

1 M. Cris Armenta (SBN 177403)
THE ARMENTA LAW FIRM APC
2 11900 W. Olympic Boulevard, Suite 730
Los Angeles, CA 90064
3 Tel: (310) 826-2826 x 108
Facsimile: (310) 826-5456
4 Email: cris@crisarmenta.com

5 Credence E. Sol (SBN 219784)
La Garenne
6 86300 Chauvigny
France
7 Telephone: 06 74 90 22 08
Email: credence.sol@sol-law.com

8 Attorneys for Plaintiff
9 Cindy Lee Garcia

10 UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12 CINDY LEE GARCIA, an
13 individual,

14 Plaintiff,

15 vs.

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

25 Defendants.
26

Case No. CV12-8315 MWF (VBKx)

(1) **EX PARTE APPLICATION FOR A
TEMPORARY RESTRAINING
ORDER AND AN ORDER TO
SHOW CAUSE RE PRELIMINARY
INJUNCTION, AND ORDER OF
IMPOUNDMENT;**

(2) **DECLARATIONS OF CINDY
LEE GARCIA, DAN SUTTER,
GAYLORD FLYNN, KHALED
ABOU EL FADL; ZACARAH
LEVINE; DAVE HARDY, AND
M. CRIS ARMENTA;**

(3) **REQUEST FOR JUDICIAL
NOTICE;**

(4) **[PROPOSED] ORDER (lodged
separately)**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PLEASE TAKE NOTICE that Plaintiff Cindy Lee Garcia brings this Ex Parte Application for a Temporary Restraining Order and an Order to Show Cause Re Issuance of Preliminary Injunction, and an Order of Impoundment. This Application is based on the papers and pleadings in this action, the matters of which this Court may take judicial notice, the declarations submitted in support.

This Application follows a conference pursuant to Local Rule 11-6 between counsel for Plaintiff and counsel for Defendants YouTube and Google. Although Plaintiff has communicated with Defendant Nakoula's criminal defense attorney and advised of this Application and its contents, that attorney does not formally represent Defendant Nakoula in this civil matter. Defendant Nakoula is currently detained at the Bureau of Prisons' Los Angeles Metropolitan Detention Center and these papers are being served, along with the Summons and First Amended Complaint, through the procedures set forth by the Bureau of Prisons in conjunction with the Los Angeles County Sheriffs Department.

Dated: October 17, 2012

THE ARMENTA LAW FIRM, A.P.C.

By: 
M. Cris Armenta
Attorneys for Cindy Lee Garcia

TABLE OF CONTENTS

1

2 TABLE OF CONTENTS..... i

3 TABLE OF AUTHORITIES iii

4 MEMORANDUM OF POINTS AND AUTHORITIES 1

5 I. STATEMENT OF THE ISSUES..... 1

6 II. PRELIMINARY STATEMENT..... 1

7 III. STATEMENT OF FACTS IN SUPPORT OF THE APPLICATION 5

8 A. Plaintiff Agreed to Provide a Dramatic Performance But Did Not

9 Agree to Relinquish her Copyright in that Performance.....5

10 B. Nakoula Used Plaintiff As a “Puppet” for His Racist Views, and

11 YouTube Published a Doctored Version of Her Performance.....6

12 C. After Defendants Published an Arabic Translation of the Film,

13 It Went Viral and Provoked a Wave of Global Violence

14 And a *Fatwa* on Plaintiff’s Head, to Which Defendants Are

15 Completely Indifferent.....7

16 D. Defendant Nakoula Admitted That He Procured Plaintiff’s

17 Dramatic Performance Through Fraud and

18 Deception.....8

19 E. In Addition to Becoming the Target of a *Fatwa*, Ms. Garcia Has

20 Received Numerous Death Threats,9

21 F. Plaintiff Has Begged YouTube and Google to Save Her Life and

22 Take Down the Film, But they Prefer to Continue to Profit From

23 The Millions of Pageviews That the Film Attracts.....11

24 G. YouTube and Google Have Specific Knowledge of the Infringing

25 Material and Are in Receipt of Direct Financial Benefits

26 Attributed to the Rampant Infringement.....12

27 H. The Only “Defense” That Defendants Have Offered So Far is Their

28 Deliberately Incorrect Assumption That Plaintiff Garcia’s

Copyrighted Performance is a “Joint Work.”.....13

IV. STANDARD FOR ISSUANCE OF RESTRAINING ORDER AND

ORDER TO SHOWCAUSE RE PRELIMINARY INJUNCTION IN

COPYRIGHT CASES 14

V. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS..... 14

A. Plaintiff Clearly Owns the Rights to Her Dramatic Performance..... 14

B. Plaintiff Never Assigned Her Copyright Interests 16

1 C. Defendant Nakoula and Plaintiff Garcia Never Agreed, in Writing
2 Or Otherwise, to Create a “Joint Work of Authorship,” as Google
3 And YouTube Apparently Claim 17
4 D. YouTube has Stepped Far Outside the DMCA’s Safe Harbor
5 Harbor Provision, Subjecting it To Liability for Copyright
6 Infringement 19
7 E. Even if Defendant Nakoula Had a Joint Copyright Interest with
8 Plaintiff Garcia, All of the Third Parties Who Have Copied and
9 Re-Posted the Film on YouTube Have No Right to Copy and Re-
10 Post the Film, and Are Infringing on Plaintiff Garcia’s Copyright 20
11
12 VI. PLAINTIFF GARCIA WILL SUFFER IRREPARABLE HARM IF
13 THE TRO AND INJUNCTION ARE NOT GRANTED 21
14
15 VII. THE BALANCE OF EQUITIES IN PLAINTIFF GARCIA’S FAVOR .. 22
16
17 VIII. AN INJUNCTION IS DECIDEDLY IN THE PUBLIC INTEREST 23
18
19 IX. THE RELIEF REQUESTED 24
20
21 X. CONCLUSION 25
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Federal Statutes

17 U.S.C. § 10118

17 U.S.C. § 102(a).....14

17 U.S.C. § 107.....19

17 U.S.C. § 201 (b)16

17 U.S.C. § 204 (a).....16

17 U.S.C. § 411(a).....1

17 U.S.C. § 502(a).....14

17 U.S.C. § 512(c)(1)(a).14

18 U.S.C. § 2.....24

Cases

A&M Records v. Napster, Inc.,
239 F.3d 1004 (9th Cir. 2001); 19

Aalmuhammed v. Lee,
202 F.2d 1227, 1233-1234 (9th Cir. 2000) 18

American Geophysical Union v. Texaco, Inc.,
60 F.3d 913, 922 (2d Cir. 1994) 19

Beardslee v. Woodford,
395 F.3d 1064, 1067 (9th Cir. 2005) 14,23

Brown v. Twentieth Century Fox Film Corp.,
799 F. Supp. 166 (D.D.C. 1992) 16

Caribbean Marine Services Co., Inc. v. Baldrige,
844 F.2d 668, 674 (9th Cir. 1988)..... 21

Childress v. Taylor,
945 F.2d 500 (2nd Cir. 1991) 19

Columbia Pictures, Inc. v. Bunnell,
245 F.R.D. 443 (C.D. Cal. 2007) 23

Cosmetic Ideas, Inc. v. IAC/Interactive Corp., et al,
606 F.3d 612 (9th Cir. 2010) 1

1 Easter Seal Society v. Playboy Enters.,
 2 815 F. 2d 323, 329 (5th Cir. 1987) 17
 3 Effects Associates, Inc. v. Cohen, et al.,
 4 908 F.2d 555 (9th Cir. 1990), 17
 5 Ellison v. Robertson,
 6 357 F.3d 1072, 1076 (9th Cir. 2004). 19
 7 Export Establishment etc. v. Columbia Broadcasting Service,
 8 Inc.,
 9 503 F. Supp. 1137, 1147 (S.D.N.Y. 1980)..... 19
 10 Fleet v. CBS, Inc.,
 11 50 Cal. App. 4th 1911, 1919-1920 (1996) 14
 12 Granny Goose Foods, Inc. v. Brotherhood of Teamsters
 13 & Auto Truck Drivers,
 14 415 U.S. 423, 429, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974). 21
 15 Harper & Row Publishers, Inc. v. Nation Enters.,
 16 471 U.S. 539, 564-65, 105 S.Ct. 2218, 85 L.Ed.2d
 17 588 (1985) 19,23
 18 Harris v. Board of Supervisors,
 19 366 F.3d 754, 766 (9th Cir. 2004) 21
 20 Jules Jordan Video v. 144942 Canada,
 21 617 F.3d 1146 (9th Cir. 2010), 15
 22 Law v. Miller,
 23 2011 U.S. Dist. LEXIS 102527 (E.D. Cal. 2011) 23
 24 Laws v. Sony Music Entm't, Inc.,
 25 448 F.3d 1134, 1137 (9th Cir. 2006), 15
 26 Lenz v. Universal Music Corp.,
 27 572 F. Supp. 2d 1150 (N.D. Cal. 2008). 19
 28 Los Angeles News Service v. Tullo,
 973 F. 2d 791, 798 (9th Cir. 1992) 19
Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.,
 571 F.3d 873, 877 (9th Cir. 2009) 14
Muller v. Walt Disney Productions,
 871 F. Supp. 678 (S.D.N.Y. 1994) 16
National Meat Ass'n v. Brown,
 599 F.3d 1093, 1097 (9th Cir. 2010)..... 14,23
Oddo v. Ries,
 743 F. 2d 630 (9th Cir 1984) 17

1 Oster v. Lightbourne,
2 2011 U.S. Dist. LEXIS 138191 (N.D. Cal. 2011) 22

3 Reinsdorf v. Skechers, U.S.A.,
4 2011 U.S. Dist. LEXIS 28293, at *9
5 (C.D. Cal. Mar. 9, 2011) 19

6 Rooney v. Columbia Pictures, Inc.,
7 538 F. Supp. 211 (S.D.N.Y. 1982) 16

8 Schenck v. United States,
9 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919) 23

10 Siegel v. Time Warner, Inc.,
11 496 F. Supp. 2d 1111, 1148 (C.D. Cal. 2007). 19

12 Sierra Forest Legacy v. Rey,
13 577 F.3d 1015, 1021 (9th Cir. 2009)..... 14

14 TMTV Corp. v Pegasus Broad. of San Juan,
15 490 F Supp. 2d 228 (D.C. Puerto Rico 2007) 15

16 Universal City Studios, Inc. v. Corley,
17 273 F.2d 429, 440 (2d Cir. 2001), 19

18 Viacom, et al. v. YouTube, et al,
19 (2nd Cir, Apr. 5, 2012), 20

20 Winter v. Natural Res. Def. Council, Inc.,
21 129 S.Ct. 365, 374, 376 (2008) 14,21,23

22 World Church of God v. Philadelphia Church of God,
23 227 F.3d 1110, 1118 (9th Cir. 2000) 19

24 Yue v. Conseco,
25 CV 11-9506 AHM, 2012 U.S. Dist. LEXIS 46565, 40-41
26 (C.D. Cal. Apr. 2, 2012) 21

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE ISSUES

Plaintiff Cindy Lee Garcia gave a dramatic performance (the “Copyrighted Performance”) in a production Defendant Nakoula B. Nakoula misrepresented as a fictional “adventure” titled *Desert Warrior*. In post-production, Defendant Nakoula dubbed Plaintiff’s lines to give the false impression that she had agreed to play a role in which she accused historical religious figure Mohammed of being a child molester. Defendant Nakoula then published the Copyrighted Performance on YouTube a 13:51 minute “trailer” (“Film”) titled *Innocence of Muslims*. Plaintiff is now the subject of a *fatwa* and has received gruesome, credible death threats. Despite begging Defendant YouTube and its parent company, Defendant Google, to remove the Film on the grounds of copyright infringement, they refuse.

The principal issue presented by this Application is whether Defendants’ actual and contributory infringement of the Copyrighted Performance,¹ which any reasonable person would know would endanger her life, warrants the issuance of a temporary restraining order and an order to show cause why a preliminary injunction should not issue requiring the Defendants to cease and desist their infringing activities and unauthorized worldwide broadcasts of the Copyrighted Performance. A related issue is whether Ms. Garcia is entitled to an impounding order.

II. PRELIMINARY STATEMENT

In July of 2011, Plaintiff delivered the Copyrighted Performance for a film that Defendant Nakoula, the film’s producer, told her was an “adventure” titled

¹ Plaintiff has filed a federal copyright application, entitling her to bring suit. Plaintiff Garcia filed an application to register her work with the United States Copyright Office. (Garcia Decl. ¶ 18, Ex. C.) Plaintiff thus is entitled to bring suit. 17 U.S.C. § 411(a); see also *Cosmetic Ideas, Inc. v. IAC/Interactive Corp., et al*, 606 F.3d 612 (9th Cir. 2010) (application satisfies pre-suit registration requirement).

1 *Desert Warrior*. Plaintiff Garcia *never* assigned the rights to the Copyrighted
2 Performance to *anyone*. Nor did Plaintiff Garcia sign a work-for-hire agreement.
3 She was not an employee of anyone associated with *Desert Warrior*.

4 On July 2, 2012, Nakoula and/or his agents² posted the Film (*i.e.*, the
5 doctored, dubbed version retitled *Innocence of Muslims*) to YouTube in English. In
6 early September, Arabic versions were released around the world and in primarily
7 Muslim countries, and went “viral” on September 11, 2012. Rather than portraying
8 an innocuous historical adventure set in the desert – the video in which Defendant
9 Nakoula told Plaintiff Garcia she was appearing – the Film was instead a crude,
10 hateful work of propaganda. The Film portrays the Muslim religious figure
11 Mohammed as a sexual deviant. Specifically, Defendant Nakoula and/or his agents
12 dubbed over Plaintiff’s voice, suggesting she called Mohammed a “child molester.”

13 After YouTube broadcast the Arabic-language version of the Film, ferocious
14 violence broke out around the world. The outrage has not been confined to Muslim
15 societies; even U.S. Secretary of State Hillary Rodham Clinton has condemned the
16 Film. Many believe the Film provoked the September 11, 2012, attack on the U.S.
17 Consulate in Benghazi, Libya, in which four Americans, including Ambassador
18 Christopher Stevens, were savagely murdered. Whether or not the Film provoked
19 the violence in Benghazi, it is now universally acknowledged that the Film has
20 provoked violence and unrest worldwide.

21 Following Defendants’ global dissemination of the Film, Plaintiff became the
22 subject of a *fatwa* issued by an Egyptian cleric, which states in relevant part:

23 ***I issue a fatwa and call on the Muslim youth in America and Europe***
24 ***to do this duty, which is to kill the director, the producer and the***
actors and everyone who helped and promoted the film.

25 _____
26 ² Defendant Nakoula posted the Film under the name Sam Bacile, one of his
27 many aliases. At the time he posted the Film, Nakoula was restricted from using a
28 computer or the Internet pursuant to the terms of his federal criminal probation
following a fraud conviction, and was required to use his true name. (See RJN at ¶
& Ex. B.)

1 (See Abou El Fadl Decl. ¶ 14.) Even though Plaintiff Garcia immediately spoke to
2 condemn the Film’s hateful message (reporters called her relentlessly and camped
3 outside her home), she continues to receive death threats. (See Garcia Decl. Ex. B.)
4 She changed her life substantially to protect herself and her family. What did
5 Plaintiff do to deserve this? Nothing. In addition to taking drastic security
6 measures, Plaintiff Garcia requested that YouTube and Google remove or disable
7 the Film pursuant to the Digital Millennium Copyright Act (“DMCA”). Plaintiff
8 has begged Defendants to assist her in her efforts to protect her safety by taking
9 down the Film. They refuse.

10 Not once has Defendant Nakoula disputed that Plaintiff retained the rights to
11 her Copyrighted Performance. Under the DMCA, Defendants Google and
12 YouTube’s decision to arrogate to themselves the right to adjudicate Plaintiff
13 Garcia’s copyright claim eviscerates their “safe harbor” protections for online
14 service providers that act “expeditiously” to “remove” or “disable” content upon
15 notice of a copyright claim, making them just as legally responsible as Defendant
16 Nakoula for violating Plaintiff Garcia’s copyright interests. The “safe harbor”
17 provisions of the DMCA provide that Defendant YouTube must notify the poster
18 that the content has been removed pursuant to a DMCA takedown notice and
19 provide the poster the opportunity to contest the takedown in writing. If the poster
20 does so, YouTube must then notify the complaining copyright holder of that fact. If
21 the copyright owner does not bring a lawsuit in district court within 14 days,
22 YouTube then must restore the material.

23 Rather than comply with the DMCA and protect their own economic, legal,
24 and moral interests, Defendants Google and YouTube instead refused Plaintiff’s
25 takedown requests based on an incorrect assumption that Plaintiff has no copyright
26 interest. On October 5, 2012, Google and YouTube’s lawyers finally revealed their
27 legal reasoning -- according to them, Plaintiff had a meeting of the minds with
28

1 Defendant Nakoula, at the time she agreed to act in *Desert Warrior* that the finished
2 project would be a “joint work.” Defendants are wrong. As early as September 12,
3 2012, and in any event no later than September 20, 2012, when they were served
4 with a lawsuit in California state court, Defendants have been aware that *Defendant*
5 *Nakoula himself has admitted that he tricked Plaintiff into appearing in his hate*
6 *film.*³ Thus, Plaintiff and Defendant Nakoula never shared any joint intent to create
7 *Innocence of Muslims* as a joint work; Plaintiff’s Copyrighted Performance thus
8 remains her own. The touchstone for establishment of a joint work is a mutual
9 intent that both creators share in the *completed* work or its derivatives. Because
10 Defendant Nakoula always harbored a secret intent to treat the work as though he
11 was the sole owner, and to exploit the work in a manner contrary to any and all of
12 Plaintiff’s intentions, much less any intentions that the two shared (which, it turns
13 out, were none), there exists no “joint work,” and Plaintiff retains the rights to her
14 Copyrighted Performance. Plaintiff thus is entitled to sue Defendants for copyright
15 infringement under the United States Copyright Act.

16 Moreover, irrespective of whether Defendant Nakoula has a joint copyright
17 with Plaintiff Garcia, there are hundreds of third parties who have copied and
18 reposted the Film on YouTube, *who have no color of a legal right* to copy and re-
19 post the Film, and who clearly are infringing on Plaintiff Garcia’s copyright.
20 Defendant Nakoula’s posting of the Film on YouTube is only one of the hundreds of
21 infringing webpages (URLs) illegally displaying the Film on YouTube (and
22

23 ³ In a telling and shameful attempt to “blame the victim,” YouTube and Google
24 have taken the position that the death threats and global fatwa against Plaintiff are
25 *her* fault. (Armenta Decl. ¶ 3.) They are wrong. It was *the media*, not Plaintiff, that
26 originally revealed Ms. Garcia’s identity to the public, and the reason that Ms.
27 Garcia spoke publicly was to clear her name. Indeed, Ms. Garcia strongly believes
28 that it is her strong public stand against the Film’s message of hatred that is keeping
her alive at this point, along with the outpouring of support she has received from
moderates in the Muslim community who have lauded not only her efforts to
remove the Film, but her courage as well. (Abou El Fadl Decl. ¶ 23; Garcia Decl. ¶
14.)

1 representing tens of millions of views) that Plaintiff Garcia has identified in her
2 eight compliant DMCA takedown notices to Defendants YouTube and Google,
3 which Defendants YouTube and Google have refused to remove or disable, and
4 which continue to be viewed, recopied, and reposted widely.

5 **III. STATEMENT OF FACTS IN SUPPORT OF THE APPLICATION**

6 **A. Plaintiff Agreed to Provide a Dramatic Performance, But Did Not**
7 **Agree to Relinquish Her Copyright In That Performance.**

8 Plaintiff is an ordained Christian minister. (Declaration of Cindy Lee Garcia
9 (“Garcia Decl.”) ¶ 3.) She began acting to supplement her income after her
10 husband became disabled. (*Id.* ¶ 3.) As a minister, Ms. Garcia preaches tolerance
11 and respect for all religions. (*Id.* ¶ 4.) The depiction of Plaintiff Garcia as a person
12 who would participate in a hateful production that blasphemes any religion is
13 profoundly devastating to her. (*Id.* ¶ 4.)

14 In July of 2011, Plaintiff responded to a casting notice for a film with a
15 working title of *Desert Warrior*. (Garcia Decl. ¶ 5.) Plaintiff was cast in a
16 supporting role, in which, according to the film’s producer, Defendant Nakoula, she
17 was to play the mother of a young woman who had been promised in marriage to the
18 movie’s protagonist, “Master George.” (*Id.*) After Plaintiff was cast, Defendant
19 Nakoula gave her “call sheets” that indicated the days she was to be on set, and
20 outlined the scenes that would be filmed. (*Id.* ¶ 6.) Additionally, Defendant
21 Nakoula and/or his agents provided Plaintiff with “script sheets” for those scenes in
22 which her character was to appear. (*Id.*) None of those sheets contained content or
23 language that Plaintiff perceived to be religiously offensive. (*Id.*) Moreover, none
24 of the script sheets referred to a character named “Mohammed.” (*Id.*)

25 Plaintiff never signed a release of any kind to her rights to her dramatic
26 performance, nor a work-for-hire agreement. (Garcia Decl. ¶ 8.) Additionally, she
27 was never an employee of Nakoula or any production company associated with
28

1 *Desert Warrior*, nor was she an agent of Nakoula or anyone else. (Garcia Decl. ¶ 5.)
2 Plaintiff's position in this regard is entirely consistent with the recollections of other
3 actors who appeared in the production: none of them apparently signed releases, nor
4 did they sign work-for-hire agreements. (Declaration of Dan Sutter ¶ 4; Declaration
5 of Gaylord Flynn ¶ 1 Declaration ¶ 4.)

6 Both prior to accepting the role and while on set, Plaintiff specifically asked
7 Defendant Nakoula (who was using the alias "Sam Bacile") about the film's
8 content. (Garcia Decl. ¶ 10.) Defendant Nakoula consistently responded that the
9 film was titled *Desert Warrior*, and that it was an "adventure" story set in the
10 Arabian Desert 2,000 years ago. (*Id.*) Significantly, *at no time during her presence*
11 *on the set did Plaintiff hear any mention of Islam.* (*Id.*)

12 It is apparent now that Defendant Nakoula planned all along, contrary to his
13 stated intention to Plaintiff Garcia, never to create a film called *Desert Warrior*.
14 Instead, as he later admitted to Plaintiff Garcia, his true intention from the beginning
15 was to use her (copyrighted) performance to create a hate film. (Garcia Decl. ¶ 13.)

16 **B. Nakoula Used Plaintiff As a "Puppet" For His Racist Views, and**
17 **YouTube Published a Doctored Version of Her Performance.**

18 In March of 2012, Defendant Nakoula requested that Plaintiff participate in a
19 post-production session. (Garcia Decl. ¶ 11.) Plaintiff only restated lines she had
20 stated previously. (*Id.*) Sometime after July 2, 2012, Plaintiff telephoned Nakoula
21 to ask whether the film was ready to be screened. (*Id.* ¶ 12.) Defendant Nakoula
22 then revealed that he had posted a trailer on YouTube. (*Id.* ¶ 12.)

23 When Plaintiff accessed the trailer (*i.e.*, the "Film") on YouTube she made
24 the horrifying discovery that Defendant Nakoula had dubbed bigoted dialogue over
25 her lines, and used her Copyrighted Performance in a manner that was *entirely*
26 inconsistent with the production in which Defendant Nakoula had told Ms. Garcia
27 she was participating. (Garcia Decl. ¶ 12.) Defendant Nakoula literally turned her
28

1 into a walking, talking “puppet” for his opinion that Islam founder Mohammed was
2 a “child molester.” (Id.) That was also when Plaintiff learned that the Film had
3 been retitled to *Innocence of Muslims*. (Id.)

4 The words Plaintiff Garcia actually delivered for “Desert Warrior” were:

5 ***“Is George crazy? Our daughter is but a child?”***

6 (Garcia Decl. ¶ 12.) In *Innocence of Muslims*, Defendant Nakoula retained her
7 visual performance but dubbed in the words:

8 ***“Is your Mohammed a child molester?”***

9 (See Garcia Decl. ¶ 12, and Ex. B to Declaration of Dave Hardy (“Hardy Decl.”)
10 (YouTube video, *The Innocence of Muslims*, posted by “Sam Bacile”).) Plaintiff
11 Garcia has never uttered those words *ever*, let alone on the set of *Desert Warrior*.
12 (Garcia Decl. ¶ 12.)

13 **C. After Defendants Published an Arabic Version of the Film, It**
14 **Went Viral and Provoked a Wave of Global Violence and a Fatwa**
15 **on Plaintiff’s Head, to which Defendants Are Completely**
16 **Indifferent.**

17 On September 11, 2012, the U.S. Consulate in Benghazi, Libya, was
18 attacked, resulting in the deaths of four Americans, including Ambassador
19 Christopher Stevens. (Abou El Fadl Decl. ¶ 10.) Violence has continued to erupt
20 across the world. (Id. ¶ 11.) Many experts in geopolitical affairs have attributed
21 this violence directly to the Film. (Id. Decl. ¶ 9-15.) News reports indicate that
22 many people worldwide have died in the violence that the film has sparked. (Id.
23 Ex. D.) Whether the Film is or is not the cause of the violence, the violence in fact
24 occurred, with many at the time attributing it to the anti-Muslim sentiment in the
25 Film. (Id. ¶ 15.)

1 On September 19, 2012, Egyptian cleric Ahmad Fouad Ashoush issued a
2 “fatwa”⁴ directed at Plaintiff and every other person involved in the production of
3 *Desert Warrior/The Innocence of Muslims*:

4 *I issue a fatwa and call on the Muslim youth in America and Europe*
5 *to do this duty, which is to kill the director, the producer and the*
6 *actors and everyone who helped and promoted the film.*

6 (Abou El Fadl ¶ 14.)

7 Google Chairman Eric Schmidt’s response to the fatwa astounds. He said:
8 “We believe the answer to bad speech is more speech ... It’ll stay up.” (Armenta
9 Decl. ¶ 9 & Ex. C.) Plaintiff, however, has no desire to become a martyr for
10 Nakoula and Schmidt’s “cause” of attacking Islam while pretending that YouTube
11 and Google are neutral defenders of free speech. Nor has she any interest in helping
12 Defendants to profit from the 30 million-plus “views,” and associated ad revenues,
13 from exhibiting the Film.⁵

14 **D. Defendant Nakoula Admitted That He Procured Plaintiff’s**
15 **Dramatic Performance Through Fraud and Deception.**

16 Immediately after seeing the news about the attacks in Libya and realizing
17 that the grotesque manipulation of her performance was related to the violence
18 around the world, Plaintiff Garcia asked Nakoula why he “did this?” (Garcia Decl.
19 ¶ 13.) He replied, “You are not responsible. Tell the world that you are innocent. I
20 did this... I did it because I am tired of the radical Muslims killing innocent people.”
21 (Id. ¶ 10.) In essence, Defendant Nakoula admitted that it was *always* his secret

22
23 ⁴ Under Islamic law, a *fatwa* is a unbinding opinion, which may have
24 significant importance to the followers of that particular Iman. Of greater concern,
25 however, are the undisclosed, secret intentions of others. (Abou El Fadl Decl. ¶ 17).

26 ⁵ As proof that YouTube relies on “views” to generate revenue and enhance its
27 business model, behold the words of YouTube co-founder Chad Hurley: “[W]e need
28 views [but] I’m a little concerned with the recent Supreme Court ruling on
copyrighted material ... we’re hosting copyrighted content,” which statements he
made prior to Google’s \$1.8 billion purchase of YouTube. (Armenta Decl. ¶ 10 &
Ex. C.)

1 intention to manipulate the footage so that Plaintiff would appear to have
 2 participated in creating a hate film. (Id.) In that conversation, Defendant Nakoula,
 3 and by telling Plaintiff she was “innocent” and “not responsible,” – he basically
 4 affirmed that the work was not a joint one. (See Garcia ¶ 13.)

5 **E. In Addition to Becoming the Target of a *Fatwa*, Ms. Garcia Has**
 6 **Received Numerous Death Threats.**

7 Immediately after the Film “went viral” on YouTube, Plaintiff began to
 8 receive calls from the media, all of whom apparently were already somehow aware
 9 that she had appeared in the Film. (Garcia Decl. ¶ 14.) Media camped outside her
 10 home. (Id. ¶ 14.) Plaintiff Garcia learned about the *fatwa* and began to receive
 11 credible and gruesome threats. (Id. ¶ 14.) In order to clear her name, ensure that the
 12 world was aware that she was duped into performing in the Film, and that she never
 13 uttered the words attributed to her, she spoke out publicly that she does not condone
 14 the Film, its content and its message, and that her performance was grotesquely
 15 mutilated. (Id. ¶ 14.) Hoping that the justice system would show more concern for
 16 her continued survival than had the Defendants, Plaintiff took legal action in state
 17 court to attempt to have the Film removed from YouTube. (Id. ¶¶ 14, 15.)

18 While in Los Angeles Superior Court on September 20, 2012, for a hearing on
 19 her state-law claims against Defendants,⁶ Plaintiff and her counsel were directed by
 20 law enforcement to park in a secure location; seven armed Los Angeles County
 21 Deputy Sheriffs accompanied them in the courthouse. (Id. ¶ 15; Armenta Decl. ¶ 2.)
 22 Her attorney was approached by the head of security for the Los Angeles Superior
 23 Court, who expressed concern for Plaintiff, Ms. Armenta, and both of their families;
 24 he advised that those threatening Plaintiff “are very patient,” and that everybody
 25 connected with this case was in danger. (Id.; Garcia Decl. ¶ 15.) Both were advised

26 _____
 27 ⁶ After recognizing that her federal copyright interests preempted some of her
 28 state law claims and that, therefore, this Court holds exclusive jurisdiction, Plaintiff
 dismissed her state law action without prejudice.

1 to take serious security measures entering and exiting the L.A. Superior Court at any
2 time in the future, and with their families and homes. (Garcia Decl. ¶ 15; Armenta
3 Decl. ¶ 2.)

4 While in New York during the last week of September 2012, Plaintiff and
5 counsel were accompanied by retired police officers and other security officers.
6 (Garcia Decl. ¶ 16.) When they departed New York, the Port Authority Police
7 would not permit Plaintiff to even enter the La Guardia International Airport
8 terminal; Plaintiff was taken directly to her airplane on the tarmac in a squad car, for
9 fear that she would become an “instant target” in the terminal. (*Id.*)⁷ Plaintiff moved
10 her home, and also moved the location of her church. (*Id.* ¶ 17.) The numerous
11 death threats have been reported to the authorities. (*Id.*) They include, but are not
12 limited to, the following:

13 “I am ready to die for MUHAMMAD (PBUH) and I would Like to
14 Kill all Those Who contributed in the Shape of Acting or Financially
or any other Kind of Support in Shameless Movie.”

15 “And If You Wanna to save your life and we consider your innocent
16 then Just Kill Sam and Terry Jones.”

17 “Dear the end is near.”

18 “It’s all a big joke. She will be Killed by someone who loves and
cares our Prophet Muhammad peace be upon him”

19 “She will know what she did now she is saying sorry about that”

20 (*Id.* ¶ 17 & Ex. B.)(Grammatical errors in original.) She also received a gruesome
21 set of threats related to raping her daughter. (*Id.*) According to noted international
22 expert and UCLA Professor Abou El Fadl, it is the threats that are not made that are
23 the most dangerous. (Abou El Fadl ¶ 17.) Plaintiff’s life changed forever in
24 material ways by the continued posting of the Film. (*Id.* ¶ 16.) It is only her public
25 efforts to clear her name that may be keeping her alive and her efforts to remove or

26
27 ⁷ This type of heightened security is similar to that to which Salman Rushdie
28 was subjected for approximately ten years following the *fatwa* that was issued
against him after he published *The Satanic Verses*. (Abou El Fadl Decl. ¶ 16.)

1 disable the Film will certainly help to convince others that she is not a willing
2 puppet of a global conspiracy to harm Muslims. (Id. ¶ 21.)

3 **F. Plaintiff Has Begged YouTube and Google to Save Her Life and**
4 **Take Down the Film, But They Prefer to Continue to Profit From**
5 **the Millions of Pageviews That the Film Attracts.**

6 In accordance with YouTube’s terms of service, Plaintiff issued the first of
7 many DMCA takedown notices on September 24, 2012, through her takedown
8 agent, DMCA Solutions. (Declaration of David Hardy (“Hardy Decl.”) ¶ 5.)
9 Plaintiff and DMCA Solutions have issued eight takedown notices. In the
10 experience of DMCA Solutions, YouTube typically responds to an initial takedown
11 notice in a manner intended to protect itself from liability for contributory copyright
12 infringement pursuant to the “safe harbor” provisions of the DMCA. (Id. ¶ 4.)
13 First, YouTube typically sends a notice advising that the notice has been received
14 (“Acknowledgement of Takedown Notice”). Next, YouTube typically quickly
15 removes or disables the allegedly infringing content pending the original poster’s
16 provision of proof that he or she has the right to post it. (Id.)

17 YouTube itself, through the Associate General Counsel of Google, Inc.
18 (YouTube’s parent company) Zavanah Levine agrees that YouTube’s DMCA
19 procedures are consistent with the observations of DMCA Solutions:

20 **Once YouTube receives a notification of alleged infringement that**
21 **substantially complies with the DMCA requirements, we act**
22 **promptly to remove the identified material from our service or**
23 **disable access to it. Throughout my tenure at the company, we**
24 **have removed almost all of the videos identified in DMCA notices**
25 **within 24 hours; indeed for the vast majority of DMCA notices**
26 **(about 85%), we remove the identified videos within a few**
27 **minutes using automated tools.**

28 (Declaration of Zavanah Levine ¶ 19.)

This time, contrary to the policy and protocols sworn to by Ms. Levine, and
the practices long observed by DMCA Solutions, YouTube did *not* remove or
disable the content within 24 hours. Instead, it sent multiple, identical form letters
denying Ms. Garcia’s requests. (Hardy Decl. ¶ 7 & Ex. C (“YouTube’s First

1 Substantive Inquiry”).) In response to YouTube’s First Inquiry Response, Plaintiff’s
 2 agent sent a detailed response explaining her copyright interests, setting forth the
 3 relevant law. (*Id.* ¶ 8 & Ex. D (“Garcia’s First Substantive Response”).) Garcia’s
 4 First Substantive Response was sent on September 26, 2012. (*Id.*) By October 2,
 5 2012, YouTube still had neither responded nor disabled the content. (*Id.* ¶ 9.)
 6 YouTube has breathed life into a work of fiction that is causing violence and death
 7 the world over.

8 On October 2, 2012, counsel for Plaintiff Garcia spoke directly with counsel
 9 for Defendants Google and YouTube.⁸ (Armenta Decl. ¶ 4.) She was told that the
 10 Film was still up, that a decision was made “at the highest levels” to keep the Film
 11 up, and that *YouTube was not obligated to respond to Garcia’s First Substantive*
 12 *Response*—even though it was YouTube that had demanded “further information ...
 13 [in] as much detail as possible!” (*Id.*)

14 Within two hours of that conversation, Plaintiff received another inquiry from
 15 YouTube, requesting even more information. (Hardy Decl. ¶ 9 (“YouTube’s
 16 Second Inquiry”).) Plaintiff’s takedown agent then issued Garcia’s Second
 17 Substantive Response, citing additional relevant case law and provisions of the
 18 United States Copyright Act. (Hardy Decl. ¶ 10 & Ex. E.) Finally on October 4,
 19 2012, YouTube set forth its final position – consistent with Chairman Schmidt’s
 20 public remarks -- that the content will not be removed. (Hardy Decl. ¶ 11
 21 (“YouTube’s Final Response”).)

22 **G. YouTube and Google Have Specific Knowledge of the**
 23 **Infringing Material and Are in Receipt of Direct Financial**
 24 **Benefits Attributed to the Rampant Infringement.**

25 YouTube is on specific notice of the URLs that contain the infringing content.
 26 YouTube claims to have received more than 30 million “views” of the Film in the

27 ⁸ Counsel for Plaintiff Garcia has copied counsel for Defendants Google and
 28 YouTube on all transmissions between their respective takedown agents. (Armenta
 Decl. ¶ 7,)

1 English language alone. (See generally Hardy Decl. & Exs.) It is incontrovertible
 2 that the Film is a “draw” for consumers—whose viewings provide YouTube with
 3 profit from ad revenues—to visit YouTube. YouTube and Google have the ability
 4 to block access to the Film—in fact, they have already made the editorial judgment
 5 to do so in Saudi Arabia, Libya, Indonesia, and Egypt, and may have done so in
 6 other countries. (Armenta Decl. ¶ 9 & Ex. C.)

7 **H. The Only “Defense” that Defendants Have Offered So Far is Their**
 8 **Deliberately Incorrect Assumption That Plaintiff Garcia’s**
 9 **Copyrighted Performance is a “Joint Work.”**

10 In connection with Plaintiff Garcia’s obligations to meet and confer with
 11 opposing parties prior to bringing a motion, counsel for the parties met on
 12 Thursday, October 4, 2012. (Armenta Decl. ¶ 6.) Defense counsel finally revealed
 13 why YouTube refuses to take down the Film, claiming the work was a “joint work”
 14 and therefore Plaintiff and Nakoula may not sue each other. (Id.) As set forth
 15 below, this position is not supported by Plaintiff’s *declaration* nor Defendant
 16 Nakoula’s *admissions*.⁹ Nobody from Google or YouTube has ever asked either
 17 Plaintiff *or* Nakoula whether they intended to create a joint work. Neither the
 18 *Desert Warrior* footage nor the *Innocence of Muslims* trailer are joint works
 19 because the parties had *completely different intentions* at the inception of the work.
 20 This Ex Parte Application follows upon YouTube’s apparently final decision,
 21 related on October 4, 2012,¹⁰ to keep the Film up on its site, losing its DMCA safe
 22 harbor.

23 ⁹ On the afternoon of Monday, October 15, 2012, Nakoula’s criminal defense
 24 attorney advised that Nakoula does not own the rights to the film. (See Armenta
 25 Decl.) Therefore, the work cannot be “joint” between Nakoula and Garcia under
 any legal analysis. Nakoula’s lawyer’s statement is a party admission. Fed. R.
 Evid. 801(d)(2).

26 ¹⁰ YouTube will likely claim the delay between the posting of the film and/or
 27 death threats and this Application undercuts emergency relief. But, Plaintiff was
 28 *obliged* to work through the DMCA takedown process before initiating this
 Application. YouTube did not issue its denial until October 3, 2012. (Hardy Decl.
 ¶ 11.)

1 **IV. STANDARD FOR RESTRAINING ORDER AND ORDER TO SHOW**
 2 **CAUSE RE PRELIMINARY INJUNCTION IN COPYRIGHT CASES**

3 The standard for issuing a temporary restraining order is essentially the same
 4 as that for issuing a preliminary injunction. To be entitled to injunctive relief,
 5 Plaintiff must demonstrate: (1) that she is likely to succeed on the merits; (2) that
 6 she is likely to suffer irreparable harm in the absence of preliminary relief; (3) that
 7 the balance of equities tips in his favor; and (4) that an injunction is in the public
 8 interest. Winter v. Natural Res. Def. Council, Inc., 129 S.Ct. 365, 374, 376 (2008);
 9 National Meat Ass'n v. Brown, 599 F.3d 1093, 1097 (9th Cir. 2010); see also
 10 Beardslee v. Woodford, 395 F.3d 1064, 1067 (9th Cir. 2005).

11 The Copyright Act provides that a court “may... grant temporary and final
 12 injunctions on such terms as it may deem reasonable to prevent or restrain
 13 infringement of a copyright.” 17 U.S.C. § 502(a). A plaintiff “must establish that
 14 he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the
 15 absence of preliminary relief, that the balance of equities tips in his favor, and that
 16 an injunction is in the public interest.” Marlyn Nutraceuticals, Inc. v. Mucos
 17 Pharma GmbH & Co., 571 F.3d 873, 877 (9th Cir. 2009) (quoting Winter, 555 U.S.
 18 7, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008)); see, e.g., Sierra Forest Legacy v.
 19 Rey, 577 F.3d 1015, 1021 (9th Cir. 2009).

20 **V. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS**

21 **A. Plaintiff Clearly Owns the Rights to Her Dramatic Performance.**

22 Once Plaintiff Garcia’s performance was put in film, it became a “dramatic
 23 work” “fixed in [a] tangible medium of expression” that could be “perceived,
 24 reproduced, or otherwise communicated” through “the aid of a machine or device.”
 25 17 U.S.C. § 102(a); see Fleet v. CBS, Inc., 50 Cal. App. 4th 1911, 1919-1920 (1996)
 26 (once actor’s performance was fixed in film, it “came within the subject matter of
 27 copyright law protection”). Her individual performance in the film *Desert Warrior*
 28 is copyrightable. See id. (actors’ individual performances in film are copyrightable).

1 Defendants may argue that an actor's copyright automatically reverts to the
2 filmmaker. Not true. First, if that were the law, filmmakers would not engage in the
3 universal practice of requiring their actors to release their copyrights as a condition
4 of appearing in films, which did not occur in this case. Second, Laws v. Sony Music
5 Entm't, Inc., 448 F.3d 1134, 1137 (9th Cir. 2006), and Jules Jordan Video v. 144942
6 Canada, 617 F.3d 1146 (9th Cir. 2010), confirms that in the Ninth Circuit, a
7 performer retains the rights in her performance unless she transfers or assigns them:
8 (1) by virtue of her status as an *employee* of the filmmaker; (2) by a *written*
9 assignment of the copyright; or (3) by executing a *written* work-for-hire agreement.
10 In fact, it is clear that the law, not only of the Ninth Circuit, but also as understood
11 by the United States Patent and Trademark Office and the Copyright Office, *is and*
12 *always has been* that the copyright interest in an actor's performance resides with
13 that actor until and unless it is assigned. (See RJN at 3.) The United States publicly
14 affirmed this position in connection with the signing of the WIPO Audiovisual
15 Dramatic Performance Treaty ("AVP Treaty") signed in Beijing, China in July of
16 2012. (See RJN at 4.) The United States was instrumental in encouraging other
17 countries to sign the AVP Treaty in order to bring other countries into compliance
18 with the long-standing acknowledgement in the United States that actors, just like
19 musicians, own the rights to their performances unless assigned, unless they are
20 employees, or unless they execute a written instrument indicating their work is a
21 work-for-hire. The formal statement issued by the United States Copyright Office,
22 in connection with the AVP Treaty, states:

23 Under U.S. law, actors and musicians are considered to be "authors"
24 of their performances providing them with copyright rights.

25 Just as the rights established in the U.S. law already provide the
26 protection for musical performers mandated by the WPPT, U.S. law is
27 already generally compatible with the AVP provisions ("points of
28 attachment" for parties to this treaty under U.S. law).

(See RJN at 4.)

1 Because U.S. law firmly establishes that actors own the copyrights in their
2 performances unless assigned or otherwise relinquished, Plaintiff Garcia retains the
3 copyright to her performance. See, e.g., TMTV Corp. v Pegasus Broad. of San
4 Juan, 490 F Supp. 2d 228 (D.C. Puerto Rico 2007) (actors' portrayals of characters
5 rendered them "authors").

6 **B. Plaintiff Never Assigned Her Copyright Interests.**

7 Plaintiff is aware of no authority requiring *her* to bear the burden to show that
8 she did *not* transfer her rights. Imposing such a burden on Plaintiff would be
9 entirely inconsistent with the Copyright Act's well established requirement that a
10 copyright assignment be made in writing. See 17 U.S.C. § 204(a) (exclusive
11 copyright assignment must be in writing; 17 U.S.C. § 201(b) (writing required for
12 work-for-hire). It is undisputed that Ms. Garcia executed no such writing
13 transferring or assigning her rights. (Garcia Decl. ¶¶ 7-9.) However, because
14 counsel for YouTube have expressed difficulty in believing that Defendant Nakoula,
15 *a convicted fraudster*, neglected to obtain a legal release, Plaintiff addresses this
16 point in an abundance of caution. (See Armenta Decl. ¶ 5.)

17 In some cases, an actor or musician relinquishes his or her copyright interests
18 to a studio or filmmaker *in writing* and loses the right to assert a copyright claim in a
19 performance. See, e.g., Brown v. Twentieth Century Fox Film Corp., 799 F. Supp.
20 166 (D.D.C. 1992) (James Brown transferred rights to song "*Please, Please,*
21 *Please,*" and could not object to use of a musical clip captured on film); Rooney v.
22 Columbia Pictures, Inc., 538 F. Supp. 211 (S.D.N.Y. 1982) (actor Mickey Rooney
23 signed contracts broad enough to transfer rights in his performances); Muller v.
24 Walt Disney Productions, 871 F. Supp. 678 (S.D.N.Y. 1994) (conductor made
25 writing in which he gave up rights to his performance). That did not happen here.

26 Plaintiff's recollection is coincides with that of other actors, who also did not
27 sign releases. (See Declarations of Does #1-#3.) Moreover, the Ninth Circuit has
28

1 resoundingly rejected the argument that moviemakers enjoy some special status
 2 under the Copyright Act allowing them to avoid the writing requirement. Effects
 3 Associates, Inc. v. Cohen, et al., 908 F.2d 555 (9th Cir. 1990), is instructive. In that
 4 case, the plaintiff created special effects for use in a film, and then brought a
 5 copyright infringement action against the producer. As in this case, the parties had
 6 *no written agreement* regarding transfer of the plaintiff's copyright to the producer.
 7 The Ninth Circuit held that, as a matter of law, the plaintiff's rights had not
 8 transferred: "Absent an express transfer of ownership, a contributor who is not an
 9 employee retains ownership of his copyright." Id. at 558 (citing Easter Seal Society
 10 v. Playboy Enters., 815 F. 2d 323, 329 (5th Cir. 1987)). The court went on to hold:

11 [S]ection 101 specifically addresses the movie and book publishing
 12 industries, affording moviemakers a simple, straightforward way of
 13 obtaining ownership of the copyright in a creative contribution –
 14 namely a written agreement. The Supreme Court and this circuit,
 15 while recognizing the custom and practice in the industry, *have*
 16 *refused to permit moviemakers to sidestep section 204's writing*
 17 *requirement.* Accordingly, we find unpersuasive Cohen's contention
 18 that section 204's writing requirement, which singles out no particular
 19 group, somehow doesn't apply to him. As section 204 makes no
 20 special allowances for the movie industry, neither do we.

21 Id. at 558, emphasis supplied. See also Oddo v. Ries, 743 F. 2d 630 (9th Cir 1984)
 22 (publishing distorted manuscript exceeded scope of initial contributor and publisher
 23 liable for copyright infringement). Thus, because no writing exists showing a
 24 transfer of rights, nor a work-for-hire agreement, the copyright in Plaintiffs
 25 performance remains intact.

26 **C. Defendant Nakoula and Plaintiff Garcia Never Agreed, in Writing**
 27 **or Otherwise, to Create a "Joint Work of Authorship," as Google**
 28 **and YouTube Apparently Claim.**

Plaintiff anticipates YouTube to oppose, claiming Plaintiff may not sue
 Defendant Nakoula for copyright infringement (or, by extension, Google and
 YouTube for contributory infringement) because Plaintiff and Defendant Nakoula
 created a "joint work of authorship." However, Plaintiff *never* had a meeting of the

1 minds with Defendant Nakoula. “Joint work” defenses should be carefully
2 evaluated on a case-by-case basis to determine whether the “authors” intended to
3 create a “unitary work.” Here, Defendant Nakoula’s fraudulent procurement of
4 Plaintiff’s performance did not create a joint agreement on anything related to
5 *Innocence of Muslims*.

6 Initially, Plaintiff notes that the burden is on Defendants, *not on her*, to show
7 that both she and Defendant Nakoula intended that the doctored propaganda film
8 *Innocence of Muslims*, which she was tricked into believing was a desert historical
9 adventure called *Desert Warrior*, would be a joint work of authorship.

10 Although the Second and Seventh Circuits do not base their decisions
11 [as to joint authorship] on the word ‘authors’ in the statute, the practical
12 results they reach are consistent with ours. These circuits have held
13 that a person claiming to be an author of a joint work must prove that
14 **both parties intended each other to be joint authors.**

15 *Aalmuhammed v. Lee*, 202 F.2d 1227, 1233-1234 (9th Cir. 2000) (emphasis added).
16 *Aalmuhammad* is significant: First, as noted above, it establishes that the burden is
17 on the *putative joint author*, not the person claiming a sole copyright, to prove the
18 intent to create a jointly authored work. Second, it suggests that in this case, where
19 there is no written joint authorship agreement, a contributory infringer such as
20 Google or YouTube cannot establish a joint authorship defense, because it cannot
21 prove Plaintiff or Nakoula’s subjective intentions. Perhaps this second point is
22 academic, because in this case the uncontroverted evidence is that Plaintiff never
23 intended to be a “joint author” of *The Innocence of Muslims*, given that Defendant
24 Nakoula tricked her by assuring her that she was appearing in an innocuous action
25 film called *Desert Warrior*.

26 Even if the burden of proof was not an insurmountable obstacle for
27 Defendants, the law of joint authorship would be. While “joint” authors may not
28 sue each other in copyright, see 17 U.S.C. § 101, a “joint work” exists “only when
both authors intended at the time the work was created, ‘that their contributions be

1 *merged into separate or interdependent parts of a unitary whole.*” Id.; Childress v.
 2 Taylor, 945 F.2d 500 (2nd Cir. 1991)(emphasis supplied.) “Copyright law best
 3 serves the interests of creativity when it carefully draws the bounds of ‘joint
 4 authorship’ so as to protect the legitimate claims of both sole authors and co-
 5 authors.” Id. “Where the author never intended for his material to be part of a joint
 6 work, he retains the right to that material.” Siegel v. Time Warner, Inc., 496 F.
 7 Supp. 2d 1111, 1148 (C.D. Cal. 2007). **Where the parties’ intentions at the**
 8 **beginning of the creative process are inconsistent**, that “could indicate a lack of
 9 intent to form a joint work.” See, e.g., Reinsdorf v. Skechers, U.S.A., 2011 U.S.
 10 Dist. LEXIS 28293, at *9 (C.D. Cal. Mar. 9, 2011) (use of copyrighted photographs
 11 was limited to terms of license, not entitling Skechers to use them as it “saw fit”).¹¹

12 **D. YouTube Has Stepped Far Outside the DMCA’s Safe Harbor**
 13 **Provision, Subjecting it To Liability for Copyright Infringement.**

14 “The DMCA was enacted in 1998 to implement the World Intellectual
 15 Property Organization Copyright Treaty,” Universal City Studios, Inc. v. Corley,
 16 273 F.2d 429, 440 (2d Cir. 2001), and to update domestic copyright law. See
 17 Ellison v. Robertson, 357 F.3d 1072, 1076 (9th Cir. 2004). Title II of the DMCA,
 18 titled separately the Online Copyright Infringement Liability Limitation Act
 19 (“OCILLA”) was designed to “clarif[y] the liability faced by service providers who
 20

21 ¹¹ Google and YouTube have not raised the issue of “fair use,” but should they
 22 do so, they would be wrong. 17 U.S.C. § 107. Plaintiff considered the issue of fair
 23 use, pursuant to Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150 (N.D. Cal.
 24 2008). Google and YouTube are enjoying an economic benefit by drawing 30
 25 million “views” using the Film. A&M Records v Napster, Inc., 239 F.3d 1004 (9th
 26 Cir. 2001); see also Worldwide Church of God v. Philadelphia Church of God, 227
 27 F.3d 1110, 1118 (9th Cir. 2000) American Geophysical Union v. Texaco, Inc., 60
 28 F.3d 913, 922 (2d Cir. 1994) (finding that researchers at for-profit laboratory gained
 indirect economic advantage by photocopying copyrighted scholarly articles);
Export Establishment etc. v. Columbia Broadcasting Service, Inc., 503 F. Supp.
 1137, 1147 (S.D.N.Y. 1980) (dramatic ratings boost by using copyrighted Charlie
 Chaplin clips). The use of Plaintiff’s performance goes to the “heart” of the
 message. Los Angeles News Service v. Tullo, 973 F. 2d 791, 798 (9th Cir. 1992); see
Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564-65, 105 S.Ct.
 2218, 85 L.Ed.2d 588 (1985)

1 transmit potentially infringing material over their networks.” S. Rep. 105-190 at 2
2 (1998). Congress elected “to create a series of ‘safe harbors []’ for certain common
3 activities of service providers.” *Id.* at 19. To that end, OCILLA established a
4 series of four “safe harbors” that allow qualifying service providers to limit their
5 liability for claims of copyright infringement. *See Viacom, et al. v. YouTube, et al.*,
6 (2nd Cir. April 5, 2012), Case No. 10-3270 CV (RJN at 4.) YouTube is such a
7 provider. *See generally id.*; see also RJN 6 (2nd Circuit opinion on DMCA issues
8 relative to YouTube).

9 Under 512(c)(1)(A), safe harbor protection is available only if the service
10 provider:

- 11 (i) Does not have actual knowledge that the material or an activity using
12 the material on the system or network is infringing;
- 13 (ii) In the absence of such actual knowledge, is not aware of facts or
14 circumstances from which infringing activity is apparent; or
- 15 (iii) upon obtaining such knowledge or awareness, acts expeditiously to
16 remove or disable access to the material.

17 In short, OCILLA creates a safe harbor for online service providers (“OSPs”), *only*
18 *if* they adhere to the mandatory safe harbor guidelines and “expeditiously” block
19 access to alleged infringing material, or remove that material from their systems
20 when they receive a notification of an infringement claim from a copyright holder or
21 the copyright holder’s agent. OCILLA also includes a counter-notification
22 provision that offers OSPs a safe harbor from liability when users claim that the
23 material in question is not, in fact, infringing.

24 **E. Even if Defendant Nakoula Had a Joint Copyright Interest with**
25 **Plaintiff Garcia, All of the Third Parties Who Have Copied and**
26 **Re-Posted the Film on YouTube Have No Right to Copy and Re-**
Post the Film, and Are Infringing on Plaintiff Garcia’s Copyright.

27 While YouTube and Google may raise the issue of “joint work” and joint
28 copyright as between Plaintiff Garcia and Defendant Nakoula (albeit Plaintiff

1 absolutely contests that argument as stated above), there is no such issue with
 2 respect to the hundreds of third parties who have copied the Film and re-posted it on
 3 YouTube, accounting for tens of millions of views for YouTube. These third parties
 4 have no right to copy and re-post the Film, and are clearly infringing. Defendants
 5 YouTube and Google cannot argue otherwise. The eight DMCA takedown notices
 6 delivered by Plaintiff's DMCA takedown agent specifically named and identified
 7 these third party YouTube URLs and requested that YouTube remove or disable
 8 them. Defendants YouTube and Google have refused.

9 **VI. PLAINTIFF WILL SUFFER IRREPARABLE HARM IF THE TRO**
 10 **AND INJUNCTION ARE NOT GRANTED**

11 A temporary restraining order preserves the status quo and prevents
 12 irreparable harm until a hearing can be held on a preliminary injunction application.
 13 See Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers,
 14 415 U.S. 423, 429, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974). The irreparable injury
 15 must be both likely and immediate. Winter v. Nat. Res. Defense Council, Inc., 555
 16 U.S. 7, 129 S.Ct. 365, 374-75, 172 L.Ed.2d 249 (2008); Caribbean Marine Services
 17 Co., Inc. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988) (“a plaintiff must
 18 demonstrate immediate threatened injury as a prerequisite to preliminary injunctive
 19 relief”). Risk of death constitutes “irreparable harm.” See, e.g., Harris v. Board of
 20 Supervisors, 366 F.3d 754, 766 (9th Cir. 2004) (affirming preliminary injunction
 21 barring Los Angeles County from closing hospital and reducing public hospital beds
 22 due to risk of irreparable harm to patients including death); Yue v. Conseco, CV 11-
 23 9506 AHM, 2012 U.S. Dist. LEXIS 46565, 40-41 (C.D. Cal. Apr. 2, 2012)
 24 (preliminary injunction warranted against increased cost of life insurance because
 25 loss of “security” and “peace of mind” constitutes irreparable injury).

26 Plaintiff more than meets her burden. As set forth above and in the
 27 accompanying declarations, she has suffered and will continue to suffer immediate
 28 and irreparable harm if the Film is not taken down. For instance: (1) Plaintiff has

1 received credible threats of death and harm against both herself and her family (one
2 individual threatened to rape her daughter repeatedly); (2) Plaintiff has had to move
3 her personal residence due to threats and harassment; (3) Plaintiff has been advised
4 repeatedly and in the strongest terms to take the most stringent security measures
5 possible to protect herself; and (4) Every moment the Film remains on YouTube, her
6 copyright continues to be violated.

7 **VII. THE BALANCE OF EQUITIES IS IN PLAINTIFF GARCIA'S FAVOR**

8 Under the circumstances of this case – not just the serious intellectual
9 property issues raised by Plaintiff's claim, but more importantly, the credible threats
10 of *death* against her, the hardship to Plaintiff if the Film is not removed is grave
11 indeed. It is true that the law requires this Court to “balance” the relative hardships
12 to the parties when evaluating a request for a temporary restraining order. To this
13 day, Defendants have provided Plaintiff with *no* rationale for their cruel decision to
14 continue to endanger her life by continuing to publish the video: the only excuses
15 that Defendants have made for themselves are: (1) Defendant Nakoula's racist
16 belief that “the Muslims” have killed unspecified “innocent” people; and (2) Google
17 Chairman Eric Schmidt's disingenuous claim that the problems experienced by
18 innocent people (such as Plaintiff) due to the Film can simply be cured with “more
19 speech.” In reality, the circumstantial evidence is far more damning, particularly to
20 Google and YouTube. As set forth on the YouTube site, the Film has received more
21 than 30 million page “views” in English alone. Since YouTube derives income
22 from advertising revenues and “views”, it has 30 million reasons to leave the video
23 trailer where it is, and let Plaintiff simply fend for herself.

24 The balance of hardships cannot tip to any side other than to Plaintiff. “The
25 balance of equities strongly favors [the Plaintiff] because Defendants' only interest
26 is fiscal, whereas the [Plaintiff] faces *life or death consequences*.” See Oster v.
27 Lightbourne, 2011 U.S. Dist. LEXIS 138191 (N.D. Cal. 2011)

1 **VIII. AN INJUNCTION IS DECIDLY IN THE PUBLIC INTEREST**

2 Finally, Plaintiff must show that an injunction is in the public interest. Winter
3 v. Natural Res. Def. Council, Inc., 129 S.Ct. 365, 374, 376 (2008); National Meat
4 Ass'n v. Brown, 599 F.3d 1093, 1097 (9th Cir. 2010); see also Beardslee v.
5 Woodford, 395 F.3d 1064, 1067 (9th Cir. 2005). It is. Defendants' actions have not
6 just put the life of Cindy Lee Garcia in danger. They have endangered the lives of
7 every actor and crew member who is a subject of the *fatwa*. Media reports have
8 already reported on numerous deaths caused by the violence. The web giant known
9 as Google, a name derived from the number 10 with 100 zeroes, pursues mammon
10 at the expense of the innocent.

11 Plaintiff anticipates that Defendants may attempt to argue that the First
12 Amendment trumps the worldwide carnage sparked by the Film. It does not. First,
13 Plaintiff is a private individual who is not acting in concert with the state; she
14 therefore is not capable of violating the First Amendment. See, e.g., Law v. Miller,
15 2011 U.S. Dist. LEXIS 102527 (E.D. Cal. 2011) (rejecting claim that non-
16 governmental parties violated plaintiff's First Amendment rights where defendants
17 were not state employees and there was no nexus between the defendants and the
18 state such that the defendants' actions might be fairly treated as those of the state).
19 Second, the First Amendment does not protect copyright infringement. Columbia
20 Pictures, Inc. v. Bunnell, 245 F.R.D. 443 (C.D. Cal. 2007) ("To the extent that the
21 users are engaged in copyright infringement, the First Amendment affords them no
22 protection whatsoever.")(citing Harper & Row, 471 U.S. at 559). Third, even if the
23 Film did not violate Plaintiff's copyright, by now it is clear that Defendants' actions
24 can be compared to falsely shouting "Fire!" in a theater, creating a "clear and
25 present danger" outside the protections of the First Amendment. Schenck v. United

1 States, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470. The public interest is protected
2 best by removing the video.¹²

3 Further, Defendant Nakoula violated the terms of his federal criminal
4 probation by posting the Film – he was prohibited from using a computer or
5 accessing the Internet. (See RJN 5 & Ex. B.) As the worldwide events described in
6 this brief unfolded, Defendant Nakoula was arrested on a probation violation and
7 now sits, without bail, in the Metropolitan Detention Center in Los Angeles.
8 Magistrate Judge Segal found that he may have violated the terms of his probation,
9 used aliases, and is both a flight risk and danger to the community. (See RJN 5 &
10 Ex. B.) The public has an interest in ensuring that criminal defendants do not
11 violate probation terms -- and that Google and YouTube not continue to aid and abet
12 him in doing so¹³ – which is exactly what has here been done.

13 **IX. THE RELIEF REQUESTED**

14 Based on the above, Plaintiff requests the Defendants be temporarily
15 restrained:

16 1. From publishing, reproducing, disclosing, or otherwise allowing the
17 Copyrighted Performance (the original, un-dubbed script of which is identified in
18 Exhibit A to Ms. Garcia’s Complaint) to be uploaded or shown on YouTube.com
19 and any other Websites operated by Defendants, or any of them, and from copying

20
21
22 ¹² YouTube’s own guidelines prohibit the posting of “hate speech” -- a clearer
23 case of hate speech is hard to imagine. YouTube can hardly claim an interest in
24 keeping up globally condemned film.

25 ¹³ “Whoever commits an offense against the United States or aids, abets,
26 counsels, commends, induces or procures its commission, is punishable as a
27 principal.” 18 U.S.C. § 2. In this case, Defendants Google and YouTube are now
28 *knowingly* aiding and abetting Defendant Nakoula’s continued violation of his
federal probation by keeping the video posted. Counsel for Plaintiff have provided
counsel for YouTube and Google the Judgment and Commitment for Nakoula
showing that he was prohibited from using the Internet, computers or ISPs without
the permission of the United States Probation Officer.

1 or allowing the content to be copied into any computer database, information
2 service, storage facility, archives or other computerized network or facility:

3 2. From disclosing or displaying, or causing to be disclosed or displayed,
4 any portion of the Copyrighted Performance;

5 3. From destroying or concealing, or in any way disposing of any
6 reproduction, facsimile, excerpt, or derivative of any work related to the
7 Copyrighted Performance that is in Defendants' possession, custody or control.

8 Plaintiff further seeks an order to show cause as to why a preliminary
9 injunction should not be issued affording the same relief set forth above.

10 Plaintiff further seeks an impoundment order, such that Defendants turn over
11 for impoundment, to remain in the custody of Ms. Garcia's counsel during the
12 pendency of this action, all unauthorized copies of in their custody, possession or
13 control of the copyrighted works of Ms. Garcia, including but not limited to:

14 1. All copies of the Copyrighted Performance, whether contained in the
15 Film as titled *Desert Warrior* or *Innocence of Muslims*, in the possession, custody,
16 or control of Defendants.

17 2. Any and all media in which the Copyrighted Performance is stored
18 within the possession, custody, or control of Defendants, including but not limited to
19 computers, computer disks, cassette tapes, hard drives, CD-ROMs, DVDs, USB
20 sticks, and other media.

21 **X. CONCLUSION**

22 Based on the foregoing, Plaintiff respectfully requests that this Court
23 GRANT the Application for the relief requested.

24 Dated: October 17, 2012

THE ARMENTA LAW FIRM, A.P.C.

25
26 By: 
27 M. Cris Armenta

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 11900 Olympic Boulevard, Suite 730, Los Angeles, California 90064.

On October 17, 2012 I served the following document(s) described as:

- (1) *EX PARTE* APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND AN ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION, AND ORDER OF IMPOUNDMENT**
- (2) REQUEST FOR JUDICIAL NOTICE**
- (3) DECLARATIONS OF CINDY LEE GARCIA, DAN SUTTER, GAYLORD FLYNN, DR. KHALED ABOU EL FADL, ALL IN SUPPORT OF EX PARTE APPLICATION**
- (4) DECLARATION OF DAVID HARDY IN SUPPORT OF EX PARTE APPLICATION**
- (5) DECLARATION OF M. CRIS ARMENTA IN SUPPORT OF EX PARTE APPLICATION**
- (6) DECLARATION OF ZAHAVAH LEVINE IN SUPPORT OF EX PARTE APPLICATION**
- (7) [PROPOSED] ORDER GRANTING PLAINTIFF'S *EX PARTE* APPLICATION FOR A TEMPORARY RESTRAINING ORDER, ISSUANCE OF ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION, AND ORDER OF IMPOUNDMENT**

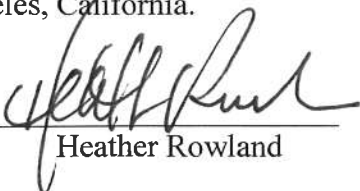
on the interested parties in this action by placing true copies thereof addressed as follows:

Timothy L. Alger
Sunita Bali
Perkins Coie LLP
3150 Porter Drive
Palo Alto, CA 94304-1212
TAlger@perkinscoie.com
sbali@perkinscoie.com

BY ELECTRONIC MAIL, pursuant to the consent of the above counsel

I declare under penalty of perjury under the law of the State of California that the above is true and correct and that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on October 17, 2012 in Los Angeles, California.


Heather Rowland

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 1511 West Beverly Blvd, Los Angeles, California 90026.

On _____ I served the following document(s) described as:

(1) *EX PARTE* APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND AN ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION, AND ORDER OF IMPOUNDMENT

(2) REQUEST FOR JUDICIAL NOTICE

(3) DECLARATIONS OF CINDY LEE GARCIA, DAN SUTTER, GAYLORD FLYNN, DR. KHALED ABOU EL FADL, ALL IN SUPPORT OF EX PARTE APPLICATION

(4) DECLARATION OF DAVID HARDY IN SUPPORT OF EX PARTE APPLICATION

(5) DECLARATION OF M. CRIS ARMENTA IN SUPPORT OF EX PARTE APPLICATION

(6) DECLARATION OF ZAHAVAH LEVINE IN SUPPORT OF EX PARTE APPLICATION

(7) [PROPOSED] ORDER GRANTING PLAINTIFF'S *EX PARTE* APPLICATION FOR A TEMPORARY RESTRAINING ORDER, ISSUANCE OF ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION, AND ORDER OF IMPOUNDMENT

on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Nakoula B. Nakoula
c/o
Los Angeles County Sheriff's Department
Stanley Mosk Courthouse
110 North Grand Avenue Room 525
Los Angeles, 90012

PERSONAL SERVICE: On _____ I served the foregoing documents listed above by personally handing them to _____

I declare under penalty of perjury under the law of the United States of America that the above is true and correct and that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on _____ in Los Angeles, California.
