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9 Attorneys for Defendants  
Google Inc. and YouTube, LLC

11 UNITED STATES DISTRICT COURT  
12 CENTRAL DISTRICT OF CALIFORNIA

14 CINDY LEE GARCIA, an individual,  
15 Plaintiff,

16 v.

17 NAKOULA BASSELEY NAKOULA,  
an individual also known as SAM  
18 BACILE, MARK BASSELEY  
YOUSSEF, ABANOB BASSELEY  
19 NAKOULA, MATTHEW NEKOLA,  
AHMED HAMDY, AMAL NADA,  
20 DANIEL K. CARESMAN, KRITBAG  
DIFRAT, SOBHI BUSHRA, ROBERT  
21 BACILY, NICOLA BACILY,  
THOMAS J. TANAS, ERWIN  
22 SALAMEH, YOUSSEFF M.  
BASSELEY, and/or MALID  
23 AHLAWI; GOOGLE, INC., a  
Delaware Corporation; YOUTUBE,  
24 LLC, a California limited liability  
company, and DOES 1 through 10,  
25 inclusive,

26 Defendants.

Case No. CV-12-8315-MWF (VBKx)

Assigned to the Honorable Michael W. Fitzgerald

OPPOSITION OF GOOGLE INC.  
AND YOUTUBE, LLC TO  
PLAINTIFF'S REQUEST FOR  
JUDICIAL NOTICE IN SUPPORT OF  
MOTION FOR PRELIMINARY  
INJUNCTION AND ORDER OF  
IMPOUNDMENT

Date: December 3, 2012  
Time: 10:00 a.m.  
Courtroom: 1600

1 Defendants Google Inc. and YouTube, LLC (collectively the “YouTube  
2 Defendants”) oppose plaintiff Cindy Lee Garcia’s (“Plaintiff”) Request for Judicial  
3 Notice in support of her Motion for Preliminary Injunction.<sup>1</sup>  
4

### 5 I. INTRODUCTION

6 The YouTube Defendants oppose Plaintiff’s request for judicial notice  
7 because she fails to meet the requirements of Federal Rule of Evidence 201. First,  
8 Plaintiff requests judicial notice of various purported “facts” contained in news  
9 reports, but the “facts” set forth are impermissibly vague. Plaintiff fails to offer the  
10 actual news reports that might support her factual assertions. Instead, Plaintiff  
11 offers her own version of the facts and the views of her purported expert, Khaled  
12 Abdou El Fadl, which are not judicially noticeable. The causes of the attack on the  
13 United States Embassy in Benghazi, Libya, and other acts of violence, have been  
14 widely debated and are not the type of facts that are “generally known” or “readily  
15 determined.”

16 Plaintiff also requests that this Court take judicial notice of facts that have no  
17 relevance to her Motion for Preliminary Injunction against the YouTube  
18 Defendants. She requests judicial notice of statements made by the United States  
19 Patent and Trademark Office regarding the WIPO Audiovisual Dramatic  
20 Performance Treaty, which has nothing to do with this copyright lawsuit. She also  
21 requests judicial notice of the “public file” in Defendant Youssef’s criminal  
22 proceeding, which brings nothing to bear on the question of whether Plaintiff is  
23 entitled to injunctive relief under the Copyright Act against the YouTube  
24 Defendants.

25 Plaintiff’s attempt to muddle the record with irrelevant matters that are not  
26 subject to judicial notice should not be permitted. Her Request for Judicial Notice  
27 should be denied.

28 <sup>1</sup> Plaintiff’s Request for Judicial Notice [Dkt. No. 13] was initially submitted in support of her ex parte application for a temporary restraining order, which was denied on October 18, 2012 [Dkt. No. 15].

1                   **II. PLAINTIFF’S REQUEST FOR JUDICIAL NOTICE**

2           Plaintiff has requested that the Court take judicial notice of the following  
3 facts in support of her Motion for Preliminary Injunction:

4           (1) *Facts set forth in news reports.* Plaintiff asks this Court to take judicial  
5 notice of alleged facts set forth in news reports regarding (a) the September 11,  
6 2012, attack on the U.S. Consulate in Benghazi, Libya, (b) violence that has erupted  
7 around the world, (c) “expert” opinions attributing this violence directly to the  
8 Film, (d) deaths resulting from the violence, (e) a “fatwa” that has been issued by  
9 an Egyptian cleric targeting people involved in the Film, and (f) Google’s response  
10 to requests that the Film be removed from the YouTube website. [Dkt. No. 13, ¶  
11 2.] Plaintiff, however, has failed to present any news reports to the Court, instead  
12 expecting this Court to rely solely on her recitation of the facts and the recitation  
13 offered in a declaration by purported expert Khaled Abou El Fadl. [*Id.*]

14           (2) *The Background and Summary of the WIPO Audiovisual Performances*  
15 *Treaty.* Plaintiff asks this Court to take judicial notice of various statements made  
16 by the United States Patent and Trademark Office regarding the 2012 WIPO  
17 Audiovisual Performances Treaty. Specifically, she requests that the Court accept  
18 as true various statements regarding United States copyright law, which reveal “the  
19 long-standing acknowledgment in the United States that actors, just like musicians,  
20 own the rights to their performances unless assigned, unless they are employees, or  
21 unless they execute a written instrument indicating their work is a work-for-hire.”  
22 [Dkt. No. 13, ¶ 3.] Instead of relying on statutes or case law that are binding on this  
23 Court, Plaintiff is seeking to establish copyright law by requesting judicial notice of  
24 statements allegedly made by United States officials regarding an international  
25 treaty. That is not the purpose of judicial notice.

26           (3) *The “public case file” in United States of America v. Nakoula, et al.*  
27 *United States District Court Case No. CR-09-617-CAS.* Specifically, Plaintiff  
28 requests judicial notice of two documents filed in that case: (i) Order of Detention

1 After Hearing and (ii) Judgment and Probation/Commitment Order, as well as the  
2 court's findings of fact as stated in those documents. These documents, however,  
3 are wholly irrelevant to Plaintiff's Motion for Preliminary Injunction against the  
4 YouTube Defendants.

### 5 III. ARGUMENT

6 The Federal Rules of Evidence provide that "[a] court may judicially notice a  
7 fact that is not subject to reasonable dispute because it: (1) is generally known  
8 within the trial court's territorial jurisdiction; or (2) can be accurately and readily  
9 determined from sources whose accuracy cannot reasonably questioned." Fed. R.  
10 Evid. 201(b). The purpose of judicial notice is to "obviate the need for formal fact-  
11 finding as to certain facts that are undisputed and easily verified." *Walker v.*  
12 *Woodford*, 454 F.Supp.2d 1007, 1022 (S.D. Cal. 2006) (noting that an "almanac,  
13 dictionary, calendar, or similar source" are the types of sources whose accuracy  
14 cannot be reasonable questioned).

15 "Because the effect of judicial notice is to deprive a party of an opportunity  
16 to use rebuttal evidence, cross-examination, and argument to attack contrary  
17 evidence, caution must be used in determining that a fact is beyond controversy  
18 under Rule 201(b)." *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1151 (9th Cir.  
19 2005) (internal quotations and citations omitted).

#### 20 A. Plaintiff's Request for Judicial Notice of "Facts" From News 21 Reports that Are Not Before the Court Should Be Denied.

22 Plaintiff asks this Court to take judicial notice of "[t]he specific facts set forth  
23 in the news reports," and offers vague descriptions of broad categories of "facts"  
24 without providing any news reports. "Although a Court may take judicial notice of  
25 a newspaper article, petitioner must meet the burden of demonstrating that the facts  
26 of the article are either (1) generally known within the territorial jurisdiction of the  
27 trial court or (2) capable of accurate and ready determination by resort to sources  
28 whose accuracy cannot be reasonably questioned as required under Rule 201(b) of

1 the Federal Rules of Evidence.” *In re American Apparel, Inc. Shareholder*  
2 *Litigation*, 855 F. Supp. 2d 1043, 1063 (C.D. Cal. 2012) (quoting *Hardison v.*  
3 *Newland*, 2003 WL 23025432, \*5 (N.D. Cal. Dec. 17, 2003) (internal quotations  
4 omitted).

5 Plaintiff has failed to meet her burden.

6 First, the “facts” identified by Plaintiff are too vague to be to be judicially  
7 noticed. For example, Plaintiff requests judicial notice of the fact “that violence has  
8 continued to erupt across the world” and that “the violence in fact occurred with  
9 many at the time attributing it to the anti-Muslim sentiment in the Film.” [Dkt. No.  
10 13, ¶ 2.] Such a vague reference to “violence” without reference to specific events  
11 cannot be judicially noticed.

12 Second, Plaintiff has not presented the news reports on which she relies.  
13 Instead, she expects the Court to take judicial notice of her recitation of facts, and  
14 the recitation offered in the declaration of purported expert Khaled Abou El Fadl,  
15 both of whom lack personal knowledge. [Dkt. No. 13, ¶ 2.] Without having the  
16 opportunity to review the relevant news reports, the Court cannot determine  
17 whether the facts contained in those articles are subject to judicial notice. *See*  
18 *Castaneda v. Saxon Mort. Servs. Inc.*, 687 F. Supp. 2d 1191, 1196 (E.D. Cal. 2009)  
19 (denying a request for judicial notice of an article “which expresse[d] opinions of  
20 the author that may reasonably be questioned”); *see also Brodsky v. Yahoo! Inc.*,  
21 630 F.Supp.2d 1104, 111 (N.D. Cal. 2009) (taking judicial notice of the existence  
22 of press releases, news articles, analyst reports, and third party press releases, but  
23 not for the truth of their contents).

24 Finally, the “facts” offered by Plaintiff are not generally known or capable of  
25 accurate or ready determination. Fed. R. Evid. 201. When an alleged fact is  
26 subject to reasonable dispute, judicial notice is improper. *Rodgers v. Horsely*, 123  
27 Fed.Appx. 281, 284-85 (9th Cir. 2005); *In re Immune Resp. Sec. Litig.*, 375 F.  
28

1 Supp. 2d 983, 995 (S.D. Cal. 2005) (citing *Lee v. City of L.A.*, 250 F.3d 668, 688-89  
 2 (9th Cir. 2001); *In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1166 (S.D.  
 3 Cal. 2010) (“A district court cannot take judicial notice of a fact that is subject to  
 4 ‘reasonable dispute’ simply because it is contained within the public record.”).  
 5 Many of the facts that Plaintiff seeks judicial notice of are the subject of widespread  
 6 debate. For example, Plaintiff seeks judicial notice of the fact that many people  
 7 have attributed the September 11, 2012, attack on the U.S. Consulate in Benghazi,  
 8 Libya, and other acts of violence, directly to the Film. But the U.S. Administration  
 9 has now acknowledged that the attack in Libya was a terrorist attack unrelated to  
 10 the Film.<sup>2</sup>

11 In sum, the Court should deny Plaintiff’s request for judicial notice of  
 12 various facts from news reports because they are not set forth with sufficient  
 13 specificity, Plaintiff failed to provide the news reports on which she relies, and the  
 14 alleged “facts” are indeed subject to reasonable dispute.

15 **B. Facts Regarding the WIPO Audiovisual Dramatic Performance**  
 16 **Treaty are Irrelevant and Should Not Be Judicially Noticed.**

17 Plaintiff asks this Court to take judicial notice of various facts surrounding  
 18 the negotiation of the WIPO Audiovisual Dramatic Performance Treaty (“AVP  
 19 Treaty”) and related statements made by the United States Patent & Trademark  
 20 Office (“USPTO”). [Dkt. No. 13, ¶ 3, Exh. A.] Plaintiff points to various  
 21 statements made by the USPTO to establish that “actors, just like musicians, own  
 22 the rights to their performances unless assigned, unless they are employees, or  
 23

24  
 25 <sup>2</sup> See *The Mystery of Benghazi*, available at  
 26 [http://www.nytimes.com/2012/10/14/opinion/sunday/douthat-the-mystery-of-](http://www.nytimes.com/2012/10/14/opinion/sunday/douthat-the-mystery-of-benghazi.html?ref=rossdouthat&r=0)  
 27 [http://www.washingtonpost.com/opinions/benghazi-attack-becomes-political-](http://www.washingtonpost.com/opinions/benghazi-attack-becomes-political-ammunition/2012/10/19/e1ad82ae-1a2d-11e2-bd10-5ff056538b7c_story.html?wprss=rss_homepage;)  
 28 [http://www.nytimes.com/2012/10/22/us/politics/benghazi-and-arab-spring-rear-up-in-us-](http://www.nytimes.com/2012/10/22/us/politics/benghazi-and-arab-spring-rear-up-in-us-campaign.html?hp&r=0)  
[campaign.html?hp&r=0.](http://www.nytimes.com/2012/10/22/us/politics/benghazi-and-arab-spring-rear-up-in-us-campaign.html?hp&r=0)

1 unless they execute a written instrument indicating their work is a work-for-hire.”  
2 [Id. at ¶ 3.]

3 Plaintiff essentially seeks to establish a point of copyright law by reference to  
4 the USPTO’s statements about an international treaty. That is an improper use if  
5 the judicial notice rule. First, statements made by the USPTO regarding an  
6 international treaty are entirely irrelevant to whether Plaintiff is entitled to a  
7 preliminary injunction against the YouTube Defendants. *United States v. Black*,  
8 482 F.3d 1035, 1041 (9th Cir.), cert. denied, 552 U.S. 1023 (2007) (requiring that  
9 matters judicially noticed have a “direct relation to the matters at issue.”) Second,  
10 the USPTO merely stated that “[u]nder U.S. law, actors and musicians are  
11 considered to be ‘authors’ of their performances providing them with copyright  
12 rights.” [Dkt. No. 13, ¶ 3, Exh. A.] Whether a particular actor has a copyright in  
13 his or her performance requires an analysis of the specific facts of the case,  
14 including but not limited to whether the actor was working as an employee. The  
15 purpose of the judicial notice doctrine is not to establish rules of law that are more  
16 properly established by binding statutes and case law.

17  
18 **C. Irrelevant Factual Findings Made by Another Court Should Not  
Be Judicially Noticed.**

19 Finally, Plaintiff requests judicial notice of “the public case file” in *United*  
20 *States v. Nakoula*, United States District Court Case No. CR09-617-CAS, including  
21 (i) the Order of Detention After Hearing and (2) the Judgment/Probation  
22 Commitment Order. [Dkt. No. 13, ¶ 4, Exh. B.] In addition to the existence of the  
23 documents, Plaintiff requests judicial notice of findings of fact contained in those  
24 documents; specifically, that “Magistrate Judge Segal found that [Defendant  
25 Youssef, also known as Nakoula] may have violated the terms of his probation,  
26 used aliases, and is both a flight risk and danger to the community.” [Id.]

27 Court proceedings may be subject to judicial notice, but only when they  
28 “have direct relation to the matters at issue.” *Black*, 482 F.3d at 1041. The status

1 of Youssef's criminal proceedings, including the terms of his probation, have no  
2 relevance to the issue of whether Plaintiff is entitled to a preliminary injunction  
3 against the YouTube Defendants under the Copyright Act.

4 Further, "a court may not take judicial notice of findings of facts from  
5 another case." *Walker*, 454 F. Supp. 2d at 1022. Therefore Magistrate Judge  
6 Segal's factual findings regarding defendant Youssef's possible violation of his  
7 probation, use of aliases, and so forth, are not properly subject to judicial notice.

8 **IV. CONCLUSION**

9 For the foregoing reasons, Plaintiff's Request for Judicial Notice should be  
10 denied in its entirety.

11  
12 DATED: October 29, 2012

**PERKINS COIE LLP**

13  
14 By: /s/ Timothy L. Alger  
Timothy L. Alger

15 Attorneys for Defendants Google Inc.  
16 and YouTube, LLC