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Twitter Or Tweeter: Who Should be Liable for a Right of Publicity Violation Under the CDA?

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Twitter Or Tweeter: Who Should be Liable for a Right of Publicity Violation Under the CDA?

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INTRODUCTION

In 2009, an unknown Twitter user created a fake account for Anthony La Russa, the manager of the St. Louis Cardinals, at twitter.com/TonyLaRussa.¹ The user posted “tweets,” or updates, as La Russa, a few of which were vulgar and Cardinals-related.² The page also included a photo of La Russa and only one line on the page suggested it was fake, as the profile stated: “[b]io [p]arodies are fun for everyone.”³ La Russa tried to contact the site to have the phony page removed, but was unsuccessful, and filed the first suit of its kind against Twitter.⁴ La Russa’s complaint alleged trademark infringement and dilution, cybersquatting, and misappropriation, also known as a

1. Complaint, *La Russa v. Twitter, Inc.*, No. CGC09488101 (Cal. Sup. Ct. May 6, 2009).

2. *Id.*

3. *Id.*

4. *Id.*

violation of the right of publicity.⁵ Hours after the suit was filed, Twitter removed the fake page, and the case was eventually settled.⁶

Similarly, Ron Livingston, *Office Space* movie star, recently filed suit after an anonymous Wikipedia editor repeatedly altered Livingston's Wikipedia entry so it stated that Livingston was homosexual.⁷ A fake Facebook profile was also created for the actor, again alluding to homosexuality; Livingston suspected the individual who edited the Wikipedia page also created the profile.⁸ When the media first reported this story, it was known the actor filed suit, but there was much debate as to whom he named as the defendant, Wikipedia and Facebook or the unknown individual responsible for posting the false information.⁹ While the individual responsible for the post would normally be named as a defendant for a right of publicity violation regardless of Twitter's liability, in this instance, that person was unknown; thus, making it plausible that Livingston would seek restitution against Twitter.

This debate occurred because of the lack of uniformity between the Circuit Courts as to how a particular provision, the intellectual property exemption, in the Communications Decency Act (CDA) should be interpreted. One circuit has held that the intellectual property exemption under the CDA only includes federal intellectual property rights, like copyright and trademark, while other circuits have held that the intellectual property exemption under the CDA includes both

5. *Id.*

6. *Id.*

7. David Kravets, *Office Space Actor Sues Anonymous Wikipedia Vandal*, WIRED (Dec. 8, 2009), <http://www.wired.com/threatlevel/2009/12/livingston>.

8. *Id.*

9. Tanya Roth, *Ron Livingston Wikipedia Suit: Is Calling Someone Gay Defamation?*, FIND LAW (Dec. 9, 2009), http://blogs.findlaw.com/celebrity_justice/2009/12/ron-livingston-wikipedia-suit-is-calling-someone-gay-defamation.html. When the story first emerged, two websites, UPI and Techdirt, reported Livingston sued Wikipedia and Facebook, while three different websites, PerezHilton, Wired, and Copyrights & Campaigns, stated that he sued the individual responsible for the post. *Id.*; see also Perez Hilton, *Office Space Star Sues Internet Troll for Calling Him Gay!*, PEREZ HILTON (Dec. 6, 2009), <http://perezhilton.com/2009-12-06-office-space-star-sues-internet-troll-for-calling-him-gay>. Since these articles first emerged, the complaint has become public and shows that Mr. Livingston actually filed suit against the anonymous individual. *Complaint, Coupleguys, Inc., v. Doe*, No. BC427389 (C.D. Cal. Dec. 4, 2009). It is worth noting that this case was filed in the Superior Court of the State of California. Since California is in the Ninth Circuit, it would follow the holding of *Perfect 10, Inc. v. CCBill*, 488 F.3d 1102, 1119 (9th Cir. 2007), which has construed the CDA to limit the term intellectual property to federal intellectual property. Therefore, the right of publicity would not fall under the exception provided in the CDA, and internet service providers (ISPs), such as Wikipedia or Facebook, could not be held liable for the violation of a person's right of publicity. Therefore, because of the current Ninth Circuit stance, the case was filed against John Doe, rather than against Wikipedia or Facebook.

federal intellectual property rights and state intellectual property rights, like the right of publicity.

A resolution of this jurisdictional split is important. If the intellectual property exemption under the CDA includes only federal intellectual property rights, then an individual whose right of publicity has been violated by another party posting on a website, such as Twitter, Facebook, or Wikipedia, may only seek restitution against the individual who posted the content. On the other hand, if the intellectual property exemption under the CDA includes both federal intellectual property rights and state intellectual property rights, then an individual whose right of publicity has been violated by another party posting on a website, such as Twitter, Facebook, or Wikipedia, may seek restitution against *both* the individual who posted the content and the internet service provider (ISP), Twitter, Facebook, or Wikipedia.

This Comment will demonstrate that a state law right of publicity claim should be included in the intellectual property exception of the CDA, and thus, individuals like Tony La Russa and Ron Livingston should be able to seek redress for violations of their rights of publicity from ISPs, like Facebook, Twitter, and Wikipedia. Part II will explain the development of the right of publicity. Part III will detail the legislative history of the Communications Decency Act. Part IV will propose two possible reasons why the CDA carved out an exception for intellectual property rights. Part V will contain an examination of the case law that has caused the jurisdictional split as to whether the right of privacy and other similar state intellectual property rights fall under the intellectual property exception of the CDA. Finally, Part VI will conclude by demonstrating that according to the plain language of the statute and the proposed purposes, the right of publicity should be included in the intellectual property exemption of the CDA.

I. THE DEVELOPMENT OF THE RIGHT TO PUBLICITY

The right of publicity, a state law claim, is a person's legal right to control the exploitation of their name and likeness.¹⁰ The right "prevents unjust enrichment by providing a remedy against exploitation of the goodwill and reputation that a person develops in his name or likeness through the investment of time, effort, and money."¹¹ As the Restatement (Third) of Unfair Competition explains, the right "appropriates the commercial value of a person's identity by using

10. ROGER E. SCHECHTER & JOHN R. THOMAS, *INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS* 263 (2003).

11. *Bi-Rite Enter., Inc. v. Button Master*, 555 F. Supp. 1188, 1198 (S.D.N.Y. 1983).

without consent the person's name, likeness, or other indicia of identity for the purpose of trade."¹²

The notion of the right of publicity arose in the American legal community as a result of three pivotal law review articles.¹³ It was not until sixty-three years after the publication of these articles, in 1953, that Judge Frank of the Second Circuit Court of Appeals coined the term "right of publicity."¹⁴ The Supreme Court recognized the right of publicity in 1977, as it noted the following different motivations behind the right of privacy and the right of publicity: economic interests drive the right of publicity, while privacy protections drive the right of privacy.¹⁵

Cases involving the right of publicity typically involve a celebrity plaintiff. However, courts are split as to whether being a celebrity is a prerequisite to bringing a right of publicity claim. Some courts have found right of publicity is restricted to celebrities.¹⁶ On the other hand, the majority of courts have found that non-celebrities are allowed to recover for a violation of their right of publicity if there is proof that the individual's identity possesses some economic value.¹⁷ Therefore, for

12. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

13. *Curran v. Amazon.com, Inc.*, No. 2:07-0354, 2008 WL 472433, at *3 (S.D.W.Va. Feb. 14, 2008). The right to privacy, from which the right of publicity seemingly grew out of, first received widespread recognition as a result of Samuel Warren and Louise Brandeis's article, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The article states, "the right to life has come to mean the right to enjoy life, — *the right to be let alone*; the right to liberty secures the exercise of extensive civil privileges; and the term 'property' has grown to comprise every form of possession—intangible, as well as tangible [emphasis added]." *Id.* (emphasis added). Though the right of publicity was not specifically mentioned in this article, it set the stage for Dean Prosser to later break the right of privacy into four distinct torts. The four torts comprising the right of privacy, as suggested by Prosser in his article, *Privacy*, include the following: (1) intrusion upon seclusion or solitude, (2) publication of private facts, (3) false light, and (4) misappropriation of one's name or likeness. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). The fourth privacy tort was further defined by Prosser as the "exploitation of attributes of the plaintiff's identity," or more commonly known today as the right of publicity. *Id.* at 401. Finally, in Melville Nimmer's seminal article, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954), he attempted to define the parameters of the right of publicity, stating that the right should be available to everyone, not just limited to celebrities, and should be recognized as a property right, not a personal right, so it may be assigned and subsequently enforced by the assignees.

14. *Haelan Labs. Inc., v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

15. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977).

16. *See, e.g., Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 694 F.2d 674, 676 (11th Cir. 1983); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983); *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527, 530 (9th Cir. 1984); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 729 (S.D.N.Y. 1978); *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 700 (Ga. 1982); SCHECHTER & THOMAS, *supra* note 10, at 268.

17. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 953 (6th Cir. 2003); *see Tellado v.*

one to invoke the right of publicity, the individual must have attained some degree of “celebrity status,” meaning their identity has an economic value that needs protection.

The right has expanded and evolved over time into one the courts typically classify as an intellectual property right.¹⁸ The right originated from state statutes and common law, and there is no federal equivalent.¹⁹ Currently, nineteen states have statutes that define a right of publicity and twenty-eight others recognize a common law right of publicity.²⁰ The Restatement outlines the elements of the *prima facie* case, which require the plaintiff to establish:

1. Validity. Plaintiff owns an enforceable right in the identity or persona of a human being; and
2. Infringement
 - (A) Defendant, without permission, has used some aspect of identity or persona in such a way that plaintiff is identifiable from defendant’s use; and
 - (B) Defendant’s use is likely to cause damage to the commercial value of that persona.²¹

While these elements are typical of what one would need to prove for a successful right of publicity claim, it should be noted that the elements might vary from state to state.

Time-Life Books, Inc., 643 F. Supp. 904 (D.N.J. 1986); *Vinci v. Am. Can Co.*, 459 N.E. 2d 507, 509 (Ohio 1984); *Canessa v. J.I. Kislak, Inc.*, 235 A.2d 62, 75 (N.J. 1967); J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 4.3 (2d ed. 2003); SCHECHTER & THOMAS, *supra* note 10, at 268; *see also* *Mendonsa v. Time, Inc.*, 678 F. Supp. 967 (D.R.I. 1988). In 1987, *Life* magazine tried to sell a famous picture of a sailor, the plaintiff, kissing a nurse on V-J Day for \$1600 each. *Id.* at 968. The sailor in the picture brought an action against the magazine for “misappropriation of likeness.” *Id.* The court denied the defendant’s motion to dismiss for failure to state a claim because of the commercial nature of the sale. *Id.* at 973. Commentary on this case suggests that the holding demonstrated the court’s emphasis on the commercial use of one’s name or likeness, regardless of whether the individual was celebrity. *See id.* However, it can be argued the sailor had achieved some level of celebrity status, as the initial publication of the picture occurred on August 27, 1945, and by the time the suit was brought, the image of the sailor in the photograph was very “well known.” *Id.* at 968.

18. MCCARTHY, *supra* note 17, § 3:1.

19. *Id.* § 6:135.

20. *Statutes*, RIGHTOFPUBLICITY, <http://rightofpublicity.com/statutes> (last visited Sept. 24, 2010).

21. MCCARTHY, *supra* note 17, § 3:1; *see* RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-49 (1995).

II. THE CDA AND ITS LEGISLATIVE HISTORY

Congress passed the CDA as Title V of the Telecommunications Act of 1996.²² The CDA was primarily passed to protect minors from exposure to obscene and indecent material on the Internet, as the legislative body was “troubled by an increasing number of published reports of inappropriate uses of telecommunications technologies to transmit pornography, engage children in inappropriate adult contact, terrorize computer network users through ‘electronic stalking’ and seize personal information.”²³ However, the CDA provisions regulating pornographic content were subsequently struck down as unconstitutional.

The second reason the CDA was passed, as emphasized by both the House and Senate, was to overrule *Stratton Oakmont Inc. v. Prodigy Services*, which treated ISPs as publishers or speakers of the content posted on their sites.²⁴ In *Stratton Oakmont*, the defendant hosted “Money Talk,” the country’s top financial message board at that time.²⁵ An anonymous user posted statements on “Money Talk” alleging criminal and fraudulent behavior by Stratton Oakmont, Inc. and Stratton’s president, Daniel Porush.²⁶ Originally, Prodigy advertised it “exercised editorial control” over the message board, but by the time the defamatory comments were posted, Prodigy changed its policies.²⁷ Regardless, Stratton claimed that Prodigy edited the contents on its message boards in a way that rendered the company a publisher for liability purposes.²⁸ The court determined Prodigy exercised sufficient editorial control over the message board to qualify as a publisher. As a result, this decision imposed the same responsibilities on ISPs as newspapers, making them liable for the statements posted on their message board.²⁹ The court found that “[b]y actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and ‘bad taste,’ for example, P[rodigy] is clearly making decisions as to content . . . and such decisions constitute[d] editorial control,” and thus, Prodigy was operating as a

22. 47 U.S.C § 230 (1996).

23. See S. REP. NO. 104–23, at 59 (1995).

24. See H.R REP. NO. 104–458, at 194 (1996)(Conf. Rep.).

25. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at *1 (N.Y.Sup. May 24, 1995).

26. *Id.*

27. *Id.* at *2–3.

28. *Id.* at *3.

29. *Id.* at *4.

publisher.³⁰

At the same time, while drafting the CDA, Congress was also concerned with ensuring the continued development of the Internet.³¹ The legislative body recognized the speed at which information could be distributed and the near impossibility of regulating information content. It also saw a great opportunity for greater “availability of educational and informational resources.”³² Congress believed the Internet could provide “a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”³³ Accordingly, when writing the statute, Congress aimed “to promote the continued development of the Internet” and “preserve the vibrant and competitive free market” that the Internet created.³⁴

The legislative history of the CDA shows that Congress thought ISPs were the best entities to manage content on the Internet and specifically, their websites.³⁵ As a policy decision, Congress chose, “[w]hether wisely or not . . . to effectively immunize providers of

30. *Id.*

31. See 47 U.S.C. § 230(b) (2006). While various policy options were available to Congress, it chose to “promote the continued development of the Internet and other interactive computer services and other interactive media” and “to preserve the vibrant and competitive free market” for such service, largely “unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(1) , (2). In § 230(a), Congress explicitly listed the five reasons why it granted immunity to ISPs. They are as follows:

“(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens. (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops. (3) The Internet and other interactive computer services offer a forum for a true diversity of political disclosure, unique opportunities for cultural development, and myriad avenues for intellectual activity. (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulations. (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.”

47 U.S.C. § 230(a).

32. 47 U.S.C. § 230(a)(1).

33. 47 U.S.C. § 230(a)(3).

34. 47 U.S.C. § 230(b)(1)–(2).

35. Adam M. Greenfield, *Despite a Perfect 10, What Newspapers Should Know About Immunity (And Liability) for Online Commenting*, 4 J. L. & POL’Y FOR INFO. SOC’Y 453, 461–62 (2008).

interactive computer services from civil liability in tort with respect to material disseminated by them but created by others.”³⁶ Thus, Congress decided not to treat ISPs in the same manner as traditional publishers, such as newspapers, magazines, television, or radio stations; all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others. Further, in its legislative decision-making, Congress opted not to hold ISPs liable for their failure to edit, withhold, or restrict access to offensive material distributed through their websites.

Congress’s decision to immunize ISPs and their objection to *Stratton Oakmont* is most clearly seen in § 230(c) of the CDA, the “Good Samaritan” subsection. This subsection states “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”³⁷ The term “information content provider” is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet.”³⁸ Therefore, under the “Good Samaritan” provision, ISPs such as Facebook, MySpace, Twitter, etc., are not treated as publishers of information posted on their sites by their members, the information content providers.

However, the CDA goes on to state, “[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property,”³⁹ but does not define “intellectual property” anywhere in the Act. Federal intellectual property law claims for infringement of copyrights, trademarks, and patents are clearly exempted from this section. However, Congress made no mention in the legislative history as to whether it intended to view state law claims, like the right of publicity, as intellectual property claims or tort claims.⁴⁰ One court has concluded that the CDA only grants immunity for ISPs for tort-based negligence claims arising from the acts of their users.⁴¹ According to the

36. *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998).

37. 47 U.S.C. § 230 (c)(1); *see also Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

38. 47 U.S.C. § 230(f)(3) (2006).

39. 47 U.S.C. § 230(e)(2).

40. Ian C. Ballon, *The Good Samaritan Exemption and the CDA*, 978 PLI/ PAT 515, 564 (2009).

41. *Gucci Am., Inc. v. Hall & Assoc.*, 135 F. Supp. 2d 409 (S.D.N.Y. 2001). Gucci brought a suit against Mindspring, an ISP for trademark infringement. *Id.* at 411. Mindspring argued that the CDA precluded the company from liability for the information posted on their own website. *Id.* The court distinguished this case from others that successfully invoked § 230 as a defense because those cases were based in tort law. *Id.* at 415. Therefore, the court

Gucci court, the Act does not grant immunity for any state law intellectual property claims.

III. PURPOSE OF THE CDA

In the congressional findings, Congress noted that the Internet offers “unique opportunities for cultural development” and has been increasingly relied on by Americans for “a variety of political, educational, cultural, and entertainment services.”⁴² While Congress decided it was beneficial for the development of the Internet to immunize ISPs from the liabilities imposed on publishers, it specifically removed ISPs’ protection for the violation of “any law pertaining to intellectual property.”⁴³ But why did this legislative body carve out an intellectual property exemption to the general rule? Unfortunately, this question cannot be answered by looking at the legislative history of the Act.

The issue of ISP liability was convoluted and uncertain at the time Congress passed the CDA. In 1991, in *Cubby, Inc. v. CompuServe, Inc.*, CompuServe hosted an online news forum.⁴⁴ The contents of the forum were “manage[d], review[ed], create[d], delete[d], edit[ed], and otherwise controll[ed]” by an independent party.⁴⁵ One particular forum, Rumorville USA, a daily newsletter, published content about a competing online newsletter developed by Cubby.⁴⁶ Cubby asserted that the contents were defamatory, and while CompuServe did not disagree, it argued it should not be held liable because it was only a distributor of that information and did not know and had no reason to know of the posting.⁴⁷ The court agreed with CompuServe and held that CompuServe was a distributor rather than a publisher of the content, and thus, it should only be held liable for defamation if it knew or had reason to know of the defamatory nature of the statements.⁴⁸ Through this finding, the court seemingly held that ISPs were subject to traditional defamation law for content posted on their websites.

Stratton Oakmont, as discussed above, pointed out that if

found that the CDA did not give Mindspring immunity from *Gucci*’s trademark claim because the claim was rooted in intellectual property. *Id.*; see also *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007).

42. 47 U.S.C. § 230(a)(3), (5).

43. 47 U.S.C. § 230(e)(2).

44. *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 137 (S.D.N.Y. 1991).

45. *Id.*

46. *Id.*

47. *Id.* at 141.

48. *Id.*

distributors of information knew, or should have known, about the defamatory statements, they would be held liable.⁴⁹ The court distinguished this case from *Cubby* as it found that ISPs were no longer merely distributors of information when they exercised editorial control, and as a result should be treated as the publisher of the information.⁵⁰

In its legislative history, Congress specifically mentioned it sought to overturn *Stratton Oakmont*. In doing so, it recognized that *Cubby* and *Stratton Oakmont* created a seemingly impossible situation for ISPs. If ISPs knew, or should have known, content on their sites was defamatory they would be held liable, and if they edited their sites for such content and missed certain postings or statements, they would still be considered publishers of that information and held liable. The CDA was Congress's response to dealing with this dilemma.

One possible explanation why Congress may have created the intellectual property exemption under the CDA was to address issues of defamation on the Internet, but leave intellectual property rights alone. Congress may have recognized that copyrights and trademarks had established precedent in the area of secondary liability. Under these secondary liability doctrines, such as contributory liability and vicarious liability for copyright law, ISPs could be held liable for violations posted on their sites. By leaving intellectual property exempted from the provisions of the CDA, Congress was creating law consistent with the established precedent by still holding ISPs liable for intellectual property violations posted on their sites. Thus, while ISPs needed immunity stemming from defamatory comments posted on their websites, there was no need to change the already established intellectual property laws.

Another possible reason Congress provided the intellectual property exception might have been to continue to protect creators of intellectual property. The purpose behind intellectual property rights is primarily economic. The traditional view of intellectual property rights is "as instruments of public policy which confer economic privileges on individuals solely for the purpose of contributing to the greater public good."⁵¹ These rights provide financial incentives to individuals who create intellectual property.

49. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at *3 (N.Y.Sup. May 24, 1995).

50. *Id.* at *4.

51. Barton, J., Alexander D., Correa, C., Mashelkar, R., Samuels, G., Thomas, S. et al. (2002). *Integrating Intellectual Property Rights and Development Policy*. Resource document. http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf.

Congress may have destroyed this immunity in order to, metaphorically speaking, keep from pulling out the rug on those that own intellectual property rights. In order for these economic gains to be felt by the creators and owners of intellectual property rights, these rights need to be enforced; if there is no longer an economic gain, this may have a very serious chilling effect on the creation of intellectual property. If ISPs are immune from liability, the likelihood of them monitoring for violations of intellectual property rights seems slim to none. By taking away their immunity, ISPs have an incentive to closely monitor for these offenses. While Congress may not have had the same concern for individuals that are defamed, by including the intellectual property exemption in the CDA, the legislative body seemed to recognize the importance of preserving the already established intellectual property rights and the financial incentives they create.

IV. EXAMINING THE JURISDICTIONAL SPLIT AS TO WHETHER § 230(E)(2) OF THE CDA INCLUDES BOTH STATE AND FEDERAL INTELLECTUAL PROPERTY LAW

Jurisdictions are split as to whether “intellectual property” under § 230 includes just federal intellectual property law, or is broad enough to include both state and federal intellectual property law. The Ninth Circuit emphasized the lack of uniformity between state intellectual property laws and determined the CDA only includes federal intellectual property laws.⁵² Conversely, district courts in New Hampshire and southern New York sharply criticized this approach and focused on the language of the Act to determine whether § 230(e)(2) includes both state and federal intellectual property law.⁵³ This is significant because in situations where courts have determined the CDA only includes federal intellectual property rights, like the Ninth Circuit, ISPs cannot be held liable if users of their website violate another person’s right of publicity. In contrast, in situations where courts have determined the CDA includes both state and federal intellectual property claims, like the district courts in New Hampshire and southern New York, ISPs are no longer immune from right of publicity claims and may be held liable.

52. *Perfect 10, Inc. v. CCBill*, 488 F.3d 1102, 1118–19 (9th Cir. 2007).

53. *See Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 299–300 (D.N.H. 2008); *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 698 (S.D.N.Y. 2009).

A. *The Argument that “Intellectual Property” Under § 230 (e)(2) of the CDA Only Includes Federal Intellectual Property Law*

In the 2007 Ninth Circuit Case, *Perfect 10, Inc. v. CCBill*, the plaintiff, Perfect 10, published an adult entertainment magazine and was the owner of the subscription website perfect10.com.⁵⁴ The website featured images of models, created by the company, that were only accessible to registered, paying members.⁵⁵ Many of the models signed releases assigning their rights of publicity to Perfect 10.⁵⁶ Additionally, the company held copyrights for the images and owned several related trademarks and service marks.⁵⁷ The plaintiffs asserted that the defendants violated copyright, trademark, state law claims of violation of the right of publicity, unfair competition, and false and misleading advertising laws by providing services to websites that posted images stolen from Perfect 10’s magazine and website.⁵⁸

The court found that the term “intellectual property” was limited to “federal intellectual property.”⁵⁹ The court noted that state intellectual property laws, such as the right of publicity, are not consistent with federal intellectual property laws because of their lack of uniformity.⁶⁰ It further stated:

Because material on a website may be viewed across the Internet, and thus in more than one state at a time, permitting the reach of any particular state’s definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress’s expressed goal of insulating the development of the Internet from the various state-law regimes.⁶¹

The court seemingly concluded that because of the lack of uniformity between states and lack of clarification of the term “intellectual property” in the CDA, the only reasonable way to construe the language of § 230 would be to limit intellectual property to federal intellectual property.⁶² Therefore, it found the defendants were eligible

54. *Perfect 10*, 488 F.3d at 1108.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 1119.

60. *Id.* at 1118.

61. *Id.*

62. *See id.*

for CDA immunity for the state right of publicity claim brought by Perfect 10.⁶³

B. “Intellectual Property” Under § 230 (e)(2) of the CDA Includes Both State and Federal Intellectual Property Law

In the 2008 case, *Doe v. Friendfinder Network, Inc.*, a New Hampshire district court expressly declined to follow *Perfect 10* and adopted dicta from the First Circuit⁶⁴ holding that state publicity claims were not preempted by § 230.⁶⁵ The defendant corporation operated a number of “web communities” where users met each other through online personal advertisements.⁶⁶ A false profile was created for a member that contained a variety of information on her sexual proclivities, and other information such as birth date, height, build, hair and eye color, and submitted a nude photograph, purportedly of herself.⁶⁷ The plaintiff did not learn of the profile until more than a year after its creation.⁶⁸ After being contacted, the defendants said they would take down the profile; but instead of taking it down, they put up language stating that the profile had been removed. This language made no indication that the profile was false to begin with.⁶⁹ For several months after the initial complaint, the profile showed up on other similar websites operated by the defendants.⁷⁰ To make matters worse, the profile appeared as advertisements on third party websites, including sexually related sites.⁷¹ The plaintiff brought eight counts against the defendants, including a right of publicity claim.⁷²

The court stated the analysis of the statute should begin with its language, and the language did not suggest intellectual property was to be limited to federal intellectual property. It criticized the Ninth Circuit’s lack of statutory interpretation, in particular, its disregard for the presence of the term “any” and the absence of the term “federal” in the statute.⁷³ The court noted, “[i]t is well settled that where Congress includes particular language in one section of a statute but omits it in

63. *Id.* at 1119.

64. *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007).

65. *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 299 (D.N.H. 2008).

66. *Id.* at 291.

67. *Id.* at 292.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 293.

73. *Id.* at 300.

another section of the same Act, it is generally presumed that Congress did so intentionally and purposely in the disparate inclusion or exclusion.”⁷⁴ The court also pointed out that the Ninth Circuit failed to look at the rest of § 230, as the statute contains other provisions that specifically identify whether federal or state law applies.⁷⁵ Finally, the court found that *Perfect 10* failed to address any particular instances where the state’s definition of intellectual property went beyond the scope of federal law, or how state intellectual property law varied so drastically between states, thus making this argument “shaky at best.”⁷⁶ The court found the facts presented were sufficient to state a claim for infringement of the plaintiff’s right to publicity.⁷⁷ Therefore, the defendants could still be liable for the fake profile posted on their website.

Likewise, in 2009, in *Atlantic Recording Corp. v. Project Playlist, Inc.*, the Southern District of New York rejected the Ninth Circuit’s holding and found the CDA did not bar the plaintiff’s New York state law copyright claims.⁷⁸ The defendant operated a website that provided an index of songs available on third-party websites.⁷⁹ Users could create playlists of the songs on the website, upload the songs to their profiles on social networking sites, or download the songs from the third-party websites.⁸⁰ The plaintiffs owned the copyrights to many of the songs the defendants provided links to.⁸¹ The songs were posted without the plaintiff’s permission, and thus, the court found copyright infringement.⁸²

The defendant moved to dismiss the plaintiff’s state common law copyright infringement claims alleging the claims were barred by the CDA.⁸³ The court reasoned the same way as *Friendfinder*, and found

74. *Id.* (quoting *Duncan v. Walker*, 553 U.S. 167, 173 (2001)).

75. *Id.* at 299-300.

76. *Id.* at 301.

77. *Id.* at 306.

78. *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009). Today, federal copyright law expressly preempts most state copyright laws; yet before 1972, sound recordings were protected only under state copyright law. The plaintiff in this case was suing to enforce those state rights. Eric Goldman, *230 Doesn’t Preempt State IP Claims—Atlantic Records v. Project Playlist*, TECHNOLOGY & MARKET LAW BLOG (Apr. 2009) http://blog.ericgoldman.org/archives/2009/04/230_doesnt_pree.htm.

79. *Atlantic Recording Corp.*, 603 F. Supp. 2d at 692.

80. *Id.* at 692–693.

81. *Id.* at 693.

82. *Id.*

83. *Id.* at 698.

that “any law” was not just limited to federal law.⁸⁴ Additionally, the court noted four different places in § 230(e) where Congress specified whether it intended local, state, or federal law to apply and pointed out the absence of such language in this instance.⁸⁵ The court found this indicated that “any law” included both state and federal law, as Congress clearly knew how to make the distinction but chose not to.⁸⁶ The court also struck down the defendant’s argument that all state laws relating to intellectual property are preempted by § 230(e)(2),⁸⁷ because those laws are inconsistent with the CDA.⁸⁸ It found § 230(e) provided states with the authority to enforce any state law consistent with the CDA.⁸⁹ Since the defendant did not demonstrate the state law claims were inconsistent, its argument could not be upheld.⁹⁰ The court held the plain language of the CDA made it clear that §230 (e)(2) does not provide immunity for either state or federal intellectual property law.⁹¹ Therefore, the court concluded that the CDA did not provide immunity for federal or state intellectual property claims and the defendant’s motion to dismiss was denied.⁹²

V. THE PLAIN LANGUAGE AND THE UNDERLYING PURPOSE OF § 230(E)(2) DEMONSTRATE THE RIGHT OF PUBLICITY SHOULD FALL UNDER THE INTELLECTUAL PROPERTY EXCEPTION OF THE CDA

Courts should follow *Friendfinder* and *Atlantic Recording Corp.* and treat the right of publicity as an intellectual property right under § 230 of the CDA. The language of the statute states, “[n]othing in this section shall be construed to limit or expand *any* law pertaining to intellectual property.”⁹³ The plain language of the Act, along with the proposed purpose of the Act, speaks to the inclusiveness of state intellectual property rights under § 230(e)(2).

Here, both New York and New Hampshire District Courts have clearly pointed out that the statute is unambiguous. First, a statute is

84. *Id.* at 703.

85. *Id.*

86. *See id.*

87. “Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230 (e)(3) (2006).

88. *Atlantic Recording Corp.*, 603 F. Supp. 2d at 702.

89. *Id.*

90. *Id.*

91. *Id.* at 704.

92. *Id.*

93. 47 U.S.C. § 230(e)(2) (emphasis added).

ambiguous if a reasonably well-informed person can interpret it in more than one way.⁹⁴ And the term “any” allows for a broad interpretation of the statute and can be defined as “every.”⁹⁵ As a result, any person that is reasonably well-informed of the definition of the word “any” could not interpret the statute in more than one way; there is no ambiguity in this term, and therefore, should included both federal and state law. Second, as courts have pointed out, Congress uses the words local, state, and/or federal in subsection (e), to limit the application of other subsections of the CDA, but fails to use any limiting term in subsection (e)(2). Third, § 230 allows for state laws consistent with the CDA, and based on the purpose of the Act, as described in § 230(a), there is no indication that a state right of publicity claim would be inconsistent with this purpose. In conclusion, since the plain meaning of the word “any” is broad and inclusive of all types of law, Congress failed to use a limiting word such as local, state, or federal in the subsection, and a state law right of publicity is not indicative of any inconsistencies with the CDA, the plain meaning of the statute clearly shows a state law right of publicity claim should be included under the intellectual property exemption of § 230(e)(2).

Under the plain meaning rule, if “the intention of the legislature is so apparent from the face of the statute that there can be no question as to its meaning, there is no room for construction.”⁹⁶ As both the New York and New Hampshire District Courts made clear, convincing arguments that the Act is unambiguous and because of the plain meaning, the canons of construction analysis need not go any further.

However, if this analysis is not fully convincing, in addition to the plain language of the statute, the proposed purpose of the statute is indicative that Congress meant for the intellectual property exemption to include both state and federal laws. Economic interests like all other intellectual property rights; drive the right of publicity the economic interest being the commercial value attributed to a person’s identity. If ISPs are immune from liability, they are probably not going to monitor their websites for violations of an individual’s right of publicity. However, to ensure that this right is fully enforced, and that individuals who have put the time, effort, and money into ensuring their goodwill and reputation are being adequately compensated for this undertaking,

94. *Yakin v. Tyler Hill Corp.*, 566 F.3d 72, 75 (2d Cir. 2009).

95. MERRIAM WEBSTER, <http://www.merriam-webster.com/dictionary/any> (last visited Mar. 20, 2010) (search for definition of “any”).

96. *Application of Wiechert*, 370 F.2d 927, 948 (C.C.P.A. 1967) (quoting 2 Sutherland, STATUTORY CONSTRUCTION § 4702 (3ded. 1943)).

state intellectual property rights should be included in the intellectual property exception of the CDA.

Further, as explained in the proposed purpose of the CDA, Congress seemingly realized the impossible situations ISPs, especially the ISPs with numerous members, were facing in managing the defamatory statements posted on their websites in light of the new case law, and sought to reconcile the situation. At the same time, the legislative body realized that intellectual property laws already had secondary liability precedent in place that could be easily translated to the Internet context. Additionally, if the intellectual property exemption did not exist, intellectual property rights could be violated on the Internet without seemingly any recourse for the owners of those rights, especially if violators who created those postings could not be found. The intellectual property exception has created reasons for ISPs to monitor their sites for these types of violations and has preempted a possible chilling effect that could have occurred if the owners of these rights were to no longer receive the financial benefit of their labors.

In determining whether the right of publicity falls under the proposed purposes of the intellectual property exception, it must be determined whether the right more closely parallels that of a privacy tort, like defamation, or an intellectual property right.

First, the right of publicity and the right privacy protect fundamentally different underlying interests. Under the right of publicity, the owner of the right possesses a commercial interest, like the owners of intellectual property rights. In contrast, one does not have this same commercial interest under privacy rights. An emphasis on the loss of commercial value is very different than an emphasis on the invasion of an individual's autonomy or integrity.⁹⁷

Second, the remedies afforded are different to those who have had their right of publicity violated as opposed to having their privacy rights violated. Typically, when there is a violation of property rights, like intellectual property rights, the remedy afforded is the right to exclude, or the issuing of an injunction against the individual violating the property right.⁹⁸ On the other hand, when there is a violation of a

97. Robert T. Thompson, *Image As Personal Property: How Privacy Law Has Influenced the Right of Publicity*, 16 UCLA ENT. L. REV. 155, 164 (2009).

98. Occasionally, a party will seek monetary damages for a violation of the right of publicity. However, the damages one would seek under the right of privacy differ from the damages one would seek under the right of publicity. The Eleventh Circuit explains:

“The appropriation type of invasion of privacy, like all privacy rights, centers on damage

to human dignity. Damages are usually measured by ‘mental distress’—some bruising

privacy tort, like defamation, the remedy afforded is typically damages, not an injunction. Since individuals typically sue for an injunction when their right of publicity has been violated, the right of publicity is more closely aligned with intellectual property rights.⁹⁹

Finally, individuals who have attained the status necessary to invoke the right of publicity also gain other privileges. For example, the right of publicity is assignable during the individual's life.¹⁰⁰ Courts have found that without this characteristic, full commercial exploitation of one's name and likeness would be practically impossible.¹⁰¹ The right can also be bequeathed, enforced by the assignee, and licensed, while privacy torts cannot be assigned in any capacity or inherited.¹⁰²

Therefore, for these reasons, the right of publicity is more closely aligned with intellectual property rights, like copyrights and trademarks, than with tort rights, such as defamation. As a result, in addition to the plain language of the statute, the proposed purposes of the statute also indicate that the right of publicity should fall under § 203(e)(2) of the CDA.

CONCLUSION

As social networking sites continue to grow in size, number, and popularity, inevitably so too will violations of an individual's right of publicity. Without a resolution as to whether state law intellectual property claims, such as the right of publicity, are to be included under the intellectual property exemption of § 230(e)(2) of the CDA, confusion will continue to arise, like in the *Livingston* case, as to whether a violated individual can seek restitution against the ISP or is limited to seeking recourse from the individual responsible for the

of

the human psyche. On the other hand, the right of publicity relates to commercial damage

to the business value of human identity. Put simplistically, while infringement of the right

of publicity looks to an injury to the pocketbook, an invasion of appropriation privacy looks to an injury to the psyche."

Allison v. Vintage Sports Plaques, 136 F.3d 1443, 1447 (11th Cir. 1998). Thus, one would be compensated for different injuries under each of these rights, again not making them equivalent.

99. *See id.*

100. *Haelan Labs., Inc., v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

101. *Id.*

102. *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods. Inc.*, 296 S.E.2d 697, 705 (Ga. 1982).

posting.

Courts should follow *Friendfinder* and *Atlantic Recording Corp.* and find that intellectual property under § 230(e)(2) of the CDA includes both federal and state intellectual property rights. The plain language indicates Congress's intent to include any intellectual property rights. Additionally, if the efforts of intellectual property creators are going to be protected, their rights need to be enforced. By making ISPs potentially liable for infringement of these rights, owners of intellectual property rights will get the protection they deserve. Further, the right of publicity has the same fundamental underlying interest, typically invokes the same remedies, and gives the owner the same privileges, such as assignability and inheritability, as other intellectual property rights. These factors demonstrate that the right of publicity more closely reflects an intellectual property right, rather than a privacy tort. Therefore, the right of publicity should be included in the intellectual property exemption of § 230(e)(2) of the CDA, and ISPs should be held liable if their users post contents on their websites that violate this right.

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