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10

11 UNITED STATES DISTRICT COURT  
12 CENTRAL DISTRICT OF CALIFORNIA  
13

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 AHLAWI;  
23 GOOGLE, INC., a Delaware  
Corporation; YOUTUBE, LLC, a  
24 California limited liability company, and  
DOES 1 through 10, inclusive,  
25

26 Defendants.  
27  
28

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

OPPOSITION OF GOOGLE INC.  
AND YOUTUBE, LLC TO  
PLAINTIFF'S MOTION FOR A  
PRELIMINARY INJUNCTION AND  
ORDER OF IMPOUNDMENT

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

Honorable Michael W. Fitzgerald

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1 Defendants Google Inc. (“Google”) and YouTube, LLC (“YouTube”)  
2 (collectively the “YouTube Defendants”) oppose plaintiff Cindy Lee Garcia’s  
3 Motion for a Preliminary Injunction and Order of Impoundment.

4 **I. INTRODUCTION**

5 Plaintiff Cindy Lee Garcia (“Plaintiff”), an actress who appears for about five  
6 seconds in a controversial “trailer” for a film called “Innocence of Muslims” (the  
7 “Film”), asks this Court to order the YouTube Defendants to remove all copies of  
8 the Film from Youtube.com, a video sharing site. Plaintiff alleges direct and  
9 secondary copyright infringement, but these baseless copyright claims are really  
10 nothing more than a pretext to seek removal from YouTube of material that she  
11 considers offensive.

12 Under copyright law, Plaintiff’s allegations establish that defendant Mark  
13 Basseley Youssef (“Youssef”) has a protectable copyright interest in the Film he  
14 both wrote and produced, giving Youssef the right to upload and display the Film  
15 on Youtube.com. Plaintiff’s complaint also establishes that she lacks any copyright  
16 interest in the Film. Plaintiff admits that she did not author the Film and that her  
17 contribution to the Film is nothing more than a “work for hire.” She concedes that  
18 she functioned as an employee, performing a script which was captured on film and  
19 dubbed over by others, all under the complete control of Youssef. Nowhere does  
20 Plaintiff establish that she was, or even understood herself to be, an independent  
21 contractor with a separate and exclusive copyright in her brief appearance in the  
22 Film.

23 Plaintiff’s real grievance here—Youssef’s distortion of her brief performance  
24 in the Film so as to make her character appear to mock Islam and Mohammed—  
25 does not involve copyright law. Rather, the “injury” for which she seeks redress  
26 involves the law of contracts, fraud, and/or right-of-publicity, all against Youssef or  
27 others. But her manufactured copyright claims against the YouTube Defendants,  
28 who merely provide a platform for the sharing of videos on the Internet, clearly fail



1 on these pleadings. Lacking any viable copyright claim against the YouTube  
2 Defendants, plaintiff is not entitled to the takedown order she seeks from this Court.

3 Broader social policy also supports denial of plaintiff's application. She  
4 seeks to use copyright law as a means of stifling speech about a matter of public  
5 concern simply because she objects to that speech. Irrespective of the Film's  
6 artistic or social merits, Plaintiff's own allegations demonstrate that the Film is now  
7 part of important public debate, even becoming an issue in this year's presidential  
8 campaign. Granting injunctive relief prior to first adjudicating whether plaintiff  
9 does actually hold a legitimate copyright interest in the Film, and if she does,  
10 whether she is entitled to compel the Film's editing and removal from YouTube,  
11 would be an unconstitutional prior restraint.

12 It is well established that United States law protects and encourages speech,  
13 including discourse about matters that are the subject of strong disagreement. In  
14 this country, our laws permit even the vilest criticisms of governments, political  
15 leaders, and religious figures as legitimate exercises in free speech. The First  
16 Amendment, the Digital Millennium Copyright Act, the Communications Decency  
17 Act, and other laws drastically limit efforts by parties wishing to restrict and punish  
18 speech on the Internet and elsewhere. No matter one's views about the merits of  
19 the Film, it is beyond dispute that the Film's existence and impact are a matter of  
20 widespread public concern. Indeed, Plaintiff's involvement with the Film (which  
21 she herself has aggressively publicized on television) is newsworthy in itself.

22 Nor is Plaintiff entitled to the injunctive relief she seeks under settled legal  
23 standards. She has inexcusably delayed in moving for injunctive relief, given that  
24 the Film has been available for viewing on YouTube (and plaintiff admits she was  
25 aware of this) since early summer. Even after filing this action, she waited another  
26 three weeks before seeking a temporary restraining order. And any limited private  
27 interest Plaintiff might possess, to the extent any exists at all, in enjoining the  
28 Film's availability is heavily outweighed by the public's interest in having the Film

1 remain accessible, given the great debate that has developed over the Film’s  
2 contents, its fallout, and statements made about it by the U.S. Administration.<sup>1</sup> For  
3 all of these reasons, Plaintiff’s motion should be denied.

4 **II. BACKGROUND**

5 This motion is Plaintiff’s third attempt to obtain an order removing the Film,  
6 a 14-minute movie trailer, from YouTube.<sup>2</sup> Plaintiff alleges that she was duped  
7 into appearing as an actress in the Film. (First Amended Complaint (“FAC”) ¶ 4  
8 [Dkt. No. 5].) The English version of the Film<sup>3</sup> was first posted onto YouTube on  
9 July 2, 2012 by Youssef, who also goes by the names Sam Bacile and Nakoula  
10 Basseley Nakoula. (*Id.* ¶¶ 1, 29.) The Film was posted again on YouTube, this  
11 time dubbed in Arabic, on September 11, 2012. (*Id.* ¶¶ 1, 30.) The Film’s criticism  
12 of Mohammed has sparked public debate, and in some countries, civil unrest.<sup>4</sup>

13 Plaintiff contends the Film harmed her personally and professionally. (*Id.* ¶¶  
14 4, 8-9, 29, 38-39.) On September 19, 2012, she filed a complaint in Los Angeles  
15 Superior Court against Youssef (named as Nakoula Basseley Nakoula), unidentified  
16 producers of the Film (named as “Does”), Google, and YouTube. (Request for  
17 Judicial Notice (“RJN”), Exh. A.) Plaintiff sought declaratory relief, injunctive  
18 relief, and damages against all of the defendants under several common law

19 \_\_\_\_\_  
20 <sup>1</sup> The Film’s actual impact is in genuine dispute to this day. On October 9, 2012, on the eve of  
21 congressional hearings, the U.S. State Department contradicted earlier assertions by the U.S. Ambassador  
22 to the United Nations that the attack on the U.S. consulate in Libya was part of rioting over the Film, and  
23 acknowledged that the attack – which resulted in the death of Ambassador J. Christopher Stevens – was a  
24 planned terrorist attack unconnected with the Film. *See US officials: We Didn’t Link Libya Attack to*  
*Video*, available at [http://www.google.com/hostednews/ap/article/ALeqM5grvFY\\_slQXSwZCx](http://www.google.com/hostednews/ap/article/ALeqM5grvFY_slQXSwZCxGSAa6gZS-0_TA?docId=0eb49c9e195f4df0b1080e8b9d065fa0)  
*State Department Admits It Knew Libya*  
*Attack was Terrorism*, available at [http://www.csmonitor.com/World/Latest-News-Wires/2012/1009/State-](http://www.csmonitor.com/World/Latest-News-Wires/2012/1009/State-Department-admits-it-knew-Libya-attack-was-terrorism)

25 <sup>2</sup> YouTube “is a publicly available website where persons can post video clips for viewing by the  
26 general public.” *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1098 (C.D.  
27 Cal. 2010).

28 <sup>3</sup> The original posting of the Film is at <http://www.youtube.com/watch?v=qmodVun16Q4>.  
Plaintiff appears at 9:04-9:05 and 9:08-9:11.

<sup>4</sup> In several countries where the Film appears to violate local laws, YouTube has made the Film  
inaccessible. However, the YouTube Defendants have determined that the Film neither violates United  
States laws or YouTube’s community standards.

1 theories, including invasion of privacy, fraud, and slander, and under California's  
2 right of publicity and unfair business practices statutes. (*Id.*) The bulk of the state  
3 court complaint was devoted to allegations against Youssef and the other  
4 defendants involved in creating and publishing the Film. (*Id.*) Plaintiff made no  
5 claims under the Copyright Act, and did not assert that she held a copyright in the  
6 Film or any portion of it.

7 On September 20, 2012, Judge Luis A. Lavin denied plaintiff's *ex parte*  
8 application for temporary restraining order requiring the removal of the Film,  
9 holding that Plaintiff failed to show any likelihood of prevailing on her claims.  
10 (RJN, Exh. B.) Judge Lavin also denied Plaintiff's request for an order to show  
11 cause why a preliminary injunction should not be issued. (*Id.*)

12 Five days later, Plaintiff voluntarily dismissed her state court action (RJN,  
13 Exh. C); and on September 26, 2012, she initiated this action against the YouTube  
14 Defendants, Youssef (named as Nakoula), and Does 1 through 10, claiming (1)  
15 direct copyright infringement, (2) secondary copyright infringement, (3) fraud, (4),  
16 unfair business practices, (5) libel, and (6) intentional infliction of emotional  
17 distress. [Dkt. No. 1.] Only copyright claims are asserted against the YouTube  
18 Defendants.

19 On October 4, 2012, Plaintiff amended her complaint to add Youssef as a  
20 named Defendant following the public disclosure of his real name during criminal  
21 proceedings after he was arrested for violating the terms of his probation.<sup>5</sup> [Dkt.  
22 No. 5.] On October 17, 2012, Plaintiff filed an *ex parte* application for temporary  
23 restraining order, which was denied on October 18, 2012, and the Court set a  
24 briefing schedule and a hearing date for Plaintiff's Motion for Preliminary  
25 Injunction. [Dkt. No. 15.]

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<sup>5</sup> See <http://news.yahoo.com/calif-man-behind-anti-muslim-film-ordered-jailed-012117266.html>

1 Plaintiff alleges that she sought and received an acting role in the Film in  
2 July 2011. (FAC ¶ 27.) Plaintiff maintains that the Film was “represented to be an  
3 ‘historical Arabian Desert adventure film’” (*id.*), but the Film later was “changed  
4 horrifically to make it appear that Ms. Garcia voluntarily performed in a hateful  
5 anti-Islamic production.” (*Id.* ¶ 29) Plaintiff contends that “the innocuous lines that  
6 plaintiff delivered on set were overdubbed so as to give the appearance that she was  
7 accusing the Islamic religious figure Mohammed of being a child molester and a  
8 sexual deviant.” (*Id.* ¶ 8.) She further alleges that “[t]he words that were put into  
9 plaintiff’s mouth were so offensive, not only to plaintiff but to millions worldwide,  
10 that it sparked [] riots and violence around the globe.” (*Id.*)

11 The FAC makes a number of admissions that are relevant to Plaintiff’s claim  
12 of copyright ownership (or lack thereof). Plaintiff states that she is “an actress who  
13 appears in the Film.” (*Id.* ¶ 4.) Plaintiff “was given only specific pages of a script  
14 titled *Desert Warrior*.” (*Id.* ¶ 28.) She alleges no involvement in the writing,  
15 directing, filming, editing, or producing of the Film. Her role was merely to read  
16 lines from the script, and Plaintiff concedes that the dubbed words she is depicted  
17 as uttering in the Film were never actually spoken by her. (*Id.* ¶ 4.) In other words,  
18 those words were not part of her alleged performance.

19 Plaintiff admits that she received the script from Youssef, who “held himself  
20 out as the writer and producer of the Film,” and “managed all aspects of the  
21 production.” (*Id.* ¶ 5.) Plaintiff alleges that “Defendant [Youssef] used her as a  
22 puppet.” (*Id.* ¶ 8.) She also alleges that the producers “intentionally concealed the  
23 purpose and content of the film.” (*Id.* ¶ 27; *see also id.* ¶ 29 (“the content and  
24 overall purpose of the Film was concealed from her”).)

25 The FAC states that when the Film was released publicly on YouTube,  
26 Plaintiff’s depicted performance was “grotesquely different than the performance  
27 that plaintiff actually had delivered.” (*Id.* ¶ 8.) She describes her performance in  
28 the Film as “distorted and disguised.” (*Id.* ¶ 10.) Plaintiff asserts that the producers

1 “manipulated plaintiff’s image to create the false appearance of anti-Muslim  
2 bigotry by plaintiff.” (*Id.* ¶ 74.)

3 Plaintiff believes that she signed a contract to work on the Film, but she has  
4 not come forward with it, and she asserts the missing document merely “ensured  
5 that she would receive IMDB credit.” (*Id.* ¶ 6.) Plaintiff also alleges that she  
6 actually is not sure whether she signed a contract, and such a form is “unknown to  
7 her at this time, if it exists.” (*Id.* ¶ 7.) These inconsistencies do not dissuade her  
8 from firmly alleging what is *not* in the contract that she might have signed, but  
9 which also might not exist: “She does recall that the contract did *not* call for her to  
10 transfer any rights, including any copyrights, and that it was not a ‘work for hire’  
11 agreement.” (*Id.* ¶ 6 (original emphasis).)

### 12 III. LEGAL STANDARDS

13 “A preliminary injunction is an extraordinary remedy never awarded as of  
14 right.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). There  
15 must be “a clear showing that the plaintiff is entitled to such relief.” *Id.* at 22. A  
16 plaintiff seeking a preliminary injunction must show: (1) a likelihood of success on  
17 the merits; (2) a likelihood of irreparable harm in the absence of preliminary  
18 injunctive relief; (3) that the balance of equities tips in her favor; and (4) that an  
19 injunction is in the public interest. *Id.* at 20; *Flexible Lifeline Sys., Inc. v. Precision*  
20 *Lift, Inc.*, 654 F.3d 989, 994 (9th Cir. 2011).

21 A request for a mandatory preliminary injunction that would alter the status  
22 quo “is subject to heightened scrutiny and should not be issued unless the facts and  
23 law clearly favor the moving party.” *Dahl v. HEM Pharmaceuticals Corp.*, 7 F.3d  
24 1399, 1403 (9th Cir. 1993); *Anderson v. United States*, 612 F.2d 1112, 1114 (9th  
25 Cir. 1980) (noting that a mandatory preliminary injunction is particularly  
26 disfavored). Also, “the burden on the moving party is particularly heavy where, as  
27 here, granting the preliminary injunction would give the movant substantially the  
28 same relief it would obtain after a trial on the merits.” *City of Los Angeles v.*

1 *County of Kern*, 462 F. Supp. 2d 1105, 1111 (C.D. Cal. 2006); *see also Sanborn*  
 2 *Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 486 (8th Cir.  
 3 1993); *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 164 (1st Cir. 1995).

#### 4 IV. ARGUMENT

##### 5 A. Plaintiff Cannot Show a Likelihood of Irreparable Harm.

6 “[E]ven in a copyright infringement case, the plaintiff must demonstrate a  
 7 likelihood of irreparable harm as a prerequisite for injunctive relief, whether  
 8 preliminary or permanent.” *Flexible*, 654 F.3d at 998. Irreparable harm is harm  
 9 that “cannot be redressed by a legal or an equitable remedy following a trial.”  
 10 *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91 (3d Cir. 1992). To justify  
 11 injunctive relief, the alleged harm must be likely. *Winter*, 555 U.S. at 22. It must  
 12 also be imminent. *See Caribbean Marine Svcs. Co., Inc. v. Baldrige*, 844 F.2d 668,  
 13 674 (9th Cir. 1988) (requiring “immediate threatened injury”).

14 Plaintiffs must make a *factual* showing that irreparable injury will result in  
 15 the absence of an injunction. *See Flexible*, 654 F.3d at 998 (plaintiff must make a  
 16 showing of irreparable injury “on the facts of his case”). Mere assertions of  
 17 irreparable harm will not suffice. *See, e.g., Baldrige*, 844 F.2d at 674 (“plaintiff  
 18 must *demonstrate* immediate threatened injury as a prerequisite to preliminary  
 19 injunctive relief” (original emphasis)); *Technology & Intellectual Prop. Strategies*  
 20 *Group PC v. Fthenakis*, 2012 WL 159585, at \*4 (N.D. Cal. Jan. 17, 2012) (plaintiff  
 21 “must demonstrate it will suffer an immediate injury that is not speculative”).

##### 22 1. Plaintiff cannot establish a causal connection between the 23 allegedly infringing conduct of the YouTube Defendants and the injury she alleges.

24 Removing the Film now—more than three months after it was posted to  
 25 YouTube and Plaintiff became aware of the same,<sup>6</sup> and more than one month after  
 26 it became the subject of widespread debate—would not prevent any of the personal,  
 27

28 <sup>6</sup> Plaintiff reports that she first viewed the Film after Youssef told her it had been posted on  
 YouTube “sometime after July 2, 2012.” (See Garcia Declaration at ¶ 12)

1 reputational and emotional harms Plaintiff alleges. Even if copyright law provides  
2 a remedy for these types of injuries—which is doubtful<sup>7</sup>—the injunctive relief she  
3 wants would not solve her problem. Plaintiff simply cannot establish under the law  
4 “a sufficient causal connection” between the allegedly infringing conduct she seeks  
5 to enjoin and the injuries she seeks to avoid. *Perfect 10, Inc. v. Google Inc.*, 653  
6 F.3d 976, 982 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1713 (2012).

7 The Ninth Circuit’s recent decision in *Perfect 10* is instructive. Perfect 10  
8 owned copyrights in “photographic images of nude models” and made those images  
9 available for a fee on its website. *Id.* at 977-78. Perfect 10 sued Google, claiming  
10 that Google’s search engine and other services infringed Perfect 10’s copyrights  
11 (and allegedly threatened to bankrupt Perfect 10) by making them accessible for  
12 free. *Id.* at 978. The district court denied Perfect 10’s motion for a preliminary  
13 injunction and the Ninth Circuit affirmed, agreeing that Perfect 10 had not shown  
14 that an injunction would prevent the harm of which it complained. Particularly  
15 important to the Ninth Circuit’s analysis was the fact that “search engines other  
16 than Google contribute to making Perfect 10 images freely available”—meaning an  
17 injunction against Google would have been futile. *Id.* at 982.

18 The same reasoning applies here. All of Plaintiff’s purported harms arise  
19 from the Film. But an order against the YouTube Defendants will not entirely  
20 remove the Film from the Internet or other avenues of distribution, and it will not  
21 prevent others from seeing, sharing, and talking about the Film. Since the Film was  
22 posted three months ago, it has been viewed and copied by countless individuals.  
23 (See FAC ¶ 3.) A takedown order against the YouTube Defendants will not  
24 alleviate Plaintiff’s safety concerns, restore plaintiff’s “career and reputation” (see  
25 *id.* ¶ 38), or assuage the anger of those outraged by the Film (see *id.* ¶ 34).

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26  
27  
28 <sup>7</sup> See *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010) (“relevant harm” is that which affects  
“the parties’ legal interests” and “cannot be remedied after a final adjudication” (emphasis added)).

1 Thus, even if we assume that these feared personal harms normally might  
2 justify a copyright injunction, Plaintiff's three-month delay in seeking relief and the  
3 broad distribution of the Film in the interim makes it impossible to establish the  
4 requisite causal connection necessary to support a takedown order.

5 **2. Plaintiff has not identified any irreparable harm.**

6 Because it is an "extraordinary and drastic remedy," *Munaf v. Geren*,  
7 553 U.S. 674, 689-90 (2008), preliminary injunctive relief is appropriate only if it is  
8 "the *only* way of protecting the plaintiff from harm." *Campbell Soup*, 977 F.2d at  
9 91 (emphasis in original). If other remedies can protect a plaintiff's legal interests,  
10 then the alleged harms do not warrant preliminary injunctive relief. *Id.*

11 Here, Plaintiff claims—albeit sketchily—that she has suffered and will  
12 continue to suffer three principal harms: (1) violation of her copyright (*see, e.g.*,  
13 FAC ¶¶ 29, 42); (2) harm to her career prospects (*see, e.g., id.* ¶¶ 38, 76, 86); and  
14 (3) emotional distress arising from alleged threats, insults, and other indignities  
15 (*see, e.g., id.* ¶¶ 32-35, 81, 93; *see also* Ex Parte App. at 21-22).<sup>8</sup> None of those  
16 purported harms justifies preliminary injunctive relief.

17 *First*, Plaintiff has, at most, "a property interest in the copyrighted material."  
18 *Salinger*, 607 F.3d at 81; *see also New Era Pubs. Int'l, APS v. Henry Holt & Co.*,

19  
20 <sup>8</sup> Plaintiff's questionable claims and public appearances also continue to stir the pot of  
21 controversy. Plaintiff has appeared in a number of television interviews (*see, e.g.* Russell Goldman,  
22 *Actress Says Maker of Anti-Muslim Film Lied to Cast*, ABC News, Sept. 13, 2012, available at  
23 <http://abcnews.go.com/Blotter/actress-maker-anti-muslim-film-lied-cast/story?id=17228157>), and her  
24 complaint was the subject of news reports immediately after its filing (*see e.g.* Anthony McCartney,  
25 *'Innocence of Muslims' Actress Cindy Lee Garcia Sues YouTube, Producer*, The Huffington Post, Sept.  
26 19, 2012, available at [http://www.huffingtonpost.com/2012/09/19/innocence-of-muslims-actress-cindy-lee-garcia-youtube\\_n\\_1898577.html](http://www.huffingtonpost.com/2012/09/19/innocence-of-muslims-actress-cindy-lee-garcia-youtube_n_1898577.html); Miguel Marquez and Stan Wilson, *Actress In Anti-Islamic Film Files  
27 Lawsuit Against Filmmaker and YouTube*, CNN, Sept. 19, 2012, available at  
28 <http://www.cnn.com/2012/09/19/us/california-anti-islam-film-lawsuit>). Although plaintiff asserted in the  
state court proceedings that she participated in media interviews to correct the record regarding her  
involvement in the Film, she continued to make public appearances (often with her lawyer) – long after  
plaintiff's disavowal of the Film was well-established. This included recent press conferences on the  
sidewalk outside Los Angeles Superior Court (*see, e.g., Effort to Take Down Anti-Muslim Film Rejected*,  
available at <http://abclocal.go.com/kabc/video?id=8818769>), and appearances on the television show, "The  
View" (<http://www.youtube.com/watch?v=tKqHLk0agNA>) and the "Today Show"  
([http://today.msnbc.msn.com/id/49146658/ns/today-today\\_news/t/actress-anti-islam-film-i-was-duped/#.UHS65fkn2Ew](http://today.msnbc.msn.com/id/49146658/ns/today-today_news/t/actress-anti-islam-film-i-was-duped/#.UHS65fkn2Ew)).



1 695 F. Supp. 1493, 1526 (S.D.N.Y. 1988), *aff'd*, 873 F.2d 576 (2d Cir. 1989)  
 2 (“[T]he justification of the copyright law is the protection of the *commercial*  
 3 interest of the artist/author.”) (emphasis in original). As discussed below, Plaintiff  
 4 is not the author of the Film and does not hold her own copyright that would give  
 5 her the exclusive right to display and distribute the work. *See* 17 U.S.C. § 106.

6 Damages are the typical remedy for commercial injuries.<sup>9</sup> *See New Era*, 695  
 7 F. Supp. at 1526 (denying request to enjoin publication of allegedly infringing  
 8 book; explaining that if “the copyright owner can be reasonably compensated in  
 9 damages for injury to this commercial interest, and the injury to the public interest  
 10 in free speech resulting from injunction would be great, that is a powerful reason  
 11 for limiting the remedy to damages and withholding the injunctive relief”); *Abend*  
 12 *v. MCA*, 863 F.2d 1465, 1479 (9th Cir. 1988) (plaintiff seeking to enjoin movie did  
 13 not show “irreparable injury which would justify imposing the severe remedy of an  
 14 injunction;” plaintiff could be “compensated adequately for the infringement by  
 15 monetary compensation”), *aff'd on other grounds sub. nom. Stewart v. Abend*, 495  
 16 U.S. 207 (1990); Lemley & Volokh, *Freedom of Speech and Injunctions in*  
 17 *Intellectual Property Cases*, 48 Duke L.J. 147, 192 (1998) (“Copyright law is  
 18 aimed primarily at ensuring that authors are economically rewarded so that they and  
 19 others will continue to create new works of authorship—damages can generally  
 20 reward authors relatively adequately and are often not terribly hard to estimate.”).

21 **Second**, even if the Film has affected Plaintiff’s career prospects, that harm is  
 22 not irreparable as a matter of law. *See, e.g., Sampson v. Murray*, 415 U.S. 61, 90  
 23 (1974) (lost income and damaged reputation do not constitute irreparable injury);  
 24 *DeNovellis v. Shalala*, 135 F.3d 58, 64 (1st Cir. 1998) (temporary loss of income  
 25 does not usually constitute irreparable injury); *Shegog v. Bd. of Ed. of City of*

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26  
 27 <sup>9</sup> Plaintiff has not shown that damages would be difficult to calculate or award in this case.  
 28 Indeed, she expressly seeks damages under the Copyright Act, including “advertising revenues resulting  
 from the placement of embedded advertisements in the Film” (FAC ¶ 48), and statutory damages (*id.* ¶  
 49).

1 *Chicago*, 194 F.3d 836, 839 (7th Cir. 1999) (temporary deprivation of employment,  
2 even combined with financial distress and difficulty finding new job, is not an  
3 irreparable injury).<sup>10</sup>

4 **Third**, the insults and threatening statements Plaintiff identifies, while unfair  
5 and upsetting, do not justify injunctive relief. According to Plaintiff, several  
6 individuals have made statements that could be construed as wishing harm against  
7 her and/or her family—mostly on Plaintiff’s Facebook profile. (*See Ex Parte App.*  
8 at 10; Decl. of Cindy Lee Garcia, Exh. B.) In addition, according to Plaintiff, an  
9 Egyptian cleric has encouraged his followers to harm Plaintiff and all those who  
10 worked on the Film. (*See Ex Parte App.* at 8.)

11 This is not a showing of likely, imminent, and severe harm. For one thing,  
12 past injuries alone do not justify prospective injunctive relief. *See, e.g., City of Los*  
13 *Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Plaintiff asserts that the “threats” she  
14 identifies are “credible.” (*Ex Parte App.* at 10.) But merely saying that does not  
15 make it so. Plaintiff—who freely disclosed her hometown of Bakersfield when she  
16 was first interviewed on television—points to no facts showing that she is in actual  
17 danger because the Film is posted on YouTube. Plaintiff continues to travel around  
18 the country appearing on national television shows.<sup>11</sup> It appears that Plaintiff has  
19 successfully explained her version of the story and engaged in productive  
20 conversations with many of the people who were at first angry with her. The  
21 threats appear to be the result of her alleged participation in the Film, and not the  
22 Film’s availability on YouTube, and removal of the Film would do nothing to  
23 change the fact that she indeed participated in the Film. (*See Garcia Decl., Exh. B*  
24 at 19-21, 24-25, 30-36 (ECF pagination).) Plaintiff’s fear of harm is wholly  
25

26 <sup>10</sup> Although plaintiff identifies harm to her career as one of the irreparable harms she will suffer  
27 absent an injunction, she has offered no evidence that the Film has reduced or will reduce her career  
28 prospects. *See Perfect 10*, 653 F.3d at 981 (plaintiff failed to establish irreparable harm in part because it  
failed to identify a single customer it lost as a result of defendant’s conduct).

<sup>11</sup> A sampling of plaintiff’s television appearances are identified in footnote 1.

1 speculative, and “[s]peculative injury does not constitute irreparable injury.”  
2 *Goldie’s Bookstore, Inc. v. Sup. Ct.*, 739 F.2d 466, 472 (9th Cir. 1984).

3 Lastly, and perhaps most importantly, Plaintiff offers no evidence that an  
4 injunction would prevent *future* insults and threats. A takedown order against the  
5 YouTube Defendants would not end all distribution of the Film or erase Plaintiff’s  
6 television interviews discussing her participation in the Film, which are widely  
7 available. It also would not dissolve the alleged fatwa, prevent people from  
8 contacting her on Facebook, or change people’s views about the Film.

9 **3. Plaintiff’s inexcusable delay undermines her claims of**  
10 **irreparable harm.**

11 Courts often reject claims of irreparable harm where “the plaintiff has  
12 delayed either in bringing suit or in moving for preliminary injunctive relief.”  
13 *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995); *see also*  
14 *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) (10-week delay  
15 undercut claim of irreparable harm). A plaintiff’s “long delay before seeking a  
16 preliminary injunction implies a lack of urgency and irreparable harm.” *Oakland*  
17 *Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985).

18 Plaintiff unreasonably delayed in seeking injunctive relief against the  
19 YouTube Defendants. According to plaintiff, the Film was available on YouTube  
20 no later than July 2, 2012—almost three months before plaintiff first sought  
21 preliminary relief in Superior Court. (*See* FAC ¶ 1.) Plaintiff admits she became  
22 aware of the Film’s posting by Youssef in July, and viewed it at that point on  
23 YouTube, but she did nothing whatsoever to pursue her claims of copyright  
24 infringement until the end of September. (*See* Ex Parte App. at 6.) Even after  
25 filing this action, Plaintiff waited another three weeks before filing this motion.

26 Plaintiff offers no explanation for her excessive delay, nor can she, because  
27 none of her claims required investigation. On this basis alone, this Court should  
28

1 conclude that Plaintiff's allegations of irreparable harm under the Copyright Act are  
2 defeated by her unreasonable delay in seeking relief.

3 **B. Plaintiff Cannot Show a Likelihood of Success On the Merits of**  
4 **Her Copyright Infringement Claims Against the YouTube**  
5 **Defendants.**

6 Copyright protection is afforded to "original works of authorship fixed in any  
7 tangible medium of expression." 17 U.S.C. § 102. To prevail on a claim for  
8 copyright infringement, a plaintiff must prove that: (1) the plaintiff owns the  
9 copyrighted material; and (2) that the defendant violated the plaintiff's *exclusive*  
10 *rights* under the Copyright Act. *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir.  
11 2004). Plaintiff cannot establish either element.

12 **1. Plaintiff does not own a copyright in the Film.**

13 A copyright "vests initially in the author or authors of the work." 17 U.S.C.  
14 § 201(a). Although the Copyright Act does not define the term "author," the  
15 Supreme Court has stated that the term generally refers to "the party who actually  
16 creates the work, that is, the person who translates an idea into a fixed, tangible  
17 expression entitled to copyright protection." *Cnty. for Creative Non-Violence v.*  
18 *Reid*, 490 U.S. 730, 737 (1989). The Ninth Circuit has stated that an "author" of a  
19 copyrighted work is best defined as "the person to whom the work owes its origin  
20 and who superintended the whole work, the 'mastermind.'" *Aalmuhammed v. Lee*,  
21 202 F.3d 1227, 1233 (9th Cir. 2000) (quoting *Burrow-Giles Lithographic Co. v.*  
22 *Sarony*, 111 U.S. 53, 58 (1884)). For a movie, this definition "would generally  
23 limit authorship to someone at the top of the screen credits, sometimes the  
24 producer, sometimes the director, possibly the star, or the screenwriter—*someone*  
25 *who has artistic control.*" *Id.* (emphasis added).

26 Plaintiff's brief appearance in the Film is not enough to establish authorship.  
27 Plaintiff appeared in the Film for no more than five seconds, and most of the lines  
28 attributed to Plaintiff's character were "words that Plaintiff *never spoke.*" (FAC ¶ 4  
(original emphasis).) In fact, she thought that she was appearing in a "historical

1 Arabian Desert adventure film.” (FAC ¶¶ 27, 29.) Plaintiff merely responded to a  
 2 casting call and read lines that were given to her by Youssef, which were later  
 3 overdubbed. (FAC ¶¶ 27-28.)

4 Plaintiff did not produce the Film, direct the Film, or write the script. (FAC  
 5 ¶ 5.) She was not even a leading character. Plaintiff’s contribution is a far cry from  
 6 the “artistic control” necessary to support a finding of authorship.<sup>12</sup>

7 **2. Plaintiff cannot hold a copyright in only those portions**  
 8 **of the Film containing her dramatic performance.**

9 Because Plaintiff cannot both publicly disavow the Film and claim to be its  
 10 author, she attempts to isolate her acting performance from the rest of the Film by  
 11 claiming to have a copyright “in the dramatic performance she delivered and which  
 12 was fixed in tangible form when it was filmed during the production of ‘Desert  
 13 Warrior.’” (FAC ¶ 10.) The entirety of the Film is one work for copyright  
 14 purposes, however.<sup>13</sup> The individual images that collectively comprise the Film fall  
 15 within the scope of the copyright held by the Film’s author. *See* 17 U.S.C. § 106  
 16 (recognizing a copyright owner’s exclusive right to publicly display “the individual  
 17 images of a motion picture”).

18 One can imagine the impenetrable thicket of conflicting rights that would  
 19 arise if each creative contributor (*i.e.*, actors, director, producer, cameraman,

20 <sup>12</sup> Plaintiff invests a great deal of ink discussing the Digital Millennium Copyright Act (“DMCA”) and her takedown notices, and even burdens the record with a declaration from other litigation describing YouTube’s policy of compliance with the DMCA, which is entirely irrelevant to this case. (*See* Defendants’ Objections to Evidence at p.2.) The DMCA “safe harbor” is an affirmative defense, which shields a service provider from monetary damages if it complies with the Act’s safe harbor provisions. 17 U.S.C. §512(c). The DMCA is irrelevant to plaintiff’s request for a preliminary injunction.

21 <sup>13</sup> The YouTube Defendants have found no authority supporting plaintiff’s proposition that a  
 22 motion picture can be parsed into multiple works under the Copyright Act based on claims by actors that  
 23 they were not employees and retained copyrights in their performances. Creative contributors’ lack of  
 24 rights under copyright law allowed movie distributors to “colorize” black-and-white films in the 1980s,  
 25 even over the objection of famous directors and their heirs. *See* Kohs, *Paint Your Wagon—Please!:*  
 26 *Colorization, Copyright, and the Search for Moral Rights*, 40 Fed. Comm. L.J. 1 (1988), 9-10 (“copyright  
 27 vests in the ‘employer’ and not the individual creative participants in the film making process”), 18-19  
 28 (“In the context of film making, copyright in this country will not normally vest in the director, or any  
 other creative participant for that matter.”); Cook, *Colorization of Black and White Films: An Example of  
 the Lack of Substantive Protection for Art in the United States*, 63 Notre Dame L. Rev. 309 (1988), 325  
 (accord).

1 cinematographer, costume designer, make-up artist, etc.) could hold an independent  
2 and exclusive copyright interest in his or her contribution to a movie. The  
3 copyright held by the film's author would be rendered meaningless, as he or she  
4 could not possibly exercise the exclusive rights afforded under the Copyright Act  
5 without trampling on the rights of other contributors. *See Booth v. Colgate-*  
6 *Palmolive Co.*, 362 F. Supp. 343, 347 (S.D.N.Y. 1973) (“[T]he recognition of a  
7 performer's right in a copyrighted work would impose undue restraints on the  
8 potential market of the copyright proprietor since a prospective licensee would have  
9 to gain permission from each of possibly many performers who might have rights  
10 in the underlying work before he could safely use it.”). Accordingly, contribution  
11 to a film alone does not establish a copyright unless the requirements for  
12 “authorship” are met. *See Aalmuhammed*, 202 F.3d at 1233-35 (finding that  
13 significant creative contributions to a film failed to rise to the level of  
14 “authorship”).

15 Plaintiff relies on *Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911 (1996), to argue  
16 that an actor's performance in a film is independently copyrightable. But *Fleet* is a  
17 preemption case, not an infringement case. In *Fleet*, the court considered whether  
18 actors' claims for misappropriation of name or likeness were preempted by the  
19 Copyright Act. The court concluded that the actors' claims were preempted  
20 because the images of the actors' at issue in the case were taken directly from a  
21 copyrighted motion picture and therefore fell within the scope of copyright  
22 protection. *Id.* at 1916; *see also Laws v. Sony Music Entertainment, Inc.*, 448 F.3d  
23 1134 (2006) (affirming summary judgment against singer, finding that her voice  
24 misappropriation claim was preempted by the Copyright Act). The Court did not  
25 analyze, as it must here, whether the actors could state a claim for copyright  
26 infringement because the actors did not claim a copyright interest in the film or in  
27 their individual performances. *Fleet*, 50 Cal. App. 4th at 1916. Merely, finding  
28 something within the scope of copyright law is not the same as finding it subject to

1 copyright protection. *Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053 (C.D.  
 2 Cal. 2000) (noting that “scope and protection are not synonymous...the shadow  
 3 actually cast by the [Copyright] Act’s preemption is notably broader than the wing  
 4 of its protection.”) (quoting *U.S. ex rel. v. Board of Trustees of Univ. of Ala.*, 104  
 5 F.3d 1453, 1463 (4th Cir. 1997).

6 Plaintiff also cites *Jules Jordan Video v. 144942 Canada*, 617 F.3d 1146 (9th  
 7 Cir. 2010), for the proposition that a performer retains the copyright in her  
 8 performance unless she transfers or assigns the right to another. (Ex Parte App. at  
 9 15.) But in *Jules Jordan*, the actor also produced, directed, wrote the script, and  
 10 filmed the movies in which he claimed a copyright interest. *Id.* at 1150. He  
 11 operated a “one-man shop.” *Id.* Here, the Film was produced, directed, and  
 12 controlled in all other respects by Youssef, not Plaintiff, as Plaintiff herself  
 13 expressly concedes.

14 **3. Plaintiff identifies Youssef as the Film’s exclusive copyright**  
 15 **owner, giving him the right to post the Film on YouTube.**

16 Plaintiff’s own allegations establish that Youssef controlled the making of  
 17 the Film. Plaintiff alleges that Youssef was “the writer and producer of the Film,”  
 18 “managed all aspects of production,” and “was in charge of all aspects of the  
 19 production.” (FAC ¶ 5.) By plaintiff’s own admission, Youssef was the Film’s  
 20 “mastermind”—and, necessarily then, the Film’s author. As the author of the Film,  
 21 Youssef is also the copyright owner. 17 U.S.C. § 201(a) (“Copyright in a work  
 22 protected under this title vests initially in the author or authors of the work.”).

23 It is a basic tenant of copyright law that one cannot infringe his own  
 24 copyright. *See Richmond v. Weiner*, 353 F.2d 41 (9th Cir. 1965). As the copyright  
 25 owner, Youssef has the *exclusive* right to reproduce the copyrighted work, prepare  
 26 derivative works, distribute copies of the work to the public, and publicly display  
 27 the entire work. 17 U.S.C. § 106.  
 28

1 Plaintiff admits that the Film was posted on the YouTube website by Youssef  
2 himself. (FAC ¶¶ 1, 29, 30.) Because Youssef was exercising his lawful rights  
3 under the Copyright Act when he displayed the Film, such activity was authorized  
4 by the copyright owner, and the YouTube Defendants cannot be liable to Plaintiff  
5 for copyright infringement for failure to remove the Film at Plaintiff's demand.

6 **4. Plaintiff's dramatic performance was a "work for hire."**

7 In general, copyright in a work "vests initially in the author . . . of the work."  
8 17 U.S.C. § 201(a). But "[i]n the case of a work made for hire, *the employer . . . for*  
9 *whom the work was prepared is considered the author . . .*, and, unless the parties  
10 have expressly agreed otherwise in a written instrument signed by them, owns all of  
11 the rights comprised in the copyright." 17 U.S.C. § 201(b) (emphasis added). The  
12 Copyright Act defines a "work made for hire" to include: "(1) a work prepared by  
13 an employee within the scope of his or her employment; or (2) a work specially  
14 ordered or commissioned for use as . . . part of a motion picture or other audiovisual  
15 work . . . if the parties expressly agree in a written instrument signed by them that  
16 the work shall be considered a work made for hire." 17 U.S.C. § 101.

17 Plaintiff alleges that she might have signed a contract for Youssef, but she  
18 claims to be "unable to locate a copy of any such contract." (FAC ¶ 6.) She does,  
19 however, "recall that the contract did not call for her to transfer any rights,  
20 including any copyrights, and that it was not a 'work for hire' agreement." (*Id.*;  
21 Garcia Decl. ¶ 8.)<sup>14</sup>

22 Even if Plaintiff's contract does not include the typical "work for hire"  
23 language, which is highly doubtful,<sup>15</sup> Plaintiff was clearly an "employee" under the

24  
25 <sup>14</sup> Plaintiff has also offered declarations from other actors in the Film who claim that they did not  
26 sign releases or work-for-hire agreements. (Declarations of Gaylord Flynn ¶ 4 and Dan Sutter ¶ 4.) Such  
27 declarations are irrelevant to what was included in *plaintiff's* contract.

28 <sup>15</sup> Most contracts between actors and filmmakers contain "work for hire" language. *See* Nimmer,  
§ 23.06[A] ("All services rendered for the production company will typically be rendered on a 'work for  
hire' basis, so that the production company is clearly the owner of the results and proceeds of those  
services, including the copyright."). It is difficult to understand how an individual who claims to be a  
professional actress would work on a film without the kind of agreement that is part-and-parcel of the



1 law and her performance was squarely within the scope of her employment.

2 Whether an artist is an “employee” for purposes of the “work for hire” doctrine is  
3 determined by common law principals of agency. *Community for Creative Non-*  
4 *Violence*, 490 U.S. at 751. The Supreme Court has identified a number of factors to  
5 consider:

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

17 *Id.* at 751.

18 One of the most critical factors is the level of control that the employer has  
19 over the artist’s work. *Id.* (“we consider the hiring party’s right to control the  
20 manner and means by which the product is accomplished”); *see also Antelope*  
21 *Valley Press v. Poizner*, 162 Cal. App. 4th 839, 852 (2008) (“[T]he right of the  
22 person to whom services are rendered to control the manner and means of  
23 accomplishing the desired result of those services is a significant factor for  
24 determining whether the person performing the work is an employee or an  
25 independent contractor.”).

26 The FAC establishes that Plaintiff was Youssef’s employee. Plaintiff admits  
27 that she was hired merely as an actress for a role in the Film. She responded to a  
28 casting call and ultimately “was cast in the part” that she played. (FAC ¶¶ 4, 27.)  
She was given portions of a script to read and paid \$500 for her work. (FAC ¶ 28;  
Garcia Decl. ¶ 6.) Plaintiff further alleges that Youssef was the “writer and

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industry. On the other hand, it is also difficult to see how, if the individual is *not* a professional, and not  
an attorney, that individual would be able to competently describe the legal effect or limitations of a  
contract. The Court need not accept plaintiff’s self-serving recollection as evidence of the contract’s  
terms, especially when it runs contrary to common practice in the movie industry.

1 producer of the Film” and “*managed all aspects of production.*” (FAC ¶ 5  
2 (emphasis added).) She was hired by Youssef to “deliver an acting performance”  
3 (FAC ¶ 8, 28), and then Youssef or others took that performance and later dubbed  
4 over her words (*id.* ¶¶ 8, 29). Plaintiff was an employee, under the law, relating to  
5 her work on the Film.

6 Once it is determined that the work was created by an employee within the  
7 scope of her employment, there is a presumption that the employer owns a  
8 copyright in the work. *Twentieth Century Fox Film Corp. v. Entm’t Distrib.*, 429  
9 F.3d 869, 880 (9th Cir.2005) (recognizing presumption); *Lin-Brook Builders*  
10 *Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965) (when one hires another to  
11 make a work “of an artistic nature . . . the presumption arises that the mutual intent  
12 of the parties is that the title to the copyright shall be the person at whose instance  
13 and expense the work is done.”). An employee may only rebut the presumption by  
14 presenting evidence of an agreement that the employee would hold a copyright.  
15 *Nimmer*, § 5.03D; *Trenton v. Infinity Broadcasting Corp.*, 865 F. Supp. 1416, 1426  
16 (C.D. Cal. 1994). Plaintiff has failed to present any evidence of such an agreement.

17 **5. Plaintiff is not even a joint author.**

18 Although an author of a work is generally entitled to exclusive ownership of  
19 his or her creation, there is an exception when multiple authors contribute to a  
20 “joint work.” In the case of a “joint work,” each contributing author shares a non-  
21 exclusive right in his or her creation with the other contributing authors. 17 U.S.C.  
22 § 201(a). Each joint author has free reign to exploit the work without the consent of  
23 the other co-authors. *Richmond v. Weiner*, 353 F.2d 41, 46 (9th Cir. 1965); *Oddo v.*  
24 *Ries*, 743 F.2d 630, 632-33 (9th Cir. 1984) (“A co-owner of a copyright cannot be  
25 liable to another co-owner for infringement of the copyright. Rather, each co-  
26 owner has an independent right to use or license the use of the copyright.”).

27 A “joint work” is defined as “a work prepared by two or more authors with  
28 the intention that their contributions be merged into inseparable or interdependent

1 parts of a unitary whole.” 17 U.S.C. § 101; *see also Richlin v. Metro-Goldyn-*  
 2 *Mayer Pictures, Inc.*, 531 F.3d 962, 968 (9th Cir. 2008), *cert. denied*, 555 U.S.  
 3 1137 (2009). The Ninth Circuit has held that for a work to qualify as a “joint  
 4 work,” there must be: “(1) a copyrightable work, (2) two or more ‘authors,’ and (3)  
 5 the authors must intend their contributions be merged into inseparable or  
 6 interdependent parts of a unitary whole.” *Almuhammed*, 202 F.3d at 1231. A “joint  
 7 work” also requires “each author to make an independently copyrightable  
 8 contribution.” *Id.* (quoting *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 521 (9th Cir.  
 9 1990)).

10 Plaintiff admits she cannot be a joint author in the Film because “Plaintiff  
 11 never had a meeting of the minds with Defendant [Youssef]” that they would be  
 12 joint authors in the Film. (Ex Parte App. at 17-18.) Plaintiff also is not a “joint  
 13 author” because she is not an author at all. *See Almuhammed*, 202 F.3d at 1233-35  
 14 (finding that person who consulted on a film and even wrote portions of the script  
 15 was not a “joint author”). According to Plaintiff, it was Youssef who “managed . . .  
 16 [and] was in charge of all aspects of the production,” and therefore authored the  
 17 Film. (FAC ¶ 5.) *See id.* at 1234 (“an author ‘superintend[s]’ the work . . . ‘by  
 18 putting the persons in position, and arranging the place where people are to  
 19 be . . .’”).

20 **C. Plaintiff Cannot Show that the Equities Tip In Her Favor.**

21 To qualify for injunctive relief, a plaintiff “must establish that ‘the balance of  
 22 equities tips in [her] favor.’” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th  
 23 Cir. 2009) (quoting *Winter*, 555 U.S. at 20). This Court must therefore “balance the  
 24 interests of all parties and weigh the damage to each.” *L.A. Mem’l Coliseum*  
 25 *Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980). It must  
 26 also consider whether plaintiff’s requested relief would adversely affect the rights  
 27 of nonparties or the public at large. *See Winter*, 555 U.S. at 26 (“In this case, the  
 28 District Court and the Ninth Circuit significantly understated the burden the

1 preliminary injunction would impose on the Navy's ability to conduct realistic  
2 training exercises, and the injunction's consequent adverse impact on the public  
3 interest in national defense.").

4 Granting the relief she requests would violate the free speech rights of  
5 Youssef and others (including those who have used the Film as a basis for  
6 commentary) and burden the public's interest in free expression. In contrast,  
7 Plaintiff's alleged injuries would not be addressed by enjoining the YouTube  
8 Defendants because an injunction would do nothing to prevent such injuries, which  
9 are are purely commercial and entirely speculative. The balance of equities does  
10 not tip in Plaintiff's favor.

11 **D. Plaintiff's Requested Injunction Would be a Prior Restraint, and**  
12 **Would Not Serve the Public Interest.**

13 Nearly century ago, Justice Brandeis wrote, in a concurrence  
14 in *Whitney v. California*, 274 U.S. 357 (1927): "If there be time to expose through  
15 discussion the falsehood and fallacies, to avert the evil by the processes of  
16 education, the remedy to be applied is more speech, not enforced silence. Only an  
17 emergency can justify repression." *Id.* at 377.

18 The injunction Plaintiff seeks is an unconstitutional prior restraint. *See*  
19 *Alexander v. United States*, 509 U.S. 544, 550 (1993) ("Temporary restraining  
20 orders and permanent injunctions—*i.e.*, court orders that actually forbid speech  
21 activities—are classic examples of prior restraints."); *Evans v. Evans*, 162 Cal.  
22 App. 4th 1157, 1166 (2008) (prior restraints are "highly disfavored and  
23 presumptively violate" the First Amendment). A prior restraint is "the most serious  
24 and the least tolerable infringement on First Amendment rights." *Nebraska Press*  
25 *Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

26 To "establish a valid prior restraint under the federal Constitution, a  
27 proponent has a heavy burden to show the countervailing interest is compelling, the  
28 prior restraint is necessary and would be effective in promoting this interest, and

1 less extreme measures are unavailable.” *Evans*, 162 Cal. App. 4th at 1166 (citing  
 2 *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 562-568 (1976)). Even concerns  
 3 about national security have been deemed insufficiently compelling to justify a  
 4 prior restraint. *See New York Times Co. v. Sullivan*, 403 U.S. 713, 714 (1971) (per  
 5 curiam) (refusing to enjoin publication of the Pentagon Papers). Plaintiff has not  
 6 shown and cannot show that this is one of the rare cases justifying a prior restraint.

7 **First**, Plaintiff has not identified “compelling interests” justifying a prior  
 8 restraint; at best, she has identified highly personal interests in very short segments  
 9 of the Film that are commercial, speculative, or both. The personal harms that  
 10 Plaintiff contends justify a takedown order are unrelated to the purpose and  
 11 remedies of the Copyright Act, which is the basis for her claims.

12 **Second**, it is beyond dispute that a prior restraint would not “be effective in  
 13 promoting” Plaintiff’s interests because enjoining the YouTube Defendants would  
 14 not actually prevent any of the future harms plaintiff alleges (*i.e.* harm to career  
 15 prospects (FAC ¶¶ 38, 76, 86) and emotional distress arising from alleged threats  
 16 and insults (FAC ¶¶ 32-35, 81, 93)), especially at this late date.

17 **Third**, and perhaps most importantly, by seeking to remove the Film from  
 18 YouTube, Plaintiff seeks to stifle speech at the core of the First Amendment—  
 19 speech about religion, politics, and the value of free speech itself. (*See, e.g.*, FAC ¶  
 20 3 (alleging that the Film has inspired protests in nearly 50 countries and drawn  
 21 comment from the President of the United States and the Secretary of State);  
 22 Motion at 22 (stating that there have been 30 million viewings of the Film’s English  
 23 version); *see also* Editorial, *The United States and the Muslim World*, N.Y. Times  
 24 at A26 (Sept. 19, 2012) (discussing the Film, its effect on the Muslim world, and  
 25 effects on U.S. foreign policy). In fact, the Film has become a point of discussion  
 26 in the current campaign for president of the United States.<sup>16</sup>

27  
 28 <sup>16</sup> *See The Mystery of Benghazi*, available at  
<http://www.nytimes.com/2012/10/14/opinion/sunday/douthat-the-mystery-of->

1 Courts are rightly skeptical when a plaintiff invokes tenuous copyright claims  
 2 to stifle public debate. *See Religious Tech. Ctr. v. F.A.C.T.Net*, 901 F. Supp. 1519,  
 3 1527 (D. Colo. 1995) (“Public interest lies with the free exchange of dialogue on  
 4 matters of public concern. The injunction sought would silence the Defendants as  
 5 participants in an ongoing debate involving matters of significant public  
 6 controversy. Relief of this kind does not serve the public interest.”).<sup>17</sup>

7 Thus, rather than serving the public interest, enjoining the YouTube  
 8 Defendants would only harm the public’s interest in free speech and the free  
 9 exchange of ideas about matters of public concern. *See Salinger*, 607 F.3d at 82  
 10 (“The public’s interest in free expression . . . is significant and is distinct from the  
 11 parties’ speech interests.”). Where an injunction “will adversely affect a public  
 12 interest . . . the court may in the public interest withhold relief until a final  
 13 determination of the rights of the parties, though the postponement may be  
 14 burdensome to the plaintiff.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-  
 15 13 (1982). That is exactly what should happen here.

16 Plaintiff’s alleged interests in the Film simply do not justify a prior restraint  
 17 of core First Amendment speech. *See id.* at 312 (explaining that courts “should pay

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18 [benghazi.html?ref=rossdouthat&\\_r=0](http://www.washingtonpost.com/opinions/benghazi-attack-becomes-political-ammunition/2012/10/19/e1ad82ae-1a2d-11e2-bd10-5ff056538b7c_story.html?wprss=rss_homepage); CIA Documents Supported Susan Rice’s Description of Benghazi  
 19 Attacks, available at [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)  
 20 [ammunition/2012/10/19/e1ad82ae-1a2d-11e2-bd10-5ff056538b7c\\_story.html?wprss=rss\\_homepage](http://www.washingtonpost.com/opinions/benghazi-attack-becomes-political-ammunition/2012/10/19/e1ad82ae-1a2d-11e2-bd10-5ff056538b7c_story.html?wprss=rss_homepage);  
 21 [Bneghazi and Arab Spring Rear Up in U.S. Campaign](http://www.nytimes.com/2012/10/22/us/politics/benghazi-and-arab-spring-rear-up-in-us-campaign.html?hp&_r=0), available at  
 22 [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)  
 23 [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).

24 <sup>17</sup> Plaintiff contends that the First Amendment simply falls away because “by now it is clear that  
 25 Defendants’ actions can be compared to falsely shouting ‘Fire!’ in a theater, creating a ‘clear and present  
 26 danger’ outside the protections of the First Amendment.” (Ex Parte App. at 23 (citing *Schenk v. United*  
 27 *States*, 249 U.S. 47, 52 (1919)).) But *Schenk* did not involve a prior restraint. *Schenk* simply held that  
 28 speech may be punished if, after a trial on the merits, the speech is found to be illegal and not protected by  
 the First Amendment. *See Schenk*, 249 U.S. at 49, 52-53 (upholding conviction, after trial, for violation of  
 a federal statute). *Schenk* does not stand for the proposition that potentially controversial or offensive  
 speech should be cut off at the source before it is determined to be unlawful. *See, e.g., Balboa Island*  
*Village Inn, Inc. v. Lemen*, 40 Cal. 4th 1141, 1155-1156 (2007) (“[W]e hold that, following a trial at which  
 it is determined that the defendant defamed the plaintiff, the court may issue an injunction . . . prohibiting  
 the defendant from repeating the statements determined to be defamatory. . . . Such an injunction, issued  
 only following a determination at trial that the enjoined statements are defamatory, does not constitute a  
 prohibited prior restraint of expression.”) (emphasis added):

1 particular regard for the public consequences in employing the extraordinary  
2 remedy of injunction.”); *see also Religious Tech. Ctr. v. Netcom On-Line*  
3 *Commc’ns Svcs., Inc.*, 907 F. Supp 1361, 1383 (N.D. Cal. 1995) (rejecting request  
4 for preliminary injunctive relief against providers of an Internet bulletin board in a  
5 copyright case, in part because service providers “play[ed] a vital role in the speech  
6 of their users”).

7 **V. CONCLUSION**

8 For the foregoing reasons, Plaintiff’s Motion for a Preliminary Injunction and  
9 Order of Impoundment should be denied in its entirety.

10  
11 DATED: October 29, 2012

**PERKINS COIE LLP**

12  
13 By: /s/ Timothy L. Alger  
Timothy L. Alger

14 Attorneys for Defendant  
15 Google Inc. and YouTube, LLC  
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