
FIRST AMENDMENT — PRIOR RESTRAINTS — NINTH CIRCUIT CALLS PRELIMINARY INJUNCTION IN COPYRIGHT INFRINGEMENT SUIT A PRIOR RESTRAINT. — *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc).

“Prior restraints” — administrative and judicial orders that forbid future speech from taking place¹ — are “the least tolerable infringement on First Amendment rights.”² According to the Supreme Court, a preliminary injunction is a prior restraint if it censors speech before “an adequate determination” that the First Amendment doesn’t protect the speech.³ These kinds of injunctions are “presumptively unconstitutional.”⁴ But when it comes to preliminary injunctions in copyright suits — which also often censor speech⁵ — courts have ignored the Supreme Court’s First Amendment concerns almost entirely.⁶ Recently, in *Garcia v. Google, Inc.*,⁷ the Ninth Circuit, sitting en banc, dissolved a preliminary injunction in a copyright infringement suit, calling the injunction a “prior restraint.”⁸ By doing so, the court created a tension within the Ninth Circuit’s doctrine on prior restraint. Lower courts may now need to sort through difficult constitutional issues that *Garcia* left unanswered.

In July 2011, Cindy Lee Garcia answered a casting call for *Desert Warrior*, an action-adventure film set in ancient Arabia.⁹ Garcia was cast in a cameo role.¹⁰ Unbeknownst to her, the film’s writer-director, Mark Basseley Youssef, later used the footage he gathered to create an anti-Islam polemic titled *Innocence of Muslims*.¹¹ The film depicted the Prophet Mohammed as a murderer and pedophile.¹² Film producers dubbed over Garcia’s lines to make it appear as though she was

¹ *Alexander v. United States*, 509 U.S. 544, 550 (1993).

² *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976).

³ *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 390 (1973); see also *Mark A. Lemley & Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 169–72 (1998).

⁴ See *Neb. Press*, 427 U.S. at 558 (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418–20 (1971)).

⁵ That is, a preliminary injunction will remove a work from circulation even before the court actually determines that the work constitutes copyright infringement. See *Lemley & Volokh, supra note 3*, at 174.

⁶ See John M. Newman, Note, *Raising the Bar and the Public Interest: On Prior Restraints, “Traditional Contours,” and Constitutionalizing Preliminary Injunctions in Copyright Law*, 10 VA. SPORTS & ENT. L.J. 323, 360, 365 (2011).

⁷ 786 F.3d 733 (9th Cir. 2015) (en banc).

⁸ *Id.* at 747.

⁹ *Id.* at 737.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

asking, “Is your Mohammed a child molester?”¹³ In June 2012, Youssef uploaded a thirteen-minute-and-fifty-one-second trailer of *Innocence of Muslims* to YouTube.¹⁴ Garcia appeared in the trailer for five seconds.¹⁵ The clip “fomented outrage” across the Middle East, and was allegedly linked to the 2012 attack on the U.S. Consulate in Benghazi, Libya.¹⁶ An Egyptian cleric issued a fatwa, calling upon Muslims to kill everyone involved in the film.¹⁷ Garcia received numerous death threats.¹⁸ In response, Garcia sent Google five takedown notices under the Digital Millennium Copyright Act,¹⁹ claiming that YouTube’s hosting of the video infringed her copyright in her “audio-visual dramatic performance.”²⁰ Google refused to take down the film.²¹

On September 26, 2012, Garcia filed suit against Google in the U.S. District Court for the Central District of California, alleging copyright infringement.²² Specifically, Garcia argued that her five-second performance in *Innocence of Muslims* was a copyrightable “work” under the Copyright Act of 1976,²³ and Google was infringing on her copyright by broadcasting her performance without her permission.²⁴ She later moved for a temporary restraining order on her copyright claim, which the district court treated as a motion for a preliminary injunction.²⁵ The court denied her motion.²⁶ It noted that under the Supreme Court’s decision in *Winter v. Natural Resources Defense Council, Inc.*,²⁷ a plaintiff seeking a preliminary injunction must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm without an injunction; (3) that the balance of equities tips in her favor; and (4) that an injunction is in the public interest.²⁸ The

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 738.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 17 U.S.C. §§ 512, 1201–1205, 1301–1332 (2012); 28 U.S.C. § 4001 (2012).

²⁰ *Garcia*, 786 F.3d at 738.

²¹ *Id.* Before filing suit in federal court, Garcia sued Youssef, Google, and other production assistants in Los Angeles Superior Court. *Id.* She voluntarily dismissed her suit six days later. *Id.*

²² *Id.* Garcia also named Youssef as a codefendant, alleging fraud, unfair business practices, libel, and intentional infliction of emotional distress in addition to copyright infringement. *Id.*

²³ 17 U.S.C. §§ 101–805; *see also id.* § 102(a) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . ”).

²⁴ *See Garcia*, 786 F.3d at 738, 741.

²⁵ *Garcia v. Nakoula*, No. 2:12-cv-08315, 2012 BL 334702, at *1 (C.D. Cal. Nov. 30, 2012).

²⁶ *Id.* at *2.

²⁷ 555 U.S. 7 (2008).

²⁸ *See Garcia*, 2012 BL 334702, at *1 (quoting *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 877 (9th Cir. 2009)).

court held that Garcia couldn't credibly claim that she'd suffer irreparable harm without immediate relief; after all, she had waited several months after the video was uploaded to YouTube to file suit.²⁹ It also held that Garcia couldn't demonstrate a likelihood of success on the merits.³⁰ Even assuming Garcia had a copyright interest in her performance, the court found that she had implicitly granted Youssef a license to use her performance in his finished film.³¹

A divided three-judge panel of the Ninth Circuit reversed. Writing for the majority, then-Chief Judge Kozinski³² found that Garcia prevailed under all four *Winter* factors.³³ First, Garcia was likely to succeed on the merits.³⁴ An individual performance within a larger film *can* count as a copyrightable "work" if — as here — that performance evinces "some minimal degree of creativity."³⁵ Second, Garcia could demonstrate irreparable harm: the death threats she received were "real and immediate," and taking down the film would stop those threats.³⁶ Finally, both the balance of the equities and the public interest favored Garcia: Youssef lied to her about the true nature of the film and thus put her life at risk.³⁷ Judge Kozinski also brushed off Google's First Amendment concerns, stating simply that "the First Amendment doesn't protect copyright infringement."³⁸ Consequently, the Ninth Circuit issued an order directing Google to remove all copies of *Innocence of Muslims* from YouTube.³⁹

The Ninth Circuit granted en banc review and dissolved the injunction.⁴⁰ Writing for the majority, Judge McKeown⁴¹ found that the law did not "clearly compel suppression" in this case, and that the

²⁹ *Id.* at *1–2.

³⁰ *Id.* at *1.

³¹ *Id.* at *2.

³² Then-Chief Judge Kozinski was joined by Judge Gould.

³³ See *Garcia v. Google, Inc.*, 766 F.3d 929, 940 (9th Cir. 2014), amending 743 F.3d 1258 (9th Cir. 2014).

³⁴ See *id.* at 933–38.

³⁵ *Id.* at 934 (quoting *Feist Publ'n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)). In addition, the court found that the "work for hire" doctrine — under which an artist's copyright interest in her performance vests in her employer — was inapplicable because Garcia didn't legally qualify as Youssef's employee. See *id.* at 936–37. The "implied license" doctrine was also inapplicable; Youssef exceeded the scope of Garcia's implied license by inserting her performance in a different film than the one she had signed up for. See *id.* at 937–38.

³⁶ *Id.* at 938–39.

³⁷ See *id.* at 939–40.

³⁸ *Id.* at 939.

³⁹ *Id.* at 940 n.8. In a dissent, Judge Smith argued that the facts and law did not "clearly favor" granting Garcia a preliminary injunction. *Id.* at 940 (Smith, J., dissenting). He also argued that the majority analyzed the fourth *Winter* factor — "public interest" — without properly considering the First Amendment. See *id.* at 948–49.

⁴⁰ *Garcia*, 786 F.3d at 739, 747.

⁴¹ Judge McKeown was joined by Chief Judge Thomas and Judges Berzon, Rawlinson, Clifton, Callahan, Smith, Murguia, and Christen.

district court did not abuse its discretion in denying Garcia's motion.⁴² First, Garcia wasn't likely to succeed on the merits.⁴³ Neither Ninth Circuit precedent nor the Copyright Office — to whose expertise the court deferred — suggested that an actor's performance in a film was a copyrightable work.⁴⁴ Second, Garcia couldn't demonstrate that she'd suffer "irreparable harm" without an injunction.⁴⁵ A copyright plaintiff must show "harm to her legal interests *as an author*";⁴⁶ Garcia's alleged harm, however, was "untethered from . . . copyright."⁴⁷

The court also found that the panel's takedown order "gave short shrift to the First Amendment values at stake."⁴⁸ The court criticized the panel for "censor[ing]" a "politically significant film" based on a "dubious . . . theory of copyright."⁴⁹ While the intersection between the First Amendment and copyright is "much-debated," the court highlighted the Supreme Court's statement that copyright is not "categorically immune from challenges under the First Amendment."⁵⁰ Indeed, "[t]he panel's takedown order of a film of substantial interest to the public [was] a classic prior restraint of speech," and "Garcia [could not] overcome the . . . heavy presumption against such restraints with a thin copyright claim in a five-second performance."⁵¹

Judge Kozinski dissented. He claimed that the majority "ma[de] a total mess of copyright law."⁵² If an individual performance within a film isn't a copyrightable work, "it isn't copyrightable by *anyone*," and only the final film itself is copyrightable.⁵³ As a result, the majority had "cast[] doubt on the copyrightability of vast swaths of material created during production of a film."⁵⁴ Judge Kozinski also criticized

⁴² *Garcia*, 786 F.3d at 740 (emphasis omitted). The majority noted that because the injunction required Google to take affirmative action, Garcia's burden was "doubly demanding"; she needed to show that the law and facts "*clearly favor[ed]* her position, not simply that she [was] likely to succeed." *Id.*

⁴³ *Id.*

⁴⁴ See *id.* at 741–42.

⁴⁵ *Id.* at 744–46.

⁴⁶ *Id.* at 744.

⁴⁷ *Id.* at 745. Because Garcia could not satisfy the first two *Winter* factors, the court did not consider it necessary to discuss the final two factors. *Id.* at 746.

⁴⁸ *Id.* at 747.

⁴⁹ *Id.*

⁵⁰ *Id.* (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003)).

⁵¹ *Id.* Judge Watford concurred in the judgment. He criticized the majority for "craft[ing] new rules of copyright law to resolve this appeal." *Id.* (Watford, J., concurring in the judgment). Instead, the majority could have focused solely on the "irreparable harm" prong. *Id.* That is, even assuming that "risk of death qualifies as irreparable injury," Garcia couldn't prove that an injunction would stop the death threats. *Id.* at 748. The fatwa would probably stay in place even if Google removed *Innocence of Muslims* from YouTube; the video would still be accessible online somewhere else. *Id.* at 748–49.

⁵² *Id.* at 749 (Kozinski, J., dissenting).

⁵³ *Id.* (emphasis added).

⁵⁴ *Id.*

the majority for finding that *Garcia* hadn't made an "ample showing of irreparable harm"; after all, "[i]t's her *life* that's at stake."⁵⁵

The Ninth Circuit didn't articulate a limiting principle in its prior restraint discussion; that is, it didn't explain why *any* copyright preliminary injunction that forbids speech wouldn't also be a prior restraint.⁵⁶ Lower courts might therefore read *Garcia* as holding that all similar copyright preliminary injunctions are prior restraints, and bear heavy presumptions against their constitutionality. The Ninth Circuit was certainly free to adopt the prior restraint standard for copyright preliminary injunctions. Although giving these injunctions prior restraint scrutiny is far from well established, the Supreme Court hasn't set a clear legal standard to use here.⁵⁷ But by not applying its usual prior restraint test, and by not fleshing out the constitutional implications of its argument, the Ninth Circuit didn't fully explain how to avoid "[giving] short shrift to the First Amendment."⁵⁸

The Supreme Court has outlined two different legal standards for preliminary injunctions. First, since the nineteenth century, courts have applied a four-factor test (with some variation from circuit to circuit).⁵⁹ The Supreme Court incorporated these factors into a uniform four-part test in *Winter*,⁶⁰ and the Ninth Circuit has recognized the *Winter* test as the proper standard for most preliminary injunctions.⁶¹ Second, when an injunction requires a court to censor speech before it conclusively determines that the speech isn't protected, the Court has almost always applied the prior restraint doctrine.⁶² There's a strong presumption that prior restraints are unconstitutional.⁶³ To determine if a plaintiff can successfully rebut that presumption, the Ninth Circuit had previously synthesized the Supreme Court's doctrine into a three-part test: "(1) the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing

⁵⁵ *Id.* at 753.

⁵⁶ *Garcia* did imply that for some injunctions that prevent expression — such as an injunction that restrains publication of "copyrighted computer code" — a prior restraint standard would not be appropriate. *See id.* at 747 (majority opinion). How the First Amendment applies to computer code is not settled. *See* Jorge R. Roig, *Decoding First Amendment Coverage of Computer Source Code in the Age of YouTube, Facebook, and the Arab Spring*, 68 N.Y.U. ANN. SURV. AM. L. 319, 321–25 (2012).

⁵⁷ *See* Newman, *supra* note 6, at 343–44.

⁵⁸ *Garcia*, 786 F.3d at 747.

⁵⁹ *See* Corinne Stuart, Comment, *The Applicability of the Prior Restraint Doctrine to False Advertising Law*, 21 GEO. MASON L. REV. 531, 532–33 (2014).

⁶⁰ *See id.* at 533.

⁶¹ *See, e.g.*, *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012).

⁶² *See* Lemley & Volokh, *supra* note 3, at 170–71.

⁶³ *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

interest; (2) the order is narrowly drawn; and (3) less restrictive alternatives are not available.”⁶⁴

The Supreme Court has never clarified what standard to use for copyright preliminary injunctions.⁶⁵ On the one hand, these injunctions can clearly censor speech: they restrict defendants from writing and communicating as they please.⁶⁶ On the other hand, copyright is also a property interest — an interest that the Constitution allows Congress to grant as a way of *fostering* speech.⁶⁷ As a result, the Supreme Court has “generally resisted” the idea that copyright is inconsistent with the First Amendment.⁶⁸ Furthermore, the First Amendment can cut both ways in a copyright suit. When a defendant disseminates an author’s copyrighted work without the author’s permission, the defendant could be infringing on the author’s First Amendment right *not* to speak.⁶⁹ Thus, while the First Amendment protects the ability to make one’s own speech, it “bears less heavily when speakers assert the right to make *other people’s* speeches.”⁷⁰

Because copyright has a different “flavor” than other kinds of speech, courts have been extremely hesitant to characterize copyright

⁶⁴ Levine v. U.S. Dist. Court, 764 F.2d 590, 595 (9th Cir. 1985) (internal citations omitted).

⁶⁵ See Newman, *supra* note 6, at 343–44. To be sure, the Court has clarified the proper standard for copyright *permanent* injunctions. See eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 392–93 (2006). But preliminary injunctions are different. Permanent injunctions — which courts grant after they conclusively determine that the speech at issue is unprotected — are “generally seen as constitutional.” Lemley & Volokh, *supra* note 3, at 169–70. But “[t]he special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment.” Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 390 (1973) (emphasis added). Courts have chosen to minimize the risk that they will censor speech that ultimately turns out to be protected, even if in the process they neglect to censor speech that ultimately turns out to be unprotected. See Lemley & Volokh, *supra* note 3, at 176.

⁶⁶ Lemley & Volokh, *supra* note 3, at 165–66.

⁶⁷ See Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

⁶⁸ 2 RIGHTS AND LIABILITIES IN MEDIA CONTENT § 14:7 (2d ed.), Westlaw (database updated Nov. 2015).

⁶⁹ See Harper & Row, 471 U.S. at 559–60. To be sure, it’s not always clear what counts as a violation of an author’s First Amendment right not to speak in the copyright context. See, e.g., Viva R. Moffat, *Borrowed Fiction and the Rightful Copyright Position*, 32 CARDOZO ARTS & ENT. L.J. 839, 854–55 (2014) (discussing whether an unauthorized sequel to a well-known novel infringes on this right). However, one of the main justifications for giving copyright owners the right not to speak seems to be to prevent outsiders from being “confused as to the source of [a new] work,” or accidentally “associat[ing] a new work with the author of the old work.” *Id.* at 855. Garcia exemplifies why protecting that right is important: because Youssef put Garcia’s performance in a film that “differ[ed] so radically from anything Garcia could have imagined when she was cast,” Garcia v. Google, Inc., 766 F.3d 929, 937 (9th Cir. 2014), extremists associated Garcia with the film’s message and targeted her personally, *see id.* at 938.

⁷⁰ Eldred v. Ashcroft, 537 U.S. 186, 221 (2003) (emphasis added).

preliminary injunctions as prior restraints.⁷¹ Indeed, the Ninth Circuit had previously rejected an argument that an intellectual property preliminary injunction constituted a prior restraint.⁷² Instead, the court has simply applied the four-factor *Winter* test and disregarded the First Amendment entirely.⁷³ By calling a copyright preliminary injunction a prior restraint, then, *Garcia* represented a sea change in the Ninth Circuit's jurisprudence.⁷⁴

Going forward, this development may cause more heat than light. First, when analyzing whether *Garcia* could overcome the "heavy presumption" against a prior restraint, the Ninth Circuit didn't mention the three-part test that it had derived from Supreme Court precedent. Instead, it considered two factors: the political significance of *Innocence of Muslims* and *Garcia*'s "dubious" likelihood of success on the merits.⁷⁵ Before *Garcia*, however, the strength of the plaintiff's claim and the public's interest in the work had little relevance. Instead, the plaintiff needed to show "a clear and present danger or a serious and imminent threat to a protected competing interest," that "the order is narrowly drawn," and that "less restrictive alternatives are not available."⁷⁶ While *Garcia* likely couldn't have met this high standard either, the court left similarly situated litigants with little guidance about how a court might evaluate their claims.

More importantly, *Garcia* raises serious constitutional questions. First, the court implied that *Garcia*'s burden to get an injunction was heavier because *Innocence of Muslims* was "a film at the center of an international uproar."⁷⁷ If lower courts take this statement to heart in cases involving copyright claims that aren't "dubious," authors with

⁷¹ See Lemley & Volokh, *supra* note 3, at 182; Newman, *supra* note 6, at 360. But see Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1277 (11th Cir. 2001) (characterizing a copyright preliminary injunction as a prior restraint).

⁷² See Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1403 n.11 (9th Cir. 1997).

⁷³ See, e.g., Flexible Lifeline Sys., Inc. v. Precision Lift, Inc., 654 F.3d 989, 994 (9th Cir. 2011).

⁷⁴ One might argue that *Garcia*'s discussion of prior restraint was only dicta, since it wasn't necessary to the court's main holding. But in the Ninth Circuit, a statement isn't dicta just because it's not "necessary in some strict logical sense" to a decision. *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1134 (9th Cir. 2015) (quoting *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc) (separate opinion of Kozinski, J.)). Rather, when a Ninth Circuit panel "confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit." *Id.* (quoting *Johnson*, 256 F.3d at 914 (separate opinion of Kozinski, J.)). The court in *Garcia* devoted two full paragraphs to its First Amendment analysis and cited multiple cases to bolster its view. See 786 F.3d at 747. Thus, courts will probably consider *Garcia*'s prior restraint discussion to be precedential.

⁷⁵ *Garcia*, 786 F.3d at 747 ("The mandatory injunction censored and suppressed a politically significant film — based upon a dubious . . . theory of copyright."); *id.* (noting that *Garcia*'s "thin copyright claim" could not overcome the "heavy presumption" against prior restraints).

⁷⁶ *Levine v. U.S. Dist. Court*, 764 F.2d 590, 595 (9th Cir. 1985).

⁷⁷ See *Garcia*, 786 F.3d at 747.

legitimate copyright grievances will find it harder to get preliminary injunctions when the public is clamoring to view their works. According to the Supreme Court, however, it is “fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public,”⁷⁸ because doing so would “depriv[e] copyright owners of their right in the property precisely when they encounter those users who could afford to pay for it.”⁷⁹

Moreover, applying prior restraint scrutiny to copyright preliminary injunctions could end up curtailing copyright *plaintiffs'* First Amendment rights. As noted above, copyright is different from other kinds of speech: *both* the plaintiff and the defendant in a copyright suit can have First Amendment interests.⁸⁰ Thus, applying First Amendment scrutiny to copyright preliminary injunctions presents courts with a very serious dilemma.⁸¹ If the court grants the injunction and the plaintiff doesn't end up having a valid copyright claim, the court has failed to protect the defendant's right to speak. But if the court *doesn't* grant the injunction and the plaintiff *does* end up having a valid copyright claim, the court may have failed to protect the plaintiff's right *not* to speak. And as both the Ninth Circuit and Supreme Court have recognized, “the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”⁸²

There is an important reason that courts have not applied First Amendment scrutiny to copyright preliminary injunctions. Copyright “does not seem to fit the paradigmatic suppression of free speech,” since it “suppresses some speech in order to encourage the speech of others.”⁸³ Indeed, before *Garcia*, the Ninth Circuit kept copyright preliminary injunctions and the First Amendment scrupulously separate.⁸⁴ The Ninth Circuit certainly had the right to change course and consider copyright preliminary injunctions that restrict speech to be prior restraints. But because *Garcia* didn't explain how to properly apply the prior restraint doctrine and balance the competing interests of plaintiffs and defendants in copyright suits, the Ninth Circuit has left lower courts on their own to sort through these difficult issues.

⁷⁸ Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) (emphasis added).

⁷⁹ *Id.* (quoting Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1615 (1982)).

⁸⁰ See *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010).

⁸¹ This dilemma is compounded by the fact that it can be very difficult to accurately gauge the merits of a copyright claim at the preliminary injunction stage. *See id.* at 80–81.

⁸² *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 828 (9th Cir. 2013) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

⁸³ Newman, *supra* note 6, at 365 n.257.

⁸⁴ *See, e.g., Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 994 (9th Cir. 2011) (applying the traditional four-factor *Winter* test without considering the First Amendment).