



## Kozinski blasts Google, orders takedown of anti-Muslim video

By John Roemer  
Daily Journal Staff Writer

Google Inc.'s refusal to honor an imperiled actress' pleas to take down an incendiary YouTube.com video drew harsh words Wednesday from Chief Judge Alex Kozinski of the 9th U.S. Circuit Court of Appeals.

The case explored the independent copyright interests of actors playing roles and the responsibility of Internet giants like Google to mitigate potential serious harms.

Kozinski concluded for the 2-1 majority that U.S. District Judge Michael W. Fitzgerald of Los Angeles was wrong to

deny Cindy Lee Garcia an order requiring the removal from YouTube of the 2012 anti-Islamic movie "Innocence of Muslims," in which she played a tiny but inflammatory role.

The panel majority ordered Google to take down the video and sent the case back to Fitzgerald for further litigation. *Garcia v. Google Inc.*, 2014 DJDAR 2351.

The majority held that First Amendment rights do not trump copyright violations. The dissent said that the facts and the public interest in the case do not clearly favor injunctive relief.

Garcia's appearance in the film came after she was tricked into acting in a different movie that was never completed. Her

brief performance in what she thought was an apolitical adventure video was transferred to "Innocence of Muslims" and her words were partly overdubbed so that she seemed to ask, "Is your Mohammed a child molester?"

Worldwide protests led an Egyptian cleric to issue a fatwa that called for the killing of everyone involved in the video. Garcia got death threats, took security precautions and filed eight takedown notices under the Digital Millennium Copyright Act that Google resisted. So she sued, asserting that posting the video infringed her copyright in her performance.

Kozinski and colleague Ronald M. Gould agreed that she is likely to prevail on that

claim.

But intellectual property authority Mark A. Lemley of Stanford Law School saw three problems.

"First, an actor's performance is not itself independently copyrightable," he emailed. "Second, even if it were, granting an injunction against an entire movie based on a small bit of it tramples on the First Amendment."

"Third, even if an injunction against the producers of the film were appropriate, what the court actually did [in ordering YouTube to remove the film] is overbroad and frankly unprecedented," he added.

An attorney who handles intellectual

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# Actress in incendiary video prevails in court

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property and entertainment litigation, Aaron J. Moss of Greenberg Glusker Fields Claman & Machtinger LLP, called the ruling a shocker.

"The 9th Circuit has issued a lot of surprising copyright decisions over the years, but this is one of the most surprising," he emailed. "Garcia didn't (and couldn't) claim to be an author or a co-author of the film as a whole, and yet the court found that she could be the author of a performance that can't be separated from the film."

"This opinion shows why it's so important for producers to get signed work for hire agreements from not only the director, but the actors, cameramen, editors and anyone else who contributes creatively to the final product," Moss added.

Kozinski and Gould held that any implied license producer Mark Youssef had to use Garcia's work was erased by his lies about how her performance in the uncompleted video would be used. "Youssef's fraud alone is likely to void any agreement he had with Garcia," Kozinski wrote.

A legal authority who has followed the case, William Slomanson of Thomas Jefferson School of Law, commented in an email, "One hopes that the fatwa-based death threats against the duped actress will continue to support the majority's take, given the likelihood of this hot potato going to en banc review or a certiorari grant."

Slomanson's research showed that although Google declined a White House request to take down the video, it blocked access to "Innocence of Muslims" in India and Indonesia to comply with local laws. Google also temporarily blocked ac-

cess in Egypt and Libya, Slomanson found.

"You have to question Google's business judgment in a case like this," said intellectual property scholar Justin Hughes of Loyola Law School, the founder of Cardozo Law School's Indie Film Clinic.

Referring to Google's CEO, he added, "If a Larry Page speech had been dubbed with anti-Islamic statements, you can bet Google would have found a reason to take it off YouTube."

A Google spokesman said, "We strongly disagree with this ruling and will fight it."

Kozinski was dismissive of Google's claim that Garcia was responsible for drawing attention — and threats — to herself by suing Google.

"We also reject Google's preposterous argument that any harm to Garcia is traceable to her filing of this lawsuit," he wrote. "Any publicity generated by Garcia's lawsuit is a necessary product of her attempt to protect herself and her legal rights after Google refused to do so."

Kozinski also shot down the dissent by Circuit Judge N. Randy Smith. Noting that Garcia had made media statements saying she did not condone the film, Kozinski wrote, "We reject the dissent's uncharitable argument that Garcia should be penalized [by denial of an injunction] for attempting to protect her life and reputation by distancing herself from 'Innocence of Muslims.'"

M. Cris Armenta of The Armenta Law Firm APC, representing Garcia, called the decision "correct on the law."

Timothy L. Alger of Perkins Coie LLP, representing Google, referred questions to his client.

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