

## SUSPECT ASSERTIONS OF COPYRIGHT

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*My job is essentially that of an entertainer, no different to that of a musician, no different to that of an actor. I just happen to be an author.*

—Bryce Courtenay<sup>1</sup>

### INTRODUCTION

Judge M. Margaret McKeown provides an enlightening—and thoroughly entertaining—discussion in her Keynote Address, “Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment.”<sup>2</sup> The essay is an important work that legal scholars are likely to draw from and discuss for years to come. Rightfully so. Judge McKeown’s Keynote is at once an exegesis of the longstanding tension between copyright law and the First Amendment, and a challenge for us, in the Internet age, to recognize: “Censorship in the guise of authorship and copyright is a trend that calls on us to stand up and take notice.”<sup>3</sup>

In this reply, I ask: What next? If we take Judge McKeown’s challenge seriously—and I believe we should—how and when should courts police for copyright claims that might censor or restrict free expression? I will break down this issue into two: (a) which assertions of copyright are impermissible or suspect from a First Amendment view, and, relatedly, (b) which doctrines are best suited to addressing these suspect assertions of copyright? In this reply, I sketch out a few thoughts on how courts might answer these questions.

\* Professor of Law. Founder, The Free Internet Project. Many thanks to Patrick Goold, Laura Heymann, and Christina Mulligan for their comments on an earlier draft, and to Steve Heyman and Justin Hughes for discussions about the First Amendment and authorship, respectively. I also benefited greatly from the vigorous debate about *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc) on the CyberProf listserv. And, of course, thanks to Judge McKeown for her illuminating Keynote Address. Ryan Backman provided excellent research assistance.

1. Bryce Courtenay *Quotes*, BRAINYQUOTE, <http://www.brainyquote.com/quotes/quotes/b/brycecourt527338.html> (last visited Feb. 8, 2016).

2. Hon. M. Margaret McKeown, *Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment*, 15 CHI.-KENT J. INTELL. PROP. 1 (2016).

3. *Id.* at 16.

## I. IDENTIFYING SUSPECT ASSERTIONS OF COPYRIGHT

One challenge for courts is figuring out which assertions of copyright are suspect from a First Amendment viewpoint. The Supreme Court's decisions in *Eldred* and *Golan* may have left a false sense of security that fair use and the idea-expression dichotomy will generally keep copyright law from First Amendment conflicts.<sup>4</sup> “[W]hen . . . Congress has not altered the traditional contours of copyright protection [such as fair use and the idea-expression dichotomy], further First Amendment scrutiny is unnecessary,” the Court proclaimed.<sup>5</sup> Judge McKeown rightfully questions whether fair use can adequately do this job of providing a free speech safety valve, given the doctrine's “imprecise nature and application.”<sup>6</sup> Moreover, in *Eldred* and *Golan*, the Court decided facial constitutional challenges to copyright provisions.<sup>7</sup> But, as Judge McKeown's Keynote shows, there may be cases involving aggressive or dubious copyright claims, which, as applied, raise First Amendment concerns.<sup>8</sup> In this section, I explore how courts might identify constitutionally suspect assertions of copyright—what Judge McKeown calls “copyright as censorship,”<sup>9</sup> while in the next section, I examine other copyright doctrines that may provide additional First Amendment safeguards to deal with these suspect assertions of copyright.

### A. *Fair??: Protecting Privacy and Reputation of Authors Under the Right of First Publication and Other Copyright Doctrines*

Reviewing a series of cases in which copyright owners seemed more concerned about protecting their reputation or privacy, Judge McKeown suggests one potential suspect category: copyright assertions “to protect privacy interests” or “to prevent the spread of damaging or offensive information on the Internet.”<sup>10</sup> Judge McKeown attributes the increasing popularity to invoke copyright as a privacy or reputational protection to the

4. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (“To the extent such assertions raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them.”); *Golan v. Holder*, 132 S. Ct. 873, 891 (2012) (“Given the ‘speech-protective purposes and safeguards’ embraced by copyright law, we concluded in *Eldred* that there was no call for the heightened review petitioners sought in that case. We reach the same conclusion here.”) (internal citations omitted).

5. *Eldred*, 537 U.S. at 221.

6. McKeown, *supra* note 2, at 16.

7. See *Eldred*, 537 U.S. at 218–21 (characterizing petitioners' challenge as one to the constitutionality of entire term extension); *Golan*, 132 S. Ct. at 890–93 (characterizing petitioners' challenge as one to the constitutionality of entire copyright restoration provision).

8. See McKeown, *supra* note 2, at 10–11.

9. *Id.* at 16.

10. *Id.* at 11–12.

growth of the Internet—where damage to reputation can be immense—and a combination of other factors that make copyright a more attractive option to seek suppression of online content than the weak privacy protections in U.S. law.<sup>11</sup> Most of the cases Judge McKeown uses as examples involved allegedly infringing content (usually in the form of a video or photograph) that was posted online.<sup>12</sup>

Judge McKeown’s insight about the Internet and copyright’s attractiveness for seeking the suppression of content provides reason alone to pay heed to her essay.<sup>13</sup> The Internet is driving this trend to use copyright in what amounts to a “privacy copyright.” The Internet enables billions of people to publish content (everyone is a publisher) to potentially a worldwide audience.<sup>14</sup> Posting embarrassing videos or photographs of someone online can be ruinous to a person’s career and reputation, if not life.<sup>15</sup> But legal protections for privacy are relatively weak in the United States, as Judge McKeown points out.<sup>16</sup> So, copyright law—with its arsenal of DMCA notice-and-takedown, statutory damages, and injunctive relief—has effectively become a surrogate for privacy law.

The difficult question is whether a copyright owner’s desire to protect privacy or reputational interests through an assertion of copyright is, in itself, suspect or deserving of greater scrutiny. Some commentators and jurists would say yes. In his seminal article on fair use, Judge Pierre Leval comes out unequivocally against using copyright to achieve privacy goals.<sup>17</sup> As I read Judge McKeown’s Keynote, I think she sides with Judge Leval’s view. Describing the controversy in *Garcia v. Google*, Judge McKeown explained: “Indeed, there was a fundamental mismatch between Garcia’s claimed harm (death threats and *reputational harm*) and the purpose of the copyright laws (to stimulate creative expression, *not to protect secrecy*).”<sup>18</sup>

In my view, though, copyright law legitimately protects an author’s reputation or privacy interests in some cases. The answer depends in part on

11. *Id.* at 11–16.

12. Two cases involved paper magazines. *See Monge v. Maya Magazines*, 688 F.3d 1164 (9th Cir. 2012); *Balsley v. LFP, Inc.*, 691 F.3d 747 (6th Cir. 2012). The rest involved web publications. *See Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc); *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325 (M.D. Fla. 2012); *Katz v. Chevaldina*, 900 F. Supp. 2d 1314 (D. Fla. 2012); *Caner v. Autry*, 16 F. Supp. 3d 689 (W.D. Va. 2014).

13. *See* McKeown, *supra* note 2, at 11–16.

14. *Id.* at 11–12.

15. *Id.* at 12.

16. *Id.* at 14–15.

17. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1130 (1990) (“Privacy and concealment are antithetical to the utilitarian goals of copyright.”).

18. *See* McKeown, *supra* note 2, at 7 (emphasis added).

whether the *author* of the work is asserting the copyright. If the author is, she may have a legitimate interest in protecting her reputation as an author or privacy over her unpublished work through some copyright doctrines, such as the right of first publication or the right to make a derivative work. However, if a mere transferee who obtained the copyright is asserting the claim, then the copyright holder lacks the same authorial basis to warrant concern for the author's reputation or privacy. Because privacy and reputation are *personal* interests, it is reasonable to limit copyright's vindication of those interests to cases brought by the person whose privacy or reputation as an author is at stake.<sup>19</sup> A similar approach applies to constitutional rights, which typically require the individual whose rights have been violated to assert the claim (except in the limited cases involving third-party standing or the overbreadth doctrine).<sup>20</sup> The Copyright Clause focuses on protecting rights of "authors" in their "writings" for a limited time, all to promote "progress."<sup>21</sup> The Copyright Act itself sometimes limits certain rights to authors: for example, the inalienable rights of attribution and integrity for works of visual art apply only to authors during their lifetimes, and the inalienable termination right applies only to authors and their heirs for a limited time.<sup>22</sup> These rights are more personal and are designed to protect the interests of authors, not the general class of copyright owners. The privacy and reputational interests of authors are cut from the same cloth. If copyright law is to be used at all to protect such personal interests, only authors should be permitted to have standing to assert their rights. Below I outline several rights under copyright law that may be used to vindicate authors' privacy or reputational interests in appropriate cases.

19. *Cf.* *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1021 (N.D. Cal. 2012) (finding Article III standing where plaintiffs alleged concrete injury and particularized grievance they suffered from statutory privacy violation); *In re Perry*, 423 B.R. 215, 266 (S.D. Tex. 2010) (finding standing for defamation claim under Texas law where plaintiffs alleged they "were personally aggrieved and had their reputations harmed by the accusations of Perry"). This is not to say that copyright owners who obtain a copyright by transfer from an author cannot invoke the right of first publication (or other exclusive rights). Of course, copyright owners can do so. But their vindication of copyrights would emanate from their economic interests as copyright owners and not the personal interests of authors. For example, an author who assigned the right of first publication to a publisher would be responsible for ensuring that she is satisfied with the final draft she submits to the publisher. If a third party published a stolen copy of the final manuscript, the publisher could sue the third party for copyright infringement to protect its economic interest in publishing the work first.

20. See Matthew Adler, *Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon*, 113 HARV. L. REV. 1371, 1391–92 (2000).

21. U.S. CONST. art. I, § 8, cl. 8.

22. See 17 U.S.C. §§ 106A, 203, 301(c)–(d) (2015).

An author's right of first publication—which is codified in Section 106(3) of the Copyright Act<sup>23</sup>—has been viewed as a right that is designed to protect an author's reputation and privacy interests, giving the author the ultimate control of when her work is first distributed to the public.<sup>24</sup> In the 1976 Act, federal copyright largely replaced the common law copyright, which had been traditionally viewed as protecting privacy interests in unpublished expression.<sup>25</sup>

As Professor Jake Linford explains, the right to first publication has both privacy and economic underpinnings.<sup>26</sup> In *Harper & Row*, the Supreme Court likened the “common-law copyright . . . often enlisted in the service of personal privacy” to “an author's right to choose when he will publish” a work under a federal copyright—the latter right being “no less deserving of protection” than the former in the Court's view.<sup>27</sup> The Court recognized that the right of first publication protected both personal and economic interests of the author: “The author's control of first public distribution implicates not only his personal interest in creative control but his property interest in exploitation of prepublication rights.”<sup>28</sup> Writing for the majority of the Ninth Circuit panel in *Monge v. Maya Magazine*, Judge McKeown favorably cited *Harper & Row* for the proposition that “[a] use that so clearly infringes the copyright holder's interests in *confidentiality* and creative control is difficult to characterize as fair.”<sup>29</sup> Similarly, the Second Circuit's rejection of a fair use defense in a biographer's copying of portions of J.D. Salinger's

23. See H.R. REP. NO. 94-1476, at 62 (1976) (“Under this provision the copyright owner would have the right to control the first public distribution of an authorized copy or phonorecord of his work, whether by sale, gift, loan, or some rental or lease arrangement.”); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 552 (1985) (The 1976 Copyright Act “recognized for the first time a distinct statutory right of first publication, which had previously been an element of the common-law protections afforded unpublished works.”); see also Ned Snow, *A Copyright Conundrum: Protecting Email Privacy*, 55 U. KAN. L. REV. 501, 539–40 (2007).

24. See Jake Linford, *A Second Look at the Right of First Publication*, J. COPYRIGHT SOC'Y OF U.S.A., 585, 602 (2011) (“Lord Mansfield also associated this right of first publication with a right of the author to profit from his reputation and to be protected from the attempts of others to free-ride on that reputation.”); *id.* at 594 (“While many courts have treated the right of first publication as analogous to chattel property rights in unpublished manuscripts or *privacy interests of particular authors attempting to exercise the right of first publication*, the right is best understood to protect the market-entry concerns of the owners—the ability to decide with whom, and how, to disseminate a work for public consumption.”) (emphasis added).

25. See *Harper & Row*, 471 U.S. at 555 (“It is true that common-law copyright was often enlisted in the service of personal privacy.”) (citing Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 198–99 (1890)).

26. Linford, *supra* note 24, at 620 (“The privacy rationale for the right of first publication overlaps with economic rationales in several ways.”).

27. *Harper & Row*, 471 U.S. at 554.

28. *Id.* at 555.

29. *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1172 (9th Cir. 2012) (quoting *Harper & Row*, 471 U.S. at 564) (internal quotation marks omitted) (emphasis added).

unpublished letters can also be viewed as protecting the privacy in the expression contained in the letters.<sup>30</sup> The right of first publication may also protect an author's reputation by enabling authors to avoid inferior or unfinished versions of their work from being published without their consent. The basic policy makes intuitive sense: just imagine the public could read an unpublished rough draft of your writing and the harm to your reputation that may ensue.

Moreover, the First Amendment right of individuals not to speak aligns with an author's right not to publish her work until ready or at all. The Supreme Court recognized this symmetry in *Harper & Row*: "copyright, and the right of first publication in particular, serve this countervailing First Amendment value [in the right not to speak]."<sup>31</sup> The right not to speak can be viewed as a form of First Amendment privacy.<sup>32</sup> For copyright law to vindicate that privacy right through the enforcement of an author's right of first publication is entirely consistent with the First Amendment.<sup>33</sup>

Copyright law protects an author's reputation through doctrines beyond the right of first publication. For example, the right to make derivative works can be viewed as protecting an author's economic *and* reputational interests.<sup>34</sup> As Professor Laura Heymann explained:

Indeed, one might consider the fact that U.S. copyright law grants the author control over derivative works to be a powerful tool in this regard, in that an author can prohibit the creation of derivative works by others not only to ensure that he or she has control over the economic benefits that come from such works *but also to control the reputational interest that comes from having a consistent canon.*<sup>35</sup>

Also, the right of public performance of an author's work—such as music used in political campaigns of Democrats or Republicans—may protect the reputation of the author, enabling the author to disassociate herself from a political candidate she does not support (or even despises).<sup>36</sup> In many of

30. *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987) ("Salinger has a right to protect the expressive content of his unpublished writings for the term of his copyright, and that right prevails over a claim of fair use under 'ordinary circumstances.'"); *see also* Patrick Goad, *Unbundling the "Tort" of Copyright Infringement*, 102 VA. L. REV. (forthcoming 2016) (discussing *Salinger* as example of copyright protecting "expressive privacy" of author).

31. *Harper & Row*, 471 U.S. at 559.

32. *See* Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 401–02 (2008).

33. *See* Christina Bohannon, *Copyright Infringement and Harmless Speech*, 61 HASTINGS L.J. 1083, 1149–50, 1157 (2010).

34. *See* Note, *An Author's Artistic Reputation Under the Copyright Act of 1976*, 92 HARV. L. REV. 1490, 1493–96 (1979).

35. Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1401–02 (2011) (emphasis added).

36. *Id.* at 1402-03; *see also* Scott Timberg, *Can R.E.M. Demand Donald Trump "Cease and Desist" Playing Their Song?*, SALON (Sept. 10, 2015, 1:09 PM CDT)

these cases, the author may be seeking to vindicate *both* economic and personal interests. It would grind copyright law to a halt if courts had to determine which motive of the author—economic or personal—was the primary reason for bringing the lawsuit. If the author had mixed motives, why should copyright law care?

I am not suggesting that protecting an author's privacy or reputation through copyright is always legitimate. Instead, my point is that it may be in some cases. Authors have legitimate privacy interests in their works before first publication, which intersects with their right not to speak under the First Amendment. Authors also have valid reputational interests with respect to their works that, in some cases, copyright law may appropriately protect. Protecting these personal interests need not conflict with the utilitarian goals of copyright law to incentivize authors to create works. Indeed, a reasonable regard for such interests in copyright law may help to fuel authors to create more works as copyright law empowers them to develop their name and reputation as authors, protected from unauthorized uses of their works constituting infringement. If everyone could publish their own sequels and movies of *Harry Potter* without copyright permission, would J.K. Rowling have had the desire and creative spark to write and publish seven *Harry Potter* novels of her own?<sup>37</sup> In the name of Merlin, I dare say not.

*B. Foul: Protecting Privacy of Authors Outside of Right of First Publication*

Other uses of copyright for privacy beyond the right of first publication are suspect, however. Such assertions of copyright raise a potential First Amendment problem. If a work has already been published with the author's authorization, then the author has effectively renounced her First Amendment right not to speak and whatever privacy interest in the work copyright protects through the right of first publication is lost. The First Amendment cases barring the government from punishing publication of truthful information provide some authority for doubting that copyright can be asserted by authors to protect the privacy of works they have already chosen to publish.<sup>38</sup> My approach is also consistent with the Copyright Act's

[http://www.salon.com/2015/09/10/can\\_re\\_m\\_demand\\_donald\\_trump\\_cease\\_and\\_desist\\_playing\\_their\\_song/](http://www.salon.com/2015/09/10/can_re_m_demand_donald_trump_cease_and_desist_playing_their_song/).

37. Of course, fair use and other copyright exceptions limit the extent to which authors can control their works.

38. *Cf. Bartnicki v. Vopper*, 532 U.S. 514 (2001); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

first-sale doctrine, which extinguishes an author's right to control the dissemination of a copy of her work once she has parted ownership of the copy.<sup>39</sup>

### C. *Foul: Protecting Reputation or Privacy of Non-Authors*

Also dubious are copyright assertions by non-authors (such as mere copyright transferees) who assert copyrights to protect their own reputation or privacy, or even the authors' reputation or privacy. In these cases brought by non-authors, the claim for protecting the author's reputation or privacy over the work as a part of copyright law is diminished, if not destroyed. As explained above, the author's privacy and reputation are personal rights; to the extent copyright law protects them at all, the standing to assert such personal rights should be limited to authors.

Three of the questionable "privacy copyright" cases Judge McKeown identifies fall into this category of non-authors seeking to protect their reputations or privacy: Hulk Hogan, TV news reporter Catherine Balsley, and Miami businessman Ranaan Katz were *not* authors of the embarrassing works (a sex video of Hogan made without his knowledge, a topless photo of Balsley, and an unflattering photo of Katz) they respectively sought to suppress from public scrutiny.<sup>40</sup> Balsley and Katz each later acquired the copyright of the photo they sought to be suppressed—which put them in a stronger litigation position than Hogan (who lacked a copyright), but the ownership of a copyright did not diminish the First Amendment concern that would be raised if a court issued an injunction to remove the content in any of the copyright cases.<sup>41</sup> Another case of this ilk is Howard Hughes's infamous attempt to buy and enforce copyrights in magazine articles about him, in order to stop Random House's use of them in a biography about him.<sup>42</sup> In each case, it is problematic to use copyright to stop the

39. See 17 U.S.C. § 109(a) (2015); H.R. REP. No. 94-1476, at 62 (1976).

40. See *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325, 1328–30 (M.D. Fla. 2012); *Balsley v. LFP, Inc.*, 691 F.3d 747, 754 (6th Cir. 2012); *Katz v. Chevaldina*, 900 F. Supp. 2d 1314, 1315 (D. Fla. 2012).

41. See *Balsley*, 691 F.3d at 755; Tim Elfprink, *Ranaan Katz, Heat Minority Owner, Loses Tussle with Blogger Over Embarrassing Photo*, MIAMI NEW TIMES (Sept. 25, 2015), <http://www.miaminewtimes.com/news/ranaan-katz-heat-minority-owner-loses-tussle-with-blogger-over-embarrassing-photo-7929046> ("Katz bought the copyright with the express intent to wipe the photo off the internet."). Hulk Hogan was successful in Florida state court in his invasion of privacy claim against website *Gawker* under state law; a jury awarded a total of \$140.1 million dollars in damages to Hogan, although the ruling is being appealed. See *Gawker Files Motions Seeking New Trial in Hulk Hogan Invasion of Privacy Case*, THE GUARDIAN (April 6, 2016, 11:34 EDT), <http://www.theguardian.com/media/2016/apr/06/hulk-hogan-gawker-files-motions-seeking-new-trial>.

42. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 305 (2d Cir. 1966).



dissemination of the works to protect the reputation or privacy of non-authors. None of the courts allowed an injunction. *Balsley* was the only case in which the plaintiff was successful in establishing copyright infringement, but the remedy was limited to an award of damages, not an injunction: The photograph of her in *Hustler* magazine was not removed.<sup>43</sup>

The amici curiae brief of Internet law professors in *Garcia* offers other examples that also fall into this category of non-authors: (i) individuals obtaining prospective copyright assignments of any review of them by their clients (in order to stop negative reviews online); and (ii) individuals obtaining copyrights (through transfer or even default judgments) to remove truthful and at times embarrassing content about them.<sup>44</sup> These cases reek of the “censorship in the guise of copyright” that Judge McKeown criticizes.

Cindy Lee Garcia, an actor in the “Innocence of Muslims” video, also falls into the category of non-author in the Ninth Circuit’s view.<sup>45</sup> The Court’s view is certainly reasonable. If Garcia is just an actor and not an author, she has no basis to assert what amounts to a right of first publication. Respectfully, though, I think Garcia’s claim of authorship raised a closer issue than the Court did. I do not necessarily think that Garcia should have been considered an author, but her position was neither frivolous nor without some force.

Imagine if the late David Bowie let a music label record Bowie’s performance of an Annie Lennox song (by license from her), but the label later published a sound recording of his performance that left out key parts of the recording and dubbed in audio of another singer over Bowie’s voice for one line, all without Bowie’s permission.<sup>46</sup> The label sold the bastardized recording of Bowie in an album in which the label did the same thing to twenty other performers as well—dubbing over their voices and turning the recordings into bastardized versions without the performers’ knowledge or consent. Assume there was no written contract governing who owned the copyrights to the recordings. In this scenario, Bowie would have a decent claim of authorship in the sound recording of his performance. (The other

43. See *Balsley*, 691 F.3d at 757.

44. Brief of Amici Curiae Internet Law Professors in Support of Appellees Google, Inc. and YouTube, LLC at 9–14, *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc) (No. 12-57302), <http://cdn.ca9.uscourts.gov/datastore/general/2014/11/25/1257302%20Amicus%20by%20Internet%20Law%20Professors.pdf>. For an excellent summary of copyright cases in which privacy and reputation may be one motivation for the lawsuit, see Jeanne Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549, 557–74 (2015).

45. *Garcia*, 786 F.3d at 737–38.

46. Justin Hughes suggested a similar hypothetical in a discussion with me a year before Bowie’s death.

performers would have the same as to their sound recordings, respectively.) Should Bowie be disqualified from copyright just because he seeks to protect his reputation by invoking copyright? Bowie's reputational interests in enforcing his right of first publication to stop the record label's distribution seems just as important as his economic interest in the right. Indeed, the reputational harm to Bowie as an artist may be far greater than the economic harm from the record label's unauthorized release of the bastardized recording of Bowie's performance.

If the right of first publication protects Bowie's reputational and economic interests in this scenario, then why not protect Garcia's interests? Surely her reputation as an actor affects her economic interests in performing. It may well be that she should *not* be considered an author of her recorded performance, as the Ninth Circuit concluded, but it is not clear to me that the reasons for rejecting her claim of authorship derive from a "mismatch" between her reputational interests and the purposes of copyright law. Those interests and purposes may well be aligned here. Put another way, if Garcia were Bowie performing and the performance involved singing not acting, would any court have any trouble treating Bowie as an author of the part of the sound recording that included him?

The big difference appears to be that Garcia's involves an *acting* performance fixed in a short video (shot by a director for a movie that apparently was never made), while Bowie's involves a *singing* performance fixed by a producer in a sound recording. Perhaps that makes a world of difference, even though both artists seek to protect their reputations from unauthorized, bastardized versions of their recorded performances. Of course, this is not to suggest that Garcia should be mentioned in the same breath as Bowie in terms of artistic abilities. But, following Justice Holmes's famous admonition, copyright law should refrain from evaluating the artistic merit of copyrighted works.<sup>47</sup>

Tweak the hypothetical once more and the distinction collapses: Instead of a sound recording, imagine that, with Bowie's permission, a producer recorded, on video, Bowie's performance of the Annie Lennox song. It's the exact same performance by Bowie, but one was recorded as a sound recording and the other as an audiovisual work. Does Bowie's claim of authorship to his recorded performance on video disappear simply because of the slight change in recording?

47. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation.").

What may be really driving the distinction is an *unstated* background norm of who constitutes an author in the respective artistic endeavors of acting versus singing. To borrow Judge Posner’s discussion of why editors and research assistants are not joint authors, “copyright would explode” if every actor is an author of her performance in every movie she acted in.<sup>48</sup> Or, as Judge McKeown put it, “Garcia’s theory would make ‘swiss cheese’ of copyright law—the practical result would be fragmenting a movie into thousands of copyrights.”<sup>49</sup>

But would it? The work-made-for-hire provision enables movie studios and producers to avoid precisely this problem.<sup>50</sup> The provision becomes a nullity if courts enable producers to avoid the requirements of the provision, either employment status or, for specially commissioned works, (including “a motion picture or other audiovisual work”) the writing requirement.<sup>51</sup> There can be no threat of holdup by any actor if producers simply follow the clear rules of the work-made-for-hire provision. In *Garcia*, the work-made-for-hire issue was never resolved.<sup>52</sup>

The text of the Copyright Act does not say who among performers and sound or film producers should be treated as authors. But the Act expressly recognizes that a work may be created and fixed over time or in several different versions and that each version constitutes “a separate work.”<sup>53</sup> In other words, maybe the Copyright Act doesn’t contemplate making a work into “swiss cheese,” but it does contemplate making each version its own slice of cheese.

Thus, as each scene of “Innocence of Muslims” was shot over several days, an audiovisual work was created for each part that was recorded,

48. *Gaiman v. McFarlane*, 360 F.3d 644, 658 (2004).

49. McKeown, *supra* note 2, at 7. For an excellent essay criticizing copyright law’s (mis)treatment of performances as not constituting creative expression, see Mathilde Pavis, *Is There Any-Body on Stage? A Legal (Mis)understanding of Performances*, 19 J. WORLD INTEL. PROP. L. 1, 1–5 (2016).

50. See 17 U.S.C. §§ 101, 201(b) (2015) (works made for hire provision and definition); Guy A. Rub, *Stronger Than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH 49, 120 (2013) (“The related work-made-for-hire doctrine . . . is crucial in limiting the number of authors in some cases, particularly in the movie and software industries.”).

51. 17 U.S.C. § 101 (2015) (definition of “work made for hire”: (1) “a work prepared by an employee within the scope of his or her employment”; or “a work specially ordered or commissioned for use . . . 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.”); F. Jay Dougherty, *Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 UCLA L. REV. 225, 317–25 (2001) (discussing work made for hire in movie industry).

52. *Garcia v. Google, Inc.*, 786 F.3d 733, 741 n.5 (9th Cir. 2015).

53. 17 U.S.C. § 101 (2015) (“A work is ‘created’ when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.”).

including the unedited versions. The final, edited version of “Innocence of Muslims” constituted a separate work. But it did not extinguish the copyrights for the unedited versions, much of which probably did not make the final cut.<sup>54</sup> A third party could not steal and publish the unedited versions without violating the copyrights. Moreover, if the scenes involving Garcia were fixed separately “under her authority” (presumably she authorized the unedited footage of her to be recorded), they would arguably constitute a separate work under the Copyright Act.<sup>55</sup> According to her Complaint, the unedited version of her performance lasted longer than five seconds and consisted of five and a half pages of script pages, shot over three and half days.<sup>56</sup> There were no factual findings indicating whether Garcia received any specific direction from the video’s producer or director, other than what was contained in the script. It is possible that, other than the lines she spoke from a script, Garcia maintained all creative control over her performance, including all the nonverbal expression, such as facial expression and body language. Given the apparent low budget nature of the video’s production, that probably is a fair assumption. Also, it is notable that her scene did *not* involve a parade of other actors; the only footage involving Garcia that was incorporated into the edited video involved, at most, only one other actor.<sup>57</sup>

The text of the Copyright Act is silent on who should be considered the author of the work—the performer, the video’s producer, or both. The same can be said of the hypothetical involving David Bowie and the record studio—although legislative history of the Sound Recordings Act of 1971 and the Copyright Office’s position support treating *both* performer and producer as joint authors.<sup>58</sup> At the very least, the text of the Copyright Act

54. See *Bull Publishing Co. v. Sandoz Nutrition Corp.*, 1989 WL 201080, No. C87-4723-DLJ, at \*3 (N.D. Cal., July 7, 1989) (each version of manual was a separate work); cf. *Walt Disney Productions v. Filmmation Associates*, 628 F. Supp. 871, 876 (C.D. Cal. 1986) (discussing infringing copies that are created before defendant’s final film was produced).

55. 17 U.S.C. § 101 (2015) (definition of “fixed”: “A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”); see *Leto v. RCA Corp.*, 341 F. Supp. 2d 1001, 1006 (N.D. Ill. 2004) (interpreting “under the authority of the author” to mean with the author’s consent).

56. See Brief of Amici Curiae Screen Actors Guild-American Federation of Television and Radio Artists *et al.* at 21, *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc), <http://cdn.ca9.uscourts.gov/datastore/general/2014/12/09/12-57302%20Amicus%20by%20SAG.pdf>.

57. *Sam Bacile – The Innocence of Muslims Trailer*, YOUTUBE (May 19, 2015), <https://youtu.be/YJBWCLeOEaM?t=9m4s>.

58. See Mark H. Jaffe, *Defusing the Time Bomb Once Again—Determining Authorship in Sound Recording*, 53 J. COPYRIGHT SOC’Y U.S.A. 139, 144–46 (Fall 2005–Winter 2006); U.S. COPYRIGHT OFFICE, CIRCULAR 56A: COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS I, <http://www.copyright.gov/circs/circ56a.pdf> (2012) (“The author of a sound recording is the performer(s) whose performance is fixed, or the record producer who processes the sounds and fixes them in the final recording, or both.”); Statement of Marybeth Peters, Register of Copyrights, Before the

does not foreclose Garcia's claim of authorship. Instead, we have to rely on background norms on who qualifies as an author, such as the Copyright Office's "longstanding practices [that] do not allow a copyright claim by an individual actor or actress in his or her performance contained within a motion picture."<sup>59</sup> Perhaps that makes pragmatic sense for feature-length movies, which can involve numerous actors. But, in this case, apparently no feature-length movie has ever surfaced, assuming one was even made.<sup>60</sup> The only thing we have is a short YouTube video. That's it. At least from the standpoint of creative expression, there does not appear to be a material difference between acting and singing that would automatically disqualify one activity from constituting authorship when recorded, but not the other. As Bowie himself described, "I really do just write and record what interests me and I do approach the stage shows in much the same way."<sup>61</sup>

In any event, regardless of the outcome in *Garcia*, non-authors who seek to use copyrights to protect their own privacy and reputation by suppressing unflattering or unfavorable content may raise a conflict with the First Amendment.

#### *D. Foul: Removing a Work When the Work Itself Is the Subject of Political Controversy*

Another First Amendment red flag arises *when the work itself is the subject of a political controversy*. In such cases, a copyright assertion that seeks to remove the work from public scrutiny might raise a First Amendment conflict. To me, this concern best explains why the Ninth Circuit panel's grant of an injunction in *Garcia* was improper.

This approach is suggested in Judge McKeown's decision in *Monge v. Maya Magazines*.<sup>62</sup> The Court rejected the defendant's fair use defense in publishing the photos from the plaintiffs' secret wedding. Even though the plaintiffs were using copyright to serve their privacy interest in keeping their

House Subcommittee on Courts on Intellectual Property on the Issue of Sound Recordings as Works Made for Hire, 106th Congress, May 25, 2000, <http://www.copyright.gov/docs/regstat52500.html> ("The copyrightable elements in a sound recording will usually, though not always, involve 'authorship' both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording.").

59. *Garcia*, 786 F.3d at 741.

60. Paul Bond, *Does 'Innocence of Muslims' Actually Exist?*, HOLLYWOOD REPORTER (Sept. 19, 2012) <http://www.hollywoodreporter.com/news/innocence-of-muslims-movie-youtube-trailer-371465>.

61. *David Bowie Quotes*, BRAINYQUOTE, <http://www.brainyquote.com/quotes/quotes/d/davidbowie309818.html> (last visited Feb. 8, 2016).

62. 688 F.3d 1164 (9th Cir. 2012).

wedding photographs from public consumption, the privacy interest did *not* disqualify the plaintiffs' copyright assertion. Instead, the Court noted that "the controversy has little to do with the photos" themselves, because the fact of a secret wedding was the story, which could be discussed without publishing the photographs.<sup>63</sup> As Judge McKeown admits in her Keynote, *Monge* was a difficult case, and one might question (as the dissenting judge did) whether fair use provided an adequate safeguard for free speech.<sup>64</sup> Nonetheless, the Ninth Circuit distinguished the decision in *Nunez*, in which the First Circuit held that a newspaper's publication of risqué photographs of Miss Universe Puerto Rico was a fair use. The First Circuit characterized *Nunez* as a case where "the pictures were the story," which weighed in favor of fair use in their publication.<sup>65</sup> The photographs themselves were the putative reason to disqualify the winner of Miss Universe Puerto Rico from serving in that role.

*Garcia v. Google* strikes me as an even stronger case than *Nunez* of an instance in which the work itself was the subject of a political controversy. In my view, the First Amendment problem in *Garcia* rests not on the plaintiff's assertion of copyright to protect her reputation or the flimsiness of her claim of authorship, but instead on the *remedy* sought by the plaintiff to remove from public scrutiny a work that was the subject of a great political controversy. Arguably, the First Amendment problem would have existed even if the rightful copyright owner of the edited video (presumably the video's producer and creator, Mark Basseley Youssef) had sought the removal of infringing copies of the video from YouTube, while removing the only copy he uploaded. The video had sparked protests in the Middle East and was a key point of inquiry during Congress's investigation of the Benghazi attack; the White House's reference to the video in its explanation of the attack became a major area of dispute between President Obama and Republican nominee Mitt Romney during the 2012 presidential debates.<sup>66</sup> The video itself was the political controversy—of both national and international magnitude.

63. *Id.* at 1175.

64. See McKeown, *supra* note 2, at 10.

65. *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 22 (1st Cir. 2000).

66. See *Garcia v. Google, Inc.*, 786 F.3d 733, 737–38 (9th Cir. 2015); *Flashback: What Susan Rice Said About Benghazi*, WALL ST. J. (Nov. 16, 2012), ("But putting together the best information that we have available to us today our current assessment is that what happened in Benghazi was in fact initially a spontaneous reaction to what had just transpired hours before in Cairo, almost a copycat of— of the demonstrations against our facility in Cairo, which were prompted, of course, by the ['Innocence of Muslims'] video.") (quoting UN Ambassador Susan Rice); Michael McGough, Opinion, *Did the Benghazi Committee Avenge Mitt Romney? Not Quite*, L.A. TIMES (Oct. 23, 2015) <http://www.latimes.com/opinion/opinion-la/la-ol-hillaryclinton-benghazi-romney-20151023-story.html>.

Thus, for a court to order the removal of “Innocence of Muslims” from YouTube, even at the behest of the rightful copyright owner, would likely violate the First Amendment. To borrow the Ninth Circuit’s conclusion in *Garcia* on different facts than my hypothetical: “The mandatory injunction censored and suppressed a politically significant film . . . . In so doing, the panel deprived the public of the ability to view firsthand, and judge for themselves, a film at the center of an international uproar.”<sup>67</sup> In my view, this First Amendment problem would arise from a court order requiring the video’s removal from YouTube *regardless of who the plaintiff was, either the author or Garcia*.

My approach is consistent with the Supreme Court’s decision in the “Pentagon Papers” case, which held that an injunction to stop a newspaper’s publication of a secret Department of Defense study about U.S. military involvement in Vietnam was an unlawful prior restraint.<sup>68</sup> Like the video in *Garcia*, the Pentagon Papers became a source of immense political controversy. It cast doubt on statements about Vietnam made by President Lyndon Johnson during the 1964 presidential election.<sup>69</sup> It is hard to imagine that the outcome would have been any different if the Pentagon Papers were copyrighted. A claim of copyright over the Pentagon Papers (assuming for the sake of argument that government works were copyrightable in the United States as they are in some countries) would not have avoided the First Amendment violation resulting from the injunction.

The Supreme Court’s decision in *Harper & Row* is not to the contrary. There, the Court rejected a magazine’s First Amendment argument to justify “scooping” the publication of former President Ford’s autobiography (after he left office) by copying and publishing quotes (consisting of 400 words) from the book before it was published.<sup>70</sup> In *Harper & Row*, the copied quotations from former President Ford were not themselves the reason for or the subject of a political controversy. While the quotes related to Ford’s reasons for pardoning President Nixon, that controversial decision existed *before* Ford wrote his book.<sup>71</sup> In other words, the quotes in Ford’s unpublished book did not spark or create the political controversy.

67. *Garcia*, 786 F.3d at 747.

68. See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

69. See *The Pentagon Papers*, UPI (1971), <http://www.upi.com/Archives/Audio/Events-of-1971/The-Pentagon-Papers>.

70. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 549 (1985).

71. *Id.* at 555.

By contrast, the video in *Garcia* did. The YouTube video was the *raison d'être* for the political protests and controversy. Without the video, there would have been no protests or controversy.<sup>72</sup>

In sum, I have suggested that copyright assertions may be suspect from a First Amendment view in the following circumstances: (1) copyright assertions by authors who are primarily seeking to protect their own privacy by the removal of copies of a work from public scrutiny outside of the right of first publication; (2) copyright assertions by non-authors who are primarily seeking to protect their reputation or privacy by the removal of copies of a work from public scrutiny; and (3) copyright assertions by any plaintiff (authors and non-authors) who attempt to remove from public scrutiny a work that is itself the subject of a political controversy. There may be other factors or scenarios in copyright cases that raise First Amendment red flags, but I leave such inquiry to future discussion.

## II. DOCTRINES TO PROTECT AGAINST SUSPECT ASSERTIONS OF COPYRIGHT

If we agree with Judge McKeown about the need for concern about expansive assertions of copyright, then it's important to ask what courts can do about such assertions. This section sketches out potential ways in which courts can deal with assertions of copyright that may conflict with the First Amendment.

### A. Authorship

I agree wholeheartedly with Judge McKeown's suggestion that authorship may be a fertile ground for courts to examine and guard against suspect assertions of copyright. I have outlined above a framework for distinguishing suspect copyright assertions by authors versus non-authors in asserting claims that may seek to protect their privacy or reputation. Cases in which the copyright owner was not even the author of the work may raise a red flag, especially where suppression of the work is sought for what amounts to the plaintiff's privacy or personal reputation. However, even

72. The YouTube video involving Ergun Caner, then dean of Liberty University is similar, but slightly more attenuated. *See* *Caner v. Autry*, 16 F. Supp. 3d 689, 693 (W.D. Va. 2014). The video purportedly caught Caner in a lie that undermined his fitness as university president and administrator. Although the controversy existed before the defendant's posting of the video, the video was definitive evidence of what Caner had stated. A Liberty employee posted the video to show that Caner had lied during a presentation to the U.S. Marines in which he "proclaimed his Muslim upbringing in Turkey and expounded on how Muslims in the Middle East would view the U.S. Marines and approach them from the perspective of jihad." *Id.* at 693.



where non-authorship raises a red flag, the lawful acquisition of the copyrights by the plaintiffs in some controversies (such as by Balsley, Katz, and Hughes) may diminish the effectiveness of using the concept of authorship as a way to guard against censorship. Only two of the cases (Hogan and Garcia) discussed by Judge McKeown turned on authorship.<sup>73</sup> Instead of authorship, courts may have to resort to equitable doctrines, such as fair use, copyright misuse, and the standard for injunctions.

### B. Defenses: Fair Use and Copyright Misuse

As Judge McKeown's Keynote convincingly describes, fair use has served as a safety valve by which courts have sometimes considered First Amendment interests. I share her concern that the "imprecise nature and application" of the fair use doctrine may undermine its effectiveness somewhat. Nonetheless, courts can incorporate First Amendment considerations when evaluating the first factor of fair use, the purpose of the defendant's use of the copyrighted work. A number of the cases already have, tacitly or expressly.<sup>74</sup>

Another defense that may help courts police suspect assertions of copyright is copyright misuse. Scholars have already suggested using copyright misuse to protect free speech.<sup>75</sup> In my view, copyright misuse may be well-suited to stopping suspect assertions of copyright. The equitable doctrine enables courts to "appropriately withhold their aid where the plaintiff is using the right asserted contrary to public interest."<sup>76</sup> The copyright cannot be enforced during the period of misuse.<sup>77</sup> Indeed, copyright misuse might offer courts a cleaner, simpler inquiry than the

73. *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc); *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325 (M.D. Fla. 2012).

74. See, e.g., *Authors Guild, Inc. v. Hathitrust*, 755 F.3d 87, 97 (2014) (finding legitimate fair use purpose in "the creation of a full-text searchable database"); *Monge v. Maya Magazines*, 688 F.3d 1164, 1173 (9th Cir. 2012) ("Although news reporting is an example of fair use, it is not sufficient itself to sustain a per se finding of fair use."); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003) (finding legitimate fair use purpose in "improving access to information on the internet"); *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 22 (1st Cir. 2000) ("This informative function is confirmed by the newspaper's presentation of various news articles and interviews in conjunction with the reproduction.").

75. JuNelle Harris, *Beyond Fair Use: Expanding Copyright Misuse to Protect Digital Free Speech*, 13 TEX. INTEL. PROP. L.J. 83, 113–15 (2004); see also Fromer, *supra* note 44, at 586 (proposing use of patent and copyright misuse as ways for courts to address patent and copyright cases brought by parties whose motivations are "ill-fitting" to the purposes of the law).

76. *Morton Salt Co. v. G.S. Suppiger*, 314 U.S. 488, 492 (1942); *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 976–77 (4th Cir. 1990) (recognizing copyright misuse and applying *Morton Salt*).

77. *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1090 (9th Cir. 2005); *Practice Management Info. Corp. v. AMA*, 121 F.3d 516 (9th Cir. 1997).

balance of factors in fair use: Is this assertion of copyright “contrary to public policy” of copyright?<sup>78</sup> No need for a court to balance any factors. Just consider if the assertion of copyright is suspect from a First Amendment standpoint. As discussed above, I have identified three such “misuse” scenarios: (1) authors’ assertions of copyright to protect their own privacy by the removal of copies of their works from public scrutiny after the authors have already first published their works; (2) non-authors’ assertions of copyrights to protect their reputation or privacy by the removal of copies of a work from public scrutiny; and (3) any plaintiffs’ (authors and non-authors alike) attempts to remove from public scrutiny a work that is itself the subject of a political controversy.

### *C. Remedies: Injunctions v. Damages*

The court’s consideration of what remedies to award in a copyright infringement case offers another opportunity for a court to consider First Amendment safeguards. Professors Mark Lemley and Eugene Volokh focused on the grant of preliminary injunctions in intellectual property (including copyright) cases.<sup>79</sup> Applying prior restraint doctrine, they suggest that a court should refrain from granting a preliminary injunction for alleged infringement unless the case for infringement was pretty strong, such as when “the defendant has made identical or nearly identical copies of the plaintiff’s works, and there is no claim of fair use but only some other copyright defense.”<sup>80</sup> Lemley and Volokh do not believe a First Amendment issue would be raised at the permanent injunction stage if infringement was shown.<sup>81</sup>

I disagree. Other areas of law, such as defamation and libel, avoid granting permanent injunctions against speech even where liability is established. A basic feature of defamation and libel law is that only damages—and not injunctive relief—are available for successful claims of defamation or libel.<sup>82</sup> The no-injunction rule derives from First Amendment concerns: “Indeed, in the vast majority of cases in which courts have considered granting an injunction directed at defamatory speech, they refuse

78. *Lasercomb*, 911 F.2d at 979.

79. See Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 210–15 (1998).

80. *Id.* at 211.

81. *Id.* (“[W]e don’t believe that prior restraint doctrine prohibits (or should prohibit) permanent injunctions of unprotected speech, entered after a full consideration of the merits, whether at trial or on summary judgment.”).

82. See David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 53 WM. & MARY L. REV. 1, 18 (2013).

to do so on the basis that the injunction would be an unconstitutional prior restraint.”<sup>83</sup>

Although copyright law has routinely allowed injunctions, I suggest that, in some cases of infringement, a copyright injunction might violate the First Amendment. In the context of unsuccessful claims of fair use, the Court has cautioned courts from automatically enjoining the infringing use: “[C]ourts may also wish to bear in mind that the goals of the copyright law, ‘to stimulate the creation and publication of edifying matter,’ are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use.”<sup>84</sup> Although the Court did not explicitly refer to free speech concerns, they seem evident in its analysis. At the very least, the Court recognized that injunctions should not always be granted, even where copyright infringement is found.

Under my theory, even if Garcia was deemed to be an author in *Garcia v. Google* and her claim of infringement was meritorious, or if the rightful copyright owner was trying to remove all copies of the video from YouTube, an injunction ordering YouTube to remove the video would likely have violated the First Amendment. As discussed above, the video itself was the source of national and international political controversy—to remove it from public scrutiny would have deprived the public, Congress, and voters in the presidential election from the ability to evaluate the controversial content in the video. Judge McKeown says that “a weak copyright claim cannot trump the First Amendment.”<sup>85</sup> I say that a *strong* copyright claim cannot, either, in some cases.<sup>86</sup>

For this reason, I agree with Judge McKeown’s characterization of *Garcia* as raising a concern about “the use of copyright injunctions to impose what amounts to prior restraints on offensive, unpopular or sensitive speech”: “These kinds of cases look, feel and smell like real First Amendment cases.”<sup>87</sup> In the end, I think the First Amendment concern in

83. *Id.* at 31.

84. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994).

85. McKeown, *supra* note 2, at 6.

86. I think this principle would apply to the video of the Reginald Denny beating after the Rodney King verdict. A court ordered Reuters and another news organization to pay \$60,000 in statutory damages for their unauthorized use of video of the beating of Reginald Denny following the Rodney King verdict. *Los Angeles News Service v. Reuters Television Int’l, Ltd.*, 149 F.3d 987, 990 (9th Cir. 1998). But if the court had issued an injunction against the news organizations barring them showing the video, the injunction would likely have violated the First Amendment as a prior restraint.

87. McKeown, *supra* note 2, at 5; *cf.* *Suntrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165, 1166 (11th Cir. 2001) (holding that grant of preliminary injunction barring dissemination of allegedly infringing derivative work “amounts to an unlawful prior restraint in violation of the First Amendment”).

*Garcia* goes more to the remedy sought than to the issue of authorship. It was censorship in the guise of an injunction.