixed in tangible form.³⁵ Moreover, the 1976 Act replaced the former system of renewable copyright terms³⁶ with a single term consisting of the life of the author plus fifty years.³⁷

a. *Copyrightable Subject Matter*

Title 17 of the United States Code section 102(a) sets forth the following categories of copyrightable subject matter: (1) literary works; (2) musical works, including any accompanying

29. Some copyrights granted under the 1909 Act will continue until December 31, 2072, maintaining the 1909 Copyright Act’s relevance. Thus, we should continue to consider the intent of the 1909 Act.

30. 17 U.S.C. § 102(a).

31. H.R. REP., *supra* note 12, at 51 (“The phrase original works of authorship, which is *purposely left undefined*, is intended to incorporate without change the standard of originality established by the courts under the present copyright statute. This standard does not include requirements of novelty, ingenuity, or aesthetic merit, and there is no intention to enlarge the standard of copyright protection to require them”) (emphasis added).

32. H.R. REP., *supra* note 12, at 51.

33. H.R. REP. NO. 1576, 94th Cong., 2d sess. 51 (1976).

34. *See* 17 U.S.C.A. § 301.

35. Barrett, *supra* note 20, at 406–07.

36. *See supra* note 26.

37. *See* 17 U.S.C.A. § 302. A subsequent amendment extended the duration of the term to the life of the author plus 70 years, *i.e.*, an additional twenty years. *See* Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-28, 12 Stat. 2827.

words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.³⁸ Title 17 of the United States Code section 102(b) also sets forth uncopyrightable subject matter, specifically “any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”³⁹

b. Fixation

Title 17 of the United States Code section 101 states: “A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecords . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁴⁰

In the context of a motion picture, Congress noted that the content of a live transmission should be regarded as fixed and should be afforded statutory protection.⁴¹ However, Congress cautioned that fixation should exclude “purely evanescent or transient reproductions” such as images projected briefly on a screen, shown electronically on a television, or captured momentarily.⁴²

c. Originality

Originality does not mean that a work is novel or unique.⁴³ Instead, originality means that the material originates from the purported author and is not copied.⁴⁴ In *Burrow-Giles Lithographic Co. v. Sarony*,⁴⁵ a Supreme Court case predating the 1976 Act that challenged the copyrightability of a photograph of Oscar Wilde, the Court held that photographs were copyrightable because “they are representatives of

38. 17 U.S.C. § 102(a).

39. *Id.*

40. 17 U.S.C. § 101.

41. H.R. REP., *supra* note 12, at 52–53.

42. H.R. REP., *supra* note 12, at 52–53.

43. Dougherty, *supra* note 25, at 235.

44. Dougherty, *supra* note 25, at 235.

45. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

original intellectual conceptions of the author.”⁴⁶ The Court reasoned that originality should be found because of plaintiff’s *level of control* over the costumes, accessories and arrangement of the photo.⁴⁷ Stated differently, the author’s creative control over the photograph entitled him to copyright protection.⁴⁸

The Court again touched on the originality requirement in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*,⁴⁹ explaining that “originality” requires: (1) independent creation; and (2) some minimal degree of creativity.”⁵⁰ The Court described the level of creativity required as “extremely low; even a slight amount will suffice.”⁵¹ The Court instructed courts to look for “some creative spark, ‘no matter how crude, humble or obvious’ it might be.”⁵² The Court imposed a limitation on originality, holding that copyright protection may extend only to those components of a work that are original to the author.⁵³ This reasoning served as the basis for holding that telephone white pages organized alphabetically by individuals’ last names were not original because the alleged originality was “devoid of even the slightest trace of creativity.”⁵⁴

As an alternative reason for striking down the alleged originality of the white pages, the *Feist* Court reasoned that Respondent Rural might not even have truly selected to publish the names and telephone numbers of its subscribers in the way it did.⁵⁵ Instead, the Kansas Corporation Commission, as a condition of granting a monopoly, required Rural to alphabetically arrange the names.⁵⁶ As a result, the Court

46. *Id.* at 58.

47. *See id.* at 60 (explaining how plaintiff created the picture “entirely from his own original mental conception, to which he gave visible form by posing the said [picture subject] Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression and from such disposition, arrangement, or representation, made entirely by the plaintiff, he produced the picture in suit”) (emphasis added).

48. *See id.*

49. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

50. *Id.* at 345.

51. *Id.*

52. *Id.* (quoting 1 M. Nimmer & D. Nimmer, Copyright § 1.08[C][1]).

53. *Id.* at 348.

54. *Id.* at 362.

55. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991).

56. *See id.*

recognized the possibility that Rural's alleged creative or original contribution was in reality dictated by an external force—the Kansas Corporation Commission—not by Rural.⁵⁷

d. Authorship

Authorship is a constitutional prerequisite to copyright protection.⁵⁸ Title 17 of the United States Code section 101 does not define authorship.⁵⁹ However, in *Burrow-Giles*, the Supreme Court defined an author as “he to whom anything owes its origin; originator; maker, one who completes a work of science or literature.”⁶⁰

In the context of a motion picture, European countries utilize a bright-line statutory definition of author as “the principal director, the principal screenwriter, and the composer.”⁶¹ In the United States, questions of authorship in the context of motion pictures are typically avoided through routine application of the “work made for hire” doctrine.⁶²

In *Aalmuhammed v. Lee*,⁶³ the Ninth Circuit addressed the issue of authorship in a motion picture in the context of a joint authorship claim. In that case, Spike Lee entered into a contract with Warner Brothers to make the movie *Malcolm X*.⁶⁴ Lee co-wrote the screenplay, directed and co-produced the motion picture, which starred Denzel Washington as Malcolm X.⁶⁵ At Mr. Washington's request, Petitioner Jefri Aalmuhammed was asked to assist Washington in preparation for the role because Aalmuhammed knew a great deal about Malcolm X and Islam.⁶⁶ Aalmuhammed's involvement in the

57. See *id.* In the context of *Garcia*, this reasoning is critical because Garcia's alleged creativity, *i.e.*, her performance in the Film, is arguably controlled by an external factor: her producer. This argument is further discussed *infra* at notes 179–81.

58. See 17 U.S.C. § 102(a).

59. See 17 U.S.C. § 101 for a list of pertinent Copyright Act definitions, none of which define authorship.

60. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

61. Chisum, *supra* note 18, at 286 (citing Council Directive 93/98/EEC of 29 Oct. 1993, Harmonizing the Term for Protection of Copyright and Certain Related Rights, Art. 2)).

62. Dougherty, *supra* note 25, at 269. For a discussion of copyright ownership under the work made for hire doctrine, see *infra* Part II.B.2.a.

63. *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000).

64. *Id.* at 1229.

65. *Id.*

66. *Id.*

motion picture was: (1) reviewing the shooting script and suggesting script revisions; (2) directing Denzel Washington and other actors while on set; (3) creating at least two entire scenes with new characters; (4) translating Arabic into English for subtitles; (5) supplying his own voice for voice-overs; (6) selecting proper prayers and religious practices for the characters; and (7) editing parts of the movie during post production.⁶⁷

Similar to Garcia, Aalmuhammed did not have a written contract with Warner Brothers, Lee, or Lee's production companies.⁶⁸ After cashing a \$25,000 check from Lee and receiving \$100,000 from Denzel Washington, Aalmuhammed asked for a writing credit as a co-writer of *Malcolm X*, but was rejected.⁶⁹ Instead, Aalmuhammed was credited as an "Islamic Technical Consultant."⁷⁰ After receiving a Certificate of Registration from the United States Copyright Office,⁷¹ Aalmuhammed filed a complaint against, among others, Spike Lee, his production company, and Warner Brothers seeking, among other relief, declaratory relief and accounting under the Copyright Act.⁷² After dismissal of his claims, Aalmuhammed appealed and the Ninth Circuit affirmed.

The Ninth Circuit articulated various interpretations of "author." First, the court described an author as "the originator or the person who causes something to come into being."⁷³ The court also described an author as one who "superintends" the work by exercising control.⁷⁴ Lastly, the court described author as "'the inventive or master mind' who 'creates or gives effect to the idea.'"⁷⁵ The court reasoned that

67. *Id.* at 1229–30.

68. *Id.* at 1230. The fact that no contract existed between Warner Brothers and Aalmuhammed demonstrates that, contrary to the Ninth Circuit's belief in *Garcia*, studios do not always contract with the various individuals involved in production. *See infra* notes 200–01 and accompanying text (suggesting that *Garcia* is a limited decision because *Garcia*-issues are often avoided through work made for hire agreements).

69. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1230 (9th Cir. 2000).

70. *Id.*

71. *Id.* at 1230.

72. *Id.*

73. *Id.* at 1232.

74. *Id.* at 1234 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)).

75. *Aalmuhammed*, 202 F.3d at 1233 (quoting *Burrow-Giles*, 111 U.S. at 61)(citation omitted).

authorship required more than minimal creative or original contribution to a work.⁷⁶

The Ninth Circuit held that Aalmuhammed was not an author because: (1) Aalmuhammed did not superintend the work; (2) Aalmuhammed was not the person who actually formed the picture by putting the persons in position or arranging the place;(3) Aalmuhammed could not have benefited from the work unless the director chose to accept his recommendations; and (4) valuable contribution is not enough for co-authorship.⁷⁷

Although *Aalmuhammed* may be limited to the context of joint authorship claims, the dissent in *Garcia* argues that Aalmuhammed articulated “general principles” of authorship that should be considered when analyzing Garcia’s authorship claim.⁷⁸

B. Copyright Ownership

This section will address general copyright ownership principals, followed by joint ownership principles, namely the work made for hire doctrine and joint works of authorship.

1. General Rights of the Copyright Holder

Copyright protection enables an author to prevent others from reproducing his individual expression without his consent.⁷⁹ However, copyright does not preclude others from using the ideas or information revealed by the author’s work.⁸⁰ Moreover, copyright only prevents others from copying the author’s particular method of expressing ideas or facts, providing no rights in the underlying ideas or facts.⁸¹ Under the current copyright system, federal copyright arises automatically, as a matter of law, as soon as a qualifying work of authorship is fixed in a tangible medium of expression.⁸²

76. *Aalmuhammed*, 202 F.3d at 1233 (quoting *Burrow-Giles*, 111 U.S. at 58).

77. *Id.* at 1235.

78. *Garcia v. Google, Inc.*, 766 F.3d 929, 942 (9th Cir. 2014) (Smith, N.R., dissenting) (arguing that *Aalmuhammed* pulled authorship principles from the Supreme Court case *Burrow-Giles Litographic Co. v. Sarony*, which had nothing to do with joint works).

79. Barrett, *supra* note 20, at 403.

80. Barrett, *supra* note 20, at 402. For example, independent creation is not an infringement of copyright.

81. Barrett, *supra* note 20, at 409.

82. Barrett, *supra* note 20, at 408–09.

Some European countries have characterized copyright as a personal right of the author, or as a combination of personal and property rights.⁸³ On the theory of personal rights, countries have included in their copyright laws a “moral rights” provision.⁸⁴ These provisions seek to protect the author against certain acts injurious to his or her personal identity or reputation.⁸⁵ These rights include, among other rights, preventing the reproduction of the author’s work in a distorted or degrading form.⁸⁶ The United States has never recognized such moral rights of authors.⁸⁷

United States Copyright law imposes certain limitations and conditions on copyright protection:

- (1) The rights of the copyright owner do not extend to certain uses of the work;
- (2) The term of copyright is limited, as required by the Constitution;
- (3) A notice of copyright in published works is required;
- (4) The registration of copyrights and the recordation of transfers of ownership are required.⁸⁸

These limitations often juxtapose against the interest of allowing an author to receive the widest potential dissemination of his or her work.⁸⁹ Thus, the above limitations seek to not become so burdensome as to restrict or deprive authors of their justified reward.⁹⁰

2. *Joint Ownership*

Title 17 of the United States Code section 201(a) states that copyright “vests initially in the author or authors of the work.”⁹¹ However, where more than one person participates in a work’s creation, the work may be classified as, among other classifications, a work made for hire or a joint work.⁹²

83. Barrett, *supra* note 20, at 403.

84. Barrett, *supra* note 20, at 403.

85. Barrett, *supra* note 20, at 403.

86. Barrett, *supra* note 20, at 403.

87. Barrett, *supra* note 20, at 403.

88. Barrett, *supra* note 20, at 405.

89. Barrett, *supra* note 20, at 405.

90. Barrett, *supra* note 20, at 405.

91. 17 U.S.C. § 201(a).

92. Barrett, *supra* note 20, at 658.

a. *Work Made for Hire*

Title 17 of the United States Code section 201(b) states “the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”⁹³ “Work made for hire” is statutorily defined pursuant to two scenarios:

(1) a work is prepared by an employee within the scope of his or her employment (“Scenario 1”); or

(2) a work is specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire (“Scenario 2”).⁹⁴

As recognized by the Supreme Court, the work made for hire doctrine carries “profound significance for freelance creators - including artists, writers, photographers, designers, composers . . . and for the publishing, advertising, music, and other industries which commission their work.”⁹⁵

In *Community for Creative Non-Violence v. Reid*,⁹⁶ the Community for Creative Non-Violence (CCNV) retained Respondent James Earl Reid to produce a sculpture.⁹⁷ The parties agreed that the project would cost no more than \$15,000, not including Reid’s services, which he offered to donate.⁹⁸ The parties did not sign a written agreement or mention copyright.⁹⁹ The Court held that Congress, “in using the term ‘employee’ . . . meant to refer to a hired party in a conventional employment relationship.”¹⁰⁰ As a result, the

93. 17 U.S.C. § 201(b). Here, there is no evidence of a written instrument between Youssef and Garcia, triggering the work made for hire doctrine.

94. Here, Scenario 1 is relevant because there is no evidence of a written instrument between Youssef and Garcia, voiding Scenario 2.

95. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

96. *Id.*

97. *Id.* at 733.

98. *Id.* at 734.

99. *Id.* at 734. Without a written contract, “Scenario 2” of the work made for hire doctrine, *see supra* at note 94, is voided. CCNV thus argued work made for hire under Scenario 1, *i.e.*, that Reid was an employee of CCNV acting within the scope of his employment.

100. *Id.* at 743.

Court, applying *Restatement (Second) of Agency* principals of agency, applied the following factors in considering whether Reid was an “employee” for the purpose of the “work for hire” doctrine:

[1] the skill required; [2] the source of the instrumentalities and tools; [3] the location of the work; [4] the duration of the relationship between the parties; [5] whether the hiring party has the right to assign additional projects to the hired party; [6] the extent of the hired party’s discretion over when and how long to work; [7] the method of payment; [8] the hired party’s role in hiring and paying assistants; [9] whether the work is part of the regular business of the hiring party; [10] whether the hiring party is in business; [11] the provision of employee benefits; and [12] the tax treatment of the hired party.¹⁰¹

The Court held that Reid was not an employee of CCNV but was instead an independent contractor.¹⁰² Because Reid was an independent contractor without a signed agreement, the sculpture did not qualify as a work made for hire.¹⁰³ In practice, courts have treated the financial relationship between the parties, including payroll formalities and tax treatment, as highly probative.¹⁰⁴

b. *Joint Works*

Under Title 17 of the United States Code section 101, a “joint work” is defined as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”¹⁰⁵ The authors of a joint work are co-owners of copyright in the work and are treated as tenants in common, with each co-owner having an independent right to use or license the use of

101. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52. The Court also stated that no one factor is determinative.

102. *Id.* at 753 (1989).

103. *Id.*

104. *Chisum*, *supra* note 18, at 323 (citing *Kirk v. Harter*, 188 F.3d 1005 (8th Cir. 1999); *Carter v. Helmsley-Spear Inc.*, 71 F.3d 77 (2d Cir. 1995); *Aymes v. Bonelli*, 980 F.2d 857 (2d Cir. 1992) (reasoning that “every case since *Reid* . . . has found the hired party to be an independent contractor where the hiring party failed to extend benefits or pay social security taxes.”); *But see JustMed Inc., v. Byce*, 600 F.3d 1118 (9th Cir. 2010) (finding that a programmer was an employee despite the fact that he worked at home, was not paid benefits, and did not have taxes withheld).

105. 17 U.S.C. § 101.

a work.¹⁰⁶ Because of this relationship, the Ninth Circuit has held that “a joint author cannot be held liable for copyright infringement against another joint owner.”¹⁰⁷ Moreover, where one person makes a relatively small contribution to a work predominately created by another, courts are reluctant to find joint authorship.¹⁰⁸ In addition, courts have added two statutory requirements to the joint work criterion: (1) each author must contribute copyrightable expression to the final work, and (2) the parties must intend themselves to be joint authors.¹⁰⁹

C. Background of Garcia

On July 2, 2012, a fourteen-minute trailer entitled *Innocence of Muslims*¹¹⁰ (“the Film”) was uploaded to YouTube.¹¹¹ Subsequent to the upload, the Film was translated to Arabic and uploaded several more times in the weeks leading up to the thirteenth anniversary of the September 11th terrorism attacks.¹¹² The Film gained worldwide recognition and became the object of hostile attention in many countries.¹¹³ The Film was also allegedly tied to the September 11, 2012 ambushing of the U.S. Embassy in Benghazi, which resulted in the deaths of three Americans and the U.S. Ambassador to Libya, Christopher Stevens.¹¹⁴

106. Chisum, *supra* note 18, at 325 (citing H.R. Rep. No. 94-1476).

107. *Oddo v. Ries*, 743 F.2d 630, 632–33 (9th Cir. 1984) (citing *Richmond v. Weiner*, 353 F.2d 41, 46 (9th Cir. 1965)); *Picture Music, Inc., v. Bourne, Inc.*, 314 F. Supp. 640, 646 (S.D.N.Y. 1970).

108. *See, e.g., Eckert v. Hurley Chicago Co.*, 638 F. Supp. 699, 704 (N.D. Ill. 1986).

109. Chisum, *supra* note 18, at 328.

110. The Film was also uploaded under titles “Muhammad Movie” and “The Real Life of Muhammad.” *See Zachary Zahos, The Art of Defamation*, THE CORNELL DAILY SUN, (October 4, 2014), <http://cornellsun.com/blog/2012/09/19/the-art-of-defamation/>.

111. First Amended Complaint at 2, *Cindy Lee Garcia v. Nakoula Basseley Nakoula, et al.*, No. 12-8315 (N.D. Cal. Oct. 4, 2012) (hereinafter “F.A. Compl.”).

112. Ian Lovett, *Man Linked to Film in Protests is Questioned*, THE NEW YORK TIMES, (September 15, 2012) http://www.nytimes.com/2012/09/16/world/middleeast/man-linked-to-film-in-protests-is-questioned.html?_r=0.

113. *See* F.A. Compl. at 2. *See also* Rick Gladstone, *Anti-American Protests Flare Beyond the Mideast*, THE NEW YORK TIMES, (September 14, 2012) <http://www.nytimes.com/2012/09/15/world/middleeast/anti-american-protests-over-film-enter-4th-day.html?pagewanted=all>.

114. Margaret Coker, et al., *Libya Attack Sparks Crisis*, THE WALL STREET JOURNAL, (September 13, 2012) <http://on.wsj.com/OG7HV0>. However, former CIA director David Petraeus later told Congress that the events in Benghazi had

In July 2011, Garcia responded to a casting call posted by Defendant Nakoula Basseley Nakoula (“Youssef”)¹¹⁵ for the Film.¹¹⁶ The producer of the Film described it as “an ‘adventure’ story set in the Arabian Desert 2,000 years ago.”¹¹⁷

Garcia concedes her role in the Film was merely “an actress.”¹¹⁸ Garcia was “given only specific pages” of the script and had no involvement in writing, directing, filming, editing, or producing the Film.¹¹⁹ Youssef held himself out to be “the writer and producer” of the Film and Garcia conceded that Youssef “managed all aspects of the production.”¹²⁰

The line that Garcia provided during production was:

Is George crazy? Our daughter is but a child?¹²¹

However, the version of the Film that was ultimately broadcasted on YouTube retained Garcia’s visual appearance, but dubbed in the words:

Is your Mohammed a child molester?¹²²

As a result of those words, Egyptian cleric Ahmad Fouad Ashoush issued a fatwa directed at Garcia and every other person appearing in the Film.¹²³ Soon thereafter, Garcia became the subject of numerous death threats.¹²⁴

Garcia filed eight takedown notices with YouTube.¹²⁵ YouTube did not remove or disable the content and instead denied Garcia’s requests.¹²⁶

On September 19, 2012 Garcia filed a lawsuit against,

nothing to do with the Film. Ben Shapiro, *THE PEOPLE VS. BARACK OBAMA*, 55 (Threshold Editions 2014).

115. Mr. Nakoula has many aliases, but will be referred to in this Comment as “Youssef.”

116. F.A. Compl. at 7.

117. Brief of Appellant Cindy Lee Garcia at 16, *Cindy Lee Garcia v. Google Inc., et al.*, No. 12-57302 (9th Cir. Jan. 18, 2013) (hereinafter “Garcia Opening Br.”).

118. Appellees Google Inc. and YouTube, LLC’s Answering Brief at 10, *Cindy Lee Garcia v. Google Inc., et al.*, No. 12-57302 (9th Circuit Feb. 15, 2013) (hereinafter “Google/YouTube Answering Br.”).

119. Google/YouTube Answering Br. at 10.

120. *Id.*

121. Garcia Opening Br. at 17.

122. *Id.* at 18.

123. *Id.* at 19 (“I issue a fatwa and call on the Muslim youth in America and Europe to do this duty, which is to kill the director, the producer and the actors and everyone who helped and promoted the film.”).

124. *Id.* at 20.

125. *Id.* at 22.

126. *Id.* at 23.

among others, Youssef, Google and YouTube in the United States District Court for the Northern District of California.¹²⁷ Garcia's First Amended Complaint alleged the following causes of action: (1) Direct Infringement of Copyright; (2) Secondary Infringement of Copyright; (3) Fraud; (4) Unfair Business Practices; (5) Libel; and (6) Intentional Infliction of Emotional Distress.¹²⁸ On October 17, 2012, Garcia filed an Ex Parte Application for Preliminary Injunction, which the court treated as a Motion for Preliminary Injunction.¹²⁹ On November 30, 2012, Garcia's Motion for Preliminary Injunction was denied.¹³⁰ Garcia subsequently appealed.

D. Holding of the Ninth Circuit

The Ninth Circuit reversed, holding that Garcia was "likely to succeed on her copyright claim."¹³¹ The Ninth Circuit broke its copyright analysis into three issues: (1) an independent copyright interest; (2) work made for hire; and (3) implied license.¹³²

1. Independent Copyright Interest

First, the Ninth Circuit concluded that Garcia did not qualify as a joint author because Garcia expressly disclaimed the intent required to be deemed a joint author.¹³³ However, the court reasoned that disqualification as a joint author of an entire work had no bearing on a copyright claim over a creative contribution to said work.¹³⁴ The Ninth Circuit reasoned that copyright could still be recognized for creative contribution to a work because an actor "live[s] his part inwardly, and then . . .

127. Compl. For (1) Direct Infringement of Copyright, (2) Secondary Infringement of Copyright, (3) Fraud, (4) Unfair Business Practices, (5) Libel, (6) Intentional Infliction of Emotional Distress, *Cindy Lee Garcia v. Google Inc.*, et al., No. 2-12-cv-08315 (N.D. Cal. Sept. 26, 2012). Garcia subsequently filed a First Amended Complaint on October 4, 2012.

128. F.A. Compl. at 9–18.

129. Google/YouTube Answering Br. at 7.

130. *Id.* at 9.

131. *Garcia v. Google, Inc.*, 766 F.3d 929, 940 (9th Cir. 2014).

132. *See id.* at 933–39.

133. *Id.* at 933 (citing *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231–36 (9th Cir. 2000)). Moreover, it is likely Garcia sought to avoid a declaration of joint authorship because such a determination would bar her copyright infringement cause of action against Youssef. *See supra* text accompanying note 107.

134. *See Garcia*, 766 F.3d at 933 (citing 17 U.S.C. § 102(a)).

gives to his experience an external embodiment.”¹³⁵ This “external embodiment” includes “body language, facial expression and reactions to other actors and elements of a scene.”¹³⁶ Thus, the Ninth Circuit held that Garcia “may have” a copyright interest in the Film.¹³⁷

However, the Ninth Circuit limited Garcia’s copyright interest to “her own contribution” but not in “preexisting material” such as the words or actions dictated in the script.”¹³⁸ In other words, Garcia could assert a copyright interest only in the portion of the Film that represented her individual creativity.¹³⁹

2. *Work Made For Hire*

The Ninth Circuit dismissed Google and YouTube’s claim that Garcia was an employee of Youssef.¹⁴⁰ The court found no evidence that Youssef directed the Film or “controlled the manner” in which Garcia’s scene was shot.¹⁴¹ The court claimed that Youssef only wrote the script.¹⁴² In applying the factors set forth in *CCNV*¹⁴³ to determine whether Garcia was an employee or an independent contractor, the court concluded that Garcia was not an employee of Youssef’s because Youssef was not in the regular business of making films.¹⁴⁴

3. *Implied License*

The Ninth Circuit agreed with Google that Garcia granted

135. *Id.* at 933–34.

136. *Id.* at 934.

137. *Id.* at 948.

138. *Id.* at 935. This determination is consistent with the copyright limitation articulated in *Feist*, *supra* note 53.

139. *Id.* (recognizing that “even if [Garcia’s] contribution is relatively minor, it isn’t de minimus.”).

140. *See Garcia v. Google, Inc.*, 766 F.3d 929, 936–37 (9th Cir. 2014). In essence, Google/YouTube attempted to trigger “Scenario 2,” *see supra* note 94, under the work for hire doctrine, arguing that Garcia performed her scene as an employee within the scope of her employment.

141. *Garcia*, 766 F.3d at 936.

142. *Id.*

143. *See supra* text accompanying note 101 for a restatement of the twelve *CCNV* factors.

144. *Garcia*, 766 F.3d at 936–37 (reasoning that Youssef was not in the regular business of making films because he did not have union contracts, relationships with prop houses or other film suppliers, leases of studio space, or distribution agreements).

Youssef an implied license to use her performance.¹⁴⁵ However, the Ninth Circuit held that Youssef exceeded the bounds of Garcia's implied license.¹⁴⁶ The court hinged upon the fact that Youssef lied to Garcia in order to secure her participation and that she agreed to perform in reliance on that lie.¹⁴⁷ This fraud alone voided any implied license Garcia granted to Youssef.¹⁴⁸

E. Subsequent Rehearing En Banc

On March 12, 2014 Google and YouTube filed a Petition for Rehearing *En Banc*.¹⁴⁹ Google argued that “[t]he majority’s opinion triggered deep concern in the entertainment and video industries - industries centered within [the Ninth] circuit. The majority’s decision empowers even minor players in films to wave around the threat of an injunction to shut down distribution.”¹⁵⁰

On November 12, 2014, the Ninth Circuit granted the Petition for Rehearing *En Banc* of Google and YouTube.¹⁵¹ On December 15, 2014, counsel for Garcia and Google/YouTube presented oral arguments.¹⁵² In its *en banc* opinion, the Ninth Circuit reversed the decision of the original three-judge panel of the Ninth Circuit.¹⁵³ The *en banc* opinion ultimately showed strong deference to the Copyright Office, whom rejected

145. *Id.* at 937.

146. *See id.*

147. *See id.* Youssef lied to Garcia by telling her the Film was an adventure story set in the Arabian Desert. In reality, the Film was a reprehensible political propaganda piece.

148. *Id.*

149. Petition for Rehearing *En Banc* By Google and YouTube, Cindy Lee Garcia v. Google Inc., et al., No. 12-57302 (9th Cir. Mar. 12, 2014).

150. *See* Kurt Orzech, *Google Wins 9th Cir. En Banc Rehearing In ‘Muslims’ Row*, LAW360 (November 12, 2014), <http://www.law360.com/articles/595474/google-wins-9th-circ-en-banc-rehearing-in-muslims-row>.

151. *Id.*

152. *See* Brandon Lowry, *Google Tells En Banc 9th Cir. Video Ruling May Fracture IP*, LAW360 (December 15, 2014), <http://www.law360.com/articles/604939/google-tells-en-banc-9th-circ-video-ruling-may-fracture-ip>. Some have called the *en banc* decision “one of the most, if not the most, important intellectual property decisions of 2014.” Stephen Wiman, *On December 15, 2014, The Ninth Circuit En Banc Will Hear Garcia v. Google, Inc. / Actors And Producers Await The Result*, JDSUPRA BUSINESS ADVISOR (December 4, 2014), <http://www.jdsupra.com/legalnews/on-december-15-2014-the-ninth-circuit-72575/>.

153. *Garcia v. Google*, 786 F.3d 733 (9th Cir. 2015).

Garcia's copyright application.¹⁵⁴

II. IDENTIFICATION OF THE LEGAL ISSUE

An insignificant supporting actor/actress who had no control over his or her performance or the motion picture as a whole should not be found to be an author for purposes of copyright. However, the *Garcia* opinion, prior to its reversal, arguably extended authorship to anyone who creatively contributed to a motion picture. Moreover, the *Garcia* opinion conflicts with *Feist*, specifically the inquiry regarding whether an individual has discretion over his or her alleged creative contribution.¹⁵⁵

Garcia is of interest not only to the legal community because it muddles United States copyright law, but also to Hollywood and the business community because it impacts movie studios and companies that engage in content streaming.¹⁵⁶ The remainder of this Comment will analyze the original *Garcia* opinion, *i.e.*, prior to the *en banc* reversal, identify and discuss its far-reaching implications, and propose a solution to those issues. Although the Ninth Circuit's *en banc* opinion later reached the correct conclusion in denying Garcia's copyright claim, this Comment serves to discuss and outline the dangers of accepting a copyright claim similar to Garcia's, should another "*Garcia*" claim arise.¹⁵⁷ Moreover, the Ninth Circuit only reached the correct conclusion after undergoing an *en banc* proceeding, which implies that there is continued disagreement within the court over whether Garcia should be granted copyright authorship. Although the *Garcia* opinion at focus in this Comment is now moot, this Comment

154. *Id.* at 741.

155. *See supra* notes 55–57.

156. Netflix, for example, is a subscription service that provides members with access to motion pictures, television, and other audio-visual entertainment. *See* NETFLIX TERMS OF USE, <https://www.netflix.com/TermsOfUse> (last visited Feb. 3, 2016). Netflix is required to obtain the consent of any author of a motion picture or television series prior to allowing access to said motion picture or television series. *Id.* Thus, under *Garcia*, Netflix would be required to obtain the consent of any individual who creatively contributed to the motion picture or television series, including cameramen, makeup artists, and supporting actors or actresses. This is not only impractical, discussed *infra* at Part III.C, but forces Netflix to engage in speculative analyses regarding whether an individual is an author under *Garcia*.

157. Garcia claims have been filed in other circuits. *See, e.g.*, 16 Casa Duse, LLC v. Merkin, No. 13-3865, 2015 WL 3937947 (2d Cir. June 29, 2015).

may aid other courts seeking to reject claims similar to *Garcia* and presents a novel test that allows courts to strike a balance in the face of future *Garcia* claims.

III. ANALYSIS

This analysis will first discuss whether *Garcia* has a copyright interest by examining the following four issues: (1) whether *Aalmuhammed* should have been afforded more consideration and, under *Aalmuhammed*, whether *Garcia* is the “master mind” of the Film;¹⁵⁸ (2) whether a high degree of “control” should be required to classify an actor/actress as an author;¹⁵⁹ (3) whether the exclusive rights of an author are weakened under *Garcia*;¹⁶⁰ and (4) whether the cases relied upon by *Garcia* are distinguishable.¹⁶¹ The analysis of whether *Garcia* has a copyright interest will conclude by addressing whether, as the Ninth Circuit believed, *Garcia* is a limited opinion and whether judicial efficiency is best served under *Garcia*.¹⁶²

Next, this analysis will re-examine the *Garcia* court’s work for hire analysis, specifically arguing that the court arbitrarily relied on one factor.¹⁶³ Finally, this Comment will examine the broader implications of *Garcia* for companies that engage in content streaming.¹⁶⁴

A. *Garcia’s Copyright Interest*

1. *Aalmuhammed deserves more consideration than the Ninth Circuit afforded it. Under Aalmuhammed, Garcia is not the “master mind” of the Film.*

The Ninth Circuit should have afforded *Aalmuhammed* more weight because although that case was decided in the context of joint authorship, it articulated “general principles” of authorship that are applicable to *Garcia’s* interest in her

158. See *infra* Part II.A.1.

159. See *infra* Part II.A.2.

160. See *infra* Part II.A.3.

161. See *infra* Part II.A.4.

162. See *infra* Part II.A.5.

163. See *infra* Part II.B.

164. See *infra* Part II.C.

performance.¹⁶⁵ Moreover, *Aalmuhammed* heightens the requirements of authorship, which is justified considering an author of a motion picture can dictate the distribution of said motion picture. As reprehensible as the Film was, Garcia should have faced a heightened requirement for authorship considering she attempted to dictate the distribution of the Film by petitioning for its removal from YouTube. Thus, the Ninth Circuit erred in failing to align *Aalmuhammed* with *Garcia*.

Aalmuhammed defined an author as, among other definitions, “the person to whom the work owes its origin and who superintended the whole work, the ‘master mind.’”¹⁶⁶ The *Aalmuhammed* court limited 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.*”¹⁶⁷ Lastly, the *Aalmuhammed* court noted that an author should “superintend” the work by, for example, arranging the positioning of the people in the film.¹⁶⁸

Under *Aalmuhammed*, Garcia is not the “master mind”¹⁶⁹ of the Film. Garcia appeared in the Film for no more than five seconds.¹⁷⁰ She did not produce the Film, did not direct the Film, nor write the Film’s script.¹⁷¹ These facts alone are enough to conclude that Garcia is not the master mind of the Film because Garcia is not exercising any artistic control or superintending the Film.

However, Garcia concedes additional facts that support a finding that Youssef, not Garcia, is the master mind of the Film. Garcia concedes that Youssef was “the writer and producer” of the Film.¹⁷² Garcia also concedes that Youssef “managed all aspects of production.”¹⁷³ Thus, the Ninth Circuit

165. *Garcia v. Google, Inc.*, 766 F.3d 929, 934 (9th Cir. 2014) (Smith, N.R., dissenting); *See also supra* note 78. The dissent also argued that Garcia’s interest in her acting performance could be analyzed as a joint work with Youssef, considering she relied on Youssef’s script, equipment, and direction. *See Garcia*, 766 F.3d at 942 n.3. Thus, *Aalmuhammed* is applicable.

166. *Aalmuhammed*, 202 F.3d at 1233 (citation omitted).

167. *Id.* at 1233 (emphasis added).

168. *Id.* at 1234.

169. *Id.* at 1233 (citation omitted).

170. *Garcia*, 786 F.3d at 737.

171. F.A. Compl. at 5.

172. *Id.*

173. *Id.*

should have held that Youssef, not Garcia, was the master mind of the Film.

2. *A high degree of “control” should be required to hold an actor or actress as an author.*

The concept of control was discussed in *Lindsay v. The Wrecked & Abandoned Vessel R.M.S. Titanic*.¹⁷⁴ In that case, plaintiff argued that she had a copyright interest in a film because she closely supervised the filming of the motion picture.¹⁷⁵ The court found that the plaintiff had a copyright interest, but made clear the extent of control necessary to be deemed an author of a motion picture:

All else being equal, where a plaintiff alleges that he exercised such a high degree of control over a film operation - including the type and amount of lighting used, the specific camera angles to be employed, and other *detail-intensive artistic elements* of a film - such that the final product duplicates his concepts and visions of what the film should look like.¹⁷⁶

Here, Youssef controlled all aspects of the Film’s production.¹⁷⁷ Youssef’s control extended beyond the Film itself, but also to Garcia’s performance in the film by virtue of his control over production and scripting. This alone establishes that Youssef controlled Garcia’s performance and is thus the author of her performance.¹⁷⁸

Moreover, Garcia’s control over her performance should be considered in context of *Feist*, which recognized that Rural might not have even selected to publish the names and telephone numbers of its subscribers in the way it did.¹⁷⁹ The *Feist* Court classified Rural’s control over its creative

174. *Lindsay v. Wrecked & Abandoned Vessel R.M.S. Titanic*, 1999 U.S. Dist. LEXIS 15837 (S.D.N.Y. Oct. 12, 1999).

175. *Id.* at 4–7.

176. *Lindsay*, 1999 U.S. Dist. LEXIS 15837, at 15.

177. *Garcia*, 786 F.3d at 744.

178. See Dougherty, *supra* note 25, at 244–45 (“When one individual directs and controls the expression of another, the general copyright principals . . . suggest that the person who directs or controls the origination of expression is the author of that expression.”).

179. See *supra* notes 55–57. Put simply, the argument was that the Kansas Corporation Commission—not Rural—was the source of Rural’s alleged creative contribution.

contribution as the product of an external force.¹⁸⁰ The same is true here. Garcia's external force is Youssef, who is controlling all aspects of production and scripting of the Film.¹⁸¹ Thus, Garcia's performance is "devoid of even the slightest trace of creativity"¹⁸² given that Youssef dictated the production and scripting of Garcia's scene.

The Ninth Circuit muddled United States copyright law by holding that any time an actor contributes to a film with a small performance that meets a minimal amount of creativity, the performance is copyrightable and the performer can control the distribution of said film.¹⁸³ However, a performer's work is arguably not considered original, and thus not copyrightable, to the extent that the actor's performance is not within his or her control, *i.e.*, the material is described in the screenplay, is originated by the director, is dictated by necessity, consists of standard, stock movements, or is copied from other performances.¹⁸⁴ Moreover, an actor's "general style" would not be copyrightable since it is merely an idea, which is not copyrightable subject matter.¹⁸⁵ As a result, a higher degree of artistic control should have been required in *Garcia*, a burden Garcia would be unable to meet.¹⁸⁶

180. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991).

181. F.A. Compl. at 5.

182. *Feist*, 499 U.S. at 362.

183. *See generally* Br. of Amici Curiae Professors of Intellectual Property Law In Support of Google, Inc. and YouTube, LLC's Petition for Rehearing En Banc, *Cindy Lee Garcia v. Google Inc., et al.*, (9th Circuit No. 12-57302, April 14, 2014) (hereinafter "Br. of Amici Curiae Professors").

184. Dougherty, *supra* note 25, at 304.

185. *See supra* note 39. *See also* Dougherty, *supra* note 25, at 304; *Feist*, 499 U.S. at 345, *supra* notes 49–50 (holding that "independent creation" is a requirement for originality). Here, an actor's performance should not be found to be an "independent creation" if a script or producer is controlling the performance of said actor/actress.

186. *See* 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* at 2-69 (2000) (reasoning that the legislative history's statement that copyright would not be extended to "social dance steps and simple routines," H.R. Rep. No. 94-1476, at 54 (1976), may suggest a heightened creativity requirement). *See also* Burrow-Giles Lithographic Co. v. Saroni, *supra* notes 45–48, (recognizing that a high level of creative control entitled an author of a photograph to copyright). *See infra* Part IV.A for a discussion of a proposed solution to *Garcia* claims that analyze the actor's level of discretion in performing his or her role.

3. *Under Garcia, the exclusive right of a film's true author is weaker and potentially in conflict with hundreds of individuals involved in the making of said film.*

Extending copyright to each contributor of a film renders the true author's *exclusive* rights afforded to him or her meaningless.¹⁸⁷ An author could "not possibly exercise the exclusive rights afford under the Copyright Act without trampling on the rights of other contributors."¹⁸⁸ Accordingly, the true copyright owner would face undue restraints on his ability to market his work because the owner would have to gain permission from each and every performer who may have rights in the underlying work before he could safely distribute it.¹⁸⁹

4. *The crutch of cases leaned on by Garcia are misplaced and distinguishable.*

Garcia relies on *Fleet v. CBS*¹⁹⁰ to support the proposition that an actor's performance in a film is independently copyrightable.¹⁹¹ However, *Fleet* analyzed a different issue. In *Fleet*, the court considered whether the Copyright Act preempts a cause of action for misappropriation.¹⁹² The *Fleet* court merely held that the actors' misappropriation claims were preempted because the images of the actors were taken directly from a copyrighted motion picture.¹⁹³ That holding has absolutely no bearing on the crux of Garcia's claim because merely finding something is within the scope of United States Copyright law does not deem it protected by United States

187. See *Booth v. Colegate-Palmolive Co.*, 362 F. Supp. 343, 347 (S.D.N.Y. 1973).

188. Opposition of Google Inc. and YouTube, LLC to Plaintiff's Motion for a Preliminary Injunction and Order of Impoundment at 15, *Cindy Lee Garcia v. Nakoula Basseley Nakoula, et al.*, (N.D. Cal. No. 12-8315, October 29, 2012) (hereinafter "Opp'n of Google/YouTube to Garcia's Prelim. Inj.").

189. Opp'n of Google/YouTube to Garcia's Prelim. Inj. at 15. In other words, *Garcia* conflicts with Congress' intent by burdening an author's copyright reward. See *supra* note 90.

190. *Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911, 1919–20 (1996).

191. *Garcia* Opening Br. at 31.

192. *Google/YouTube Answering Br.* at 10. This issue differs from *Garcia* because the actors in *Fleet* did not state a claim for copyright infringement as *Garcia* did. See *supra* note 127 for the causes of action *Garcia* filed against Youssef, Google, and YouTube.

193. See *Fleet*, 50 Cal. App. 4th at 1924.

Copyright law.¹⁹⁴ Stated differently, “the shadow actually cast by the [Copyright] Act’s preemption is notably broader than the wing of its protection.”¹⁹⁵

Garcia also relies on *Jules Jordan Video, Inc. v. 144942 Canada, Inc.*,¹⁹⁶ for the proposition that a performer retains the copyright in her performance unless she transfers or assigns the right to another.¹⁹⁷ However, *Jules Jordan Video* is distinguishable because, in that case, the actor also produced, directed, wrote the script, and filmed the movie in which he claimed a copyright interest.¹⁹⁸ By Garcia’s own assertions, the Film was produced, directed, and controlled in all respects by Youssef, not Garcia, which brings *Garcia* outside of the scope of *Jules Jordan Video*.¹⁹⁹

5. *Garcia is not narrowly tailored and stands in the face of judicial efficiency.*

The Ninth Circuit argued that its opinion is limited to *Garcia* because “the vast majority of films are covered by contract, the work for hire doctrine, or implied licenses.”²⁰⁰ However, it is a stretch to assume that Hollywood studios—while they may enter into contracts over intellectual property rights with star actors—enter into copyright contracts with non-leads like Garcia, much less with makeup artists, set designers, and the variety of other contributors who may assert litigable copyright claims under *Garcia*.²⁰¹ In fact, Warner Brothers—one of the most sophisticated and respected studios in the world—did not enter into a contract with

194. See *Shelby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053, 1058 (C.D. Cal. 2000) (explaining that “scope and protection are not synonymous”).

195. *U.S. ex rel. v. Board of Trustees of Univ. of Ala.*, 104 F.3d 1453, 1463 (4th Cir. 1997).

196. *Jules Jordan Video, Inc. v. 144942 Canada, Inc.*, 617 F.3d 1146 (9th Cir. 2010).

197. Opp’n of Google/YouTube to Garcia’s Prelim. Inj. at 16.

198. *Id.* (citing *Jules Jordan Video, Inc.*, 617 F.3d at 1150.) The *Jules* court explained Plaintiff’s contribution as a “one-man shop.” *Id.*

199. Opp’n of Google/YouTube to Garcia’s Prelim. Inj. at 16.

200. See *Garcia v. Google, Inc.*, 766 F.3d 929, 936 (citing Dougherty, *supra* note 25, at 238, 317–18, 327–33). Even the *en banc* panel argued that “[t]he reality is that contracts and the work-made-for-hire doctrine govern much of the big budget Hollywood performance and production world.” *Garcia*, 786 F.3d at 743 (citing 1 Nimmer on Copyright § 6.07(b)(2)).

201. Br. of Amici Curiae Professors at 9.

Aalmuhammed,²⁰² showing that studios do not always enter into contracts with every person involved in production. Although producers would ordinarily engage actors under work for hire agreements, such agreements do not always exist.²⁰³ More importantly, the Ninth Circuit’s opinion will not be confined to Hollywood studios: it applies to everyone who captures others on film, from professionals to amateurs to technology companies and media outlets.²⁰⁴ Thus, judicial efficiency should be considered. *Garcia* does not provide judicial efficiency because it allows anyone involved in a film to claim a copyright interest, leading to a potential influx in litigation and an uncertain standard for businesses to apply to decision-making.

Lastly, multiple circuits agree on one principal: broadening copyright authorship risks extending copyright claims to overreaching contributors and denying sole authors exclusive authorship status simply because another person rendered some form of assistance.²⁰⁵ *Garcia* brings those risks to life by standing for the proposition that virtually any sequence of actions captured on film will constitute a copyrighted performance owned separately from the copyright in the film.²⁰⁶

The Ninth Circuit erred in holding that *Garcia* may have a copyrightable interest for the following reasons: (1) *Aalmuhammed* should have been afforded more consideration and, under *Aalmuhammed*, *Garcia* is not the “master mind”; (2) a high degree of artistic control should be required to classify an actor/actress as an author, and *Garcia* does not demonstrate a high degree of control over her performance in the Film; (3) the exclusive rights of an author are weakened under *Garcia*; (4) the cases relied upon by *Garcia* are distinguishable; and (5) *Garcia* is not narrowly tailored and does not provide judicial efficiency.

202. See *supra* note 68.

203. Dougherty, *supra* note 25, at 306.

204. Br. of Amici Curiae Professors at 9. For a further discussion on the effects of *Garcia* on technology companies, see *infra* Part III.C.

205. See *Google/YouTube Answering Br.* at 16–17. See also *Childress v. Taylor*, 945 F.2d 500, 504 (2d Cir. 1991); *Gaiman v. McFarlane*, 360 F.3d 644, 648 (7th Cir. 2004) (recognizing that “copyright would explode” if every contributor to a collaborative work was afforded authorship status).

206. Br. of Amici Curiae Professors at 9.

B. Work For Hire Analysis

The Ninth Circuit erred in holding that Garcia was not an employee of Youssef. The court reached this decision solely based on the fact that Youssef was not in the “regular business” of making films.²⁰⁷ The Ninth Circuit arbitrarily relied on one of twelve factors, despite the express instruction by the *CCNV* Court to not weigh any one factor as dispositive.²⁰⁸

Here, Garcia’s complaint is littered with facts that suggest she is an employee. For example, Garcia admits she was hired as an actress for a role in the Film;²⁰⁹ Garcia was paid \$500 for her work;²¹⁰ and Garcia concedes that Youssef “managed all aspects of production.”²¹¹ Moreover, Youssef provided the instrumentalities and tools, dictated the filming location, decided when and how long Garcia worked, and was engaged in the business of film making at the time.²¹² Thus, the Ninth Circuit erred by arbitrarily relying on one factor—whether—the work is part of the regular business of the hiring party—of the twelve discussed in *CCNV* and ignored pertinent facts related to those other factors.

Ultimately, the Ninth Circuit feared that classifying Garcia as an employee of Youssef would transform “every schmuck with a video camera [into] a movie mogul.”²¹³ However, the sole factor relied upon in Garcia—whether the work is part of the regular business of the hiring party—should not be weighed heavily in this context. When an individual takes a photo of the Golden Gate Bridge, he is entitled to copyright over that photo. When an individual composes a song, he is entitled to copyright over that song. Whether photography or music is a hobby or a career has no bearing on whether copyright is granted because copyright is an automatic right that arises once an original work of authorship is fixed to a tangible medium of expression.²¹⁴ Thus, whether

207. *Garcia v. Google, Inc.*, 766 F.3d 929, 936. In *CCNV*, the Supreme Court expressly stated that no one factor should be treated as dispositive. *See supra* text accompanying note 101.

208. *See supra* text accompanying note 101 for a restatement of the twelve *CCNV* factors.

209. F.A. Compl. at 4, 27.

210. *Garcia*, 766 F.3d at 948.

211. F.A. Compl. at 5.

212. *Garcia*, 766 F.3d at 946 (Smith, N.R., dissenting).

213. *Id.* at 934.

214. *See supra* note 82.

Youssef was an industry mogul or a “schmuck with a camera”²¹⁵ should not have been treated as a dispositive fact—and it was—in the court’s work for hire analysis. The Ninth Circuit therefore erred in its work for hire analysis.

C. Beyond the Courtroom: Effects of Garcia on Technology Companies

The *Garcia* court, prior to its *en banc* reversal, ordered Google and YouTube to take down all copies of the Film from YouTube and any other platforms within its control and to take all reasonable steps to prevent further uploads.²¹⁶ Various technology companies filed a joint Amici Curiae brief in support of Google and YouTube which brought to light several impracticalities of the *Garcia* opinion.²¹⁷

The Technology Companies argued that the Ninth Circuit’s injunction was impracticable for the following reasons:

- (1) An online service cannot guarantee compliance with an order preventing all new appearances of material. Any combination of technological efforts and (at great expense) manual efforts would surely fall short.
- (2) Many online services, in particular smaller or newer competitors, lack resources, technology, staffing, or the appropriate architecture to attempt even partial compliance.
- (3) The added threat of contempt sanctions would compel services to suppress lawful materials or withdraw their services, and the effect would be either censorship of legitimate speech or a loss of competition and choice in the online marketplace.²¹⁸

The Ninth Circuit’s injunction was also worrisome because

215. *Garcia*, 766 F.3d at 934.

216. *Id.* at 1269 n.9.

217. These companies included: Adobe Systems Inc.; Automatic Inc.; eBay Inc.; Facebook Inc.; Gawker Media, LLC, IAC/Interactive Corp; Kickstarter Inc.; Pinterest Inc.; Tumblr Inc.; Twitter, Inc.; and Yahoo! Inc (hereinafter “The Technology Companies”).

218. Brief of Adobe Systems Inc.; Automatic Inc.; eBay Inc.; Facebook Inc.; Gawker Media, LLC, IAC/Interactive Corp; Kickstarter Inc.; Pinterest Inc.; Tumblr Inc.; Twitter, Inc.; and Yahoo! Inc. as Amici Curiae In Support of Google and YouTube’s Petition for Rehearing En Banc, *Cindy Lee Garcia v. Nakoula Basseley Nakoula, et al.*, (9th Circuit No. 12-57302, April 14, 2014) (hereinafter “Br. of Amici Curiae Technology Companies”).

it shifted the burden of flagging copyrighted content from users and onto Google/YouTube, which is contrary to the Digital Millennium Copyright Act (“DMCA”).²¹⁹ In enacting the DMCA, Congress sought to remove the obligation of service providers to monitor their services for infringement.²²⁰ The DMCA system sought, through the use of a notice-and-takedown process, to require users to provide notice of specific instances of infringement in order to prompt a service provider to take down the identified infringements.²²¹ The *Garcia* opinion achieves the opposite by requiring Google/YouTube to monitor the daily uploads to its website for potential infringements.

The *Garcia* injunction is also contrary to precedent from the Ninth Circuit. In *Perfect 10, Inc. v. Amazon.com, Inc.*,²²² the Ninth Circuit held that an online service provider may face liability for failure to take “simple measures” after it has actual knowledge that specific infringing material is on its system.²²³ This standard cannot operate in the face of the injunction issued in *Garcia* because proactive monitoring and filtering of online content are not “simple measures.”²²⁴ The measures imposed in *Garcia* were formidable challenges, and even sophisticated services would stumble in compliance efforts.²²⁵

In addition, even though content recognition tools exist, the most sophisticated of these tools have technical flaws.²²⁶ To be safe, a service provider must divert employees manually to search and review material on its system continuously.²²⁷ Lastly, online services are not editors of their users’ work. Nor should YouTube even be expected to monitor for potential infringements considering the volume of content uploaded to its website on a daily basis.²²⁸

219. *Id.* at 4.

220. *Id.* at 5.

221. 17 U.S.C. § 512(c)(3)(A)(i)–(vi).

222. *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007).

223. *Id.* at 729.

224. Br. of Amici Curiae Technology Companies at 9.

225. *Id.*

226. *Id.*

227. *Id.*

228. YouTube is located in 70 countries and across 76 languages and millions of people are subscribing daily. See Statistics, available at <https://www.youtube.com/yt/press/statistics.html>. 100 hours of video are uploaded to YouTube every minute. *Id.* 80% of YouTube’s traffic comes from outside of the United States. *Id.*

For the above reasons, the Ninth Circuit erred in assigning Garcia a copyright interest, erred in its work for hire analysis, and failed to recognize the impracticalities posed by its opinion.

IV. PROPOSAL

This proposal will first outline the suggested test for actors/actresses claiming authorship of a motion picture. This test will then be applied to three hypotheticals, which will demonstrate the flexibility of this proposed test.

A. *The Test*

The proposal suggested in this Comment is a test for authorship in the context of motion pictures. The test is an extension of the *Aalmuhammed* “master mind” test²²⁹ and applies solely to actors and actresses who do not qualify as an employee under the work for hire doctrine.²³⁰

The test is as follows:

An actor/actress claiming copyright authorship under Title 17 of the United States Code section 102(a) has the burden of proving that he or she acted as the “master mind” of the motion picture by exercising artistic and production control over both his or her character and of the motion picture as a whole.

Whether an individual was the master mind or has production control should turn on the following: (1) the role of the actor/actress within the motion picture; (2) the significance of that role within the motion picture; (3) the level of control and discretion afforded to the actor/actress in conveying his or her role; and (4) the level of control afforded to the actor/actress in production of the motion picture as a whole.

The first factor is a necessary threshold factual inquiry that determines the individual’s role in the underlying motion picture. This factor is not dispositive, but is highly probative to the extent that the individual is not a lead actor within the

229. *See supra* note 166.

230. This test does not apply to individuals not featured in a motion picture as an actor or actress because that issue was not before the court in *Garcia*. This test only applies to an actor or actress who claims authorship in a film based on his or her performance in said film.

underlying motion picture. This factor is important because if the individual is a mere “extra” or not heavily featured in the motion picture, he or she should face a higher burden with respect to factors two, three, and four. However, it is not dispositive if the individual is a lead actor in the motion picture, but it is informative to the extent that it is more likely that a lead actor may qualify as the master mind of a motion picture under this test.²³¹

The second factor addresses *Jules Jordan Video* to the extent that it gauges the individual’s level of contribution to the motion picture.²³² Courts applying this test should look for a level of involvement that resembles *Jules Jordan Video*’s “one-man-shop” analogy: an individual who produced, directed, contributed to the script, and acted.²³³

The third factor addresses the *Feist* concern of whether an alleged creative contribution is the product of the actor/actress or the product of a third party such as the writer, director, or producer.²³⁴ This factor is highly dispositive. If the performance is being dictated by an external force such as a producer, director, or a script—like the Kansas Corporation Commission in *Feist*²³⁵—then the copyright claim of the actor/actress should fail because the material does not originate from the purported author, *i.e.*, the actor/actress.²³⁶ A highly informative fact pertaining to this factor is whether the screenplay or director mandated the performance of the actor/actress or whether the actor/actress was afforded the discretion to carry out his or her character. This inquiry would ensure that the actor is truly “liv[ing] his part inwardly”²³⁷ and applying an “external embodiment,”²³⁸ triggering the requisite creative contribution needed to sustain a copyright claim. This

231. *Aalmuhammed* suggests this inquiry is relevant. See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000) (suggesting that the role of the individual, specifically whether they are the “star” is relevant because the “star” is possibly the master mind of the motion picture).

232. See *supra* notes 196–99.

233. See *Jules Jordan Video, Inc. v. 144942 Canada, Inc.*, 617 F.3d 1146, 1150 (9th Cir. 2010).

234. See *supra* notes 55–57 (arguing that Rural’s creative contribution was actually dictated by state law and not by Rural’s decision to alphabetize names in the white pages).

235. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991).

236. See *supra* note 44 and accompanying text.

237. *Garcia*, 766 F.3d at 934. See also *supra* notes 135–36.

238. *Garcia*, 766 F.3d at 934. See also *supra* notes 135–36.

fact also ensures that the performance is truly an “independent creation”²³⁹ of the actor/actress claiming authorship.

The final factor gauges the level of control of the actor over the motion picture as a whole. This final factor protects a motion picture from being dissected into a patchwork of overlapping property claims. This factor is relevant because if an actor is found to be an author, said actor can dictate the licensing and distribution of the entire motion picture. With that in mind, the individual should have contributed to the artistic and production decisions of the motion picture as a whole. This factor, like the third, is highly dispositive. However, a strong level of control and discretion under factor three should overcome a weaker level of control under factor four. Conversely, a moderate display of control and discretion under factor three may be bolstered by a strong display of control under factor four.

B. Hypothetical One

Assume an individual is cast as a substitute teacher in a motion picture about a high school football team from Texas that plays through a season of adversity and wins the state championship. This motion picture is 140 minutes, and the individual occupies one scene lasting approximately seven minutes. Assume this individual was given a script, which provided the actor with three pages of lines with the following instruction:

Your character—the substitute teacher—must abide by the following script. Improvisation of your character is not allowed. The substitute teacher is a pushover who allows football players to show up late, turn in assignments after due dates, and provides special treatment to student athletes. In performing your character, please perform within these boundaries.

Applying the above test, the court should first conclude that this individual was cast as a non-lead substitute teacher in a motion picture that is primarily about high school football. The individual also occupied only seven minutes of screen time. Consequently, this individual would face a high burden in demonstrating control and discretion under the third and

239. See *Feist*, 499 U.S. at 345.

fourth factors. Turning to the second factor, the court should conclude that this individual's role is not significant to the overall motion picture, which is about high school football in Texas. However, a strong showing of the third and fourth factors can overcome a weak showing of the first and second factors.

Turning to the third factor, this individual had no discretion or control over his character because the script and producer dictated his character's behavior. As a result, his creative contribution was dictated by an external force and should not be found to be original. Finally, turning to the fourth factor, this individual had no control over production or over the motion picture as a whole.

Therefore, this individual has a weak claim of authorship of this motion picture.

C. Hypothetical Two

For this hypothetical, assume an individual is cast as a high school football coach in a motion picture about a high school football team from Texas who plays through a season of adversity and wins the state championship. This motion picture is 140 minutes, and said individual appears in numerous scenes occupying approximately seventy percent of the motion picture. Assume the director or producer told this individual that he will be provided with a general outline of his scenes, but that the actor can improvise how his character will perform within each scene. For example, one suggested outline is:

Coach holds his first team meeting. The goal of this meeting is for the coach to introduce himself. This is the coach's first season, and his goal in his first meeting is to establish total control over the players and program. The coach is aggressive and runs a military style meeting.

Applying the proposed test, the court should first conclude that this individual was cast as a lead in this motion picture as the head coach in a motion picture primarily about high school football. This individual also appeared in seventy percent of scenes in the motion picture, demonstrating his character's significance. Turning to the second factor, the court would conclude that this individual's role is significant to the overall motion picture. The high school football coach is at the core of

a movie about high school football in Texas and is critical to the motion picture's success.

Turning to the third factor, this individual had total discretion and control over his character's performance. Though the individual's scenes were dictated by the script outline, the individual was afforded discretion as to how his character would demonstrate his control over his player meeting. As a result, the individual could have applied many acting techniques in carrying out his scenes and was required to choose which techniques would best reflect his character. Accordingly, this individual should be found to have a strong showing of control because he implemented his creative contribution in a way that was not dictated by an external force. Lastly, we do not have facts suggesting that this individual controlled the production of the movie as a whole, but a strong showing of control and discretion under the third factor can overcome a weak display of control under the fourth factor.

As a result of the above analysis, this individual has a strong claim of authorship of this motion picture.

D. Hypothetical Three

For this hypothetical, assume an individual is cast as a high school football quarterback in a motion picture about a high school football team from Texas that plays through a season of adversity and wins the state championship. This motion picture is 140 minutes, and said individual appears in numerous scenes occupying approximately forty percent of the motion picture. Assume the director or producer told this individual that some of his scenes will be provided by a general outline, allowing this individual to improvise how his character will perform within each scene. However, other scenes will be dictated by a script and will not allow improvisation. Moreover, this particular individual also played high school football in Texas and thus is being asked to contribute to the general direction of the motion picture as a whole in order to replicate the most realistic portrayal of high school football in Texas.

Applying the proposed test, the court should first conclude that this individual was cast as a lead because he is the quarterback of a high school football team in a motion picture primarily about high school football. Turning to the second

factor, the court would conclude that this individual's role is significant to the overall motion picture. The quarterback of a high school football team is at the core of a movie about high school football in Texas and is critical to the motion picture's success. Moreover, the individual appeared in forty percent of the film, demonstrating his character's significance.

Turning to the third factor, this individual had some control and discretion over his character's performance. Other scenes were dictated by a script and did not afford the individual any control or discretion. Thus, this individual should be found to have moderately implemented his creative contribution. Lastly, the fourth factor bolsters this individual's authorship claim because he was asked to contribute to the general portrayal of high school football in the motion picture as a whole. This fact would help this individual overcome his scenes that were scripted, a fact that would cut against his copyright claim under the third factor.

This individual has a strong claim of authorship of this motion picture.

As these hypotheticals demonstrate, actors and actresses are often retained for a variety of roles within a motion picture and are sometimes bound by scripted scenes or afforded maximum discretion in how their performance will be portrayed. The above test is ideal because it can be applied flexibly to the wide range of circumstances surrounding the retention, performance, and contribution of an actor/actress.

The above test is also ideal for this particular legal issue because it: (1) aligns with the heightened requirements of authorship articulated in *Aalmuhammed*; (2) ensures that an actor/actress demonstrates artistic control over his or her alleged independent creation; (3) protects the true author's *exclusive* rights to the motion picture by heightening the burden required for an actor/actress to be deemed an author, which would allow said actor/actress to control licensing and distribution of said motion picture;²⁴⁰ and (4) provides an actor/actress with a remedy in the event his or her contribution truly exceeds the bounds of his or her performance, warranting the

240. See *supra* note 189. Alternatively, the true author is protected because the actor/actress must also demonstrate control over the motion picture as a whole.

right of copyright authorship.²⁴¹

CONCLUSION

Ultimately, Youssef used Garcia as a pawn to further his political beliefs. As reprehensible as Youssef's deceit was, Garcia was not an author of the *Innocence of Muslims* because her five-second appearance fails to demonstrate significant creative contribution and artistic control. The *Garcia* opinion had the potential to adversely affect not only United States copyright law, but also Hollywood and companies engaged in content streaming. Although the Ninth Circuit ultimately corrected the *Garcia* opinion through an *en banc* proceeding, considerable debate regarding the authorship of supporting cast members remains. Thus, this Comment seeks to introduce a novel test for evaluating future copyright claims brought by an actor/actress.

For these reasons, the test for copyright authorship in the context of a motion picture should focus on the level of control and discretion of the actor/actress over both his or her role and the motion picture as a whole. The proposed test avoids improper grants of authorship while simultaneously providing a remedy for an actor/actress who demonstrates a level of involvement in a film that warrants copyright authorship.

241. For the reasons discussed in this Comment, it is critical to tighten the requirements for authorship in the context of a motion picture. However, *Aalmuhammed* nonetheless recognizes that the "star" of a movie could possibly be deemed an author. See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000). For that reason, the proposed test provides a remedy for an actor/actress who demonstrates a level of involvement in a film that warrants copyright authorship.