

Summer 2023

Paws Off My Profile: Protecting the Persona in a Modern Digital Age

Samantha P. McCaleb

Follow this and additional works at: <https://scholarship.law.marquette.edu/ipilr>



Part of the [Intellectual Property Law Commons](#)

Recommended Citation

Samantha P. McCaleb, *Paws Off My Profile: Protecting the Persona in a Modern Digital Age*, 27 Marq. Intell. Prop. & Innovation L. Rev. 107 (2023).

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Intellectual Property & Innovation Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact elana.olson@marquette.edu.

PAWS OFF MY PROFILE: PROTECTING THE PERSONA IN A MODERN DIGITAL AGE

SAMANTHA P. MCCALED*

*Intellectual property, more than ever, is a line drawn around information, which asserts that despite having been set loose in the world... that information retains some connection with its author that allows that person some control over how it is replicated and used.*¹

INTRODUCTION	108
PART I: SECTION 230	110
The History Behind Section 230	111
The Modern State of Section 230	113
The Intellectual Property Exception	115
PART II: THE CIRCUIT SPLIT	116
The Ninth Circuit: State Intellectual Property Claims Do Not Revoke Website Immunity	117
The Majority: Section 230(e)(2) Includes State Intellectual Property Claims	118
The Third Circuit and Karen Hepp	118
New York and Project Playlist	120
The First Circuit and Lycos	122
PART III: THE EVOLUTION OF THE RIGHT OF PUBLICITY	123
The History of the Right of Publicity	124
Transitioning from a Tort to a Personal Property Right	126
How to Succeed on a Right of Publicity Claim	130
Finding a Home for the Right of Publicity in Modern Day	131
PART IV: ANALYSIS AND SOLUTION	133
Creating a Federal Right of Publicity	133

* J.D. Candidate, Belmont University College of Law, 2024; B.M., New York University. I want to thank Professor Kristi Arth for her insight and guidance in developing this Comment and Professor Amy Moore for pushing me to think critically about Section 230. I owe endless thanks to my family and friends for their support, specifically to my dad for encouraging me to pursue this career.

1. NICK HARKAWAY, THE BLIND GIANT: BEING HUMAN IN A DIGITAL WORLD 128 (2012).

Interpreting Section 230 and Clarifying the Intellectual Property Exception	135
CONCLUSION	136

INTRODUCTION

Addison Easterling joined the social media app TikTok in mid-2019 while living in Louisiana, creating her now well-known persona of “Addison Rae.”² She rapidly gained popularity, crossing the “1 million follower milestone” in October 2019.³ Her skyrocket to fame prompted her to pursue perfecting her persona full time in California, relocating to Los Angeles and leaving LSU where she was studying at the time.⁴

The rise of social media has created such new celebrities. Gone are the days of the big-screen movie star holding the limelight: the small-screen, digital influencer is here to stay. TikTok in particular has allowed members of “Generation Z” to utilize its video creation tools to gain a wide audience of followers, with their personalities on full display across the globe.⁵ Described as a “place where raw authenticity is celebrated,” TikTok allows even its youngest users to create an economically viable persona, obtain brand deals, and reach millions of users daily.⁶

The evolution of apps, such as TikTok, has created a myriad of problems for policy makers and citizens alike: what can be done when someone steals another’s persona? Tiktok’s “most important asset . . . is their own creators.”⁷ These creators can spend hours at a time crafting a carefully curated 15-second video that conveys their personality exactly as they see fit. Should someone else damage this persona, a social media star from Louisiana may not have the same recourse options as one from Tennessee.⁸ Throw in the rising

2. Palmer Haasch, *How Addison Rae’s career went from casual TikTok dances to appearances on ‘Keeping Up With the Kardashians’*, INSIDER (Jul. 13, 2021), <https://www.insider.com/who-is-addison-rae-tiktok-dance-kardashian-controversy-2021-7#rae-began-posting-on-tiktok-in-2019-2>.

3. *Id.*

4. Olivia Craighead, *Why Tiktok’s Addison Rae Is More Than Just a “Pouty Face”*, WALL ST. J. (Jun. 11, 2020), <https://www.wsj.com/articles/addison-rae-tiktok-interview-hype-house-charli-11591878894>.

5. Bradian Muliadi, *What the Rise of Tiktok Says About Generation Z*, FORBES (Jul. 7, 2021), <https://www.forbes.com/sites/forbestechcouncil/2020/07/07/what-the-rise-of-tiktok-says-about-generation-z/?sh=1324cac96549>.

6. *See generally id.*

7. Carla Calandra, *The TikTok Business Empire*, WUNDERMAN THOMPSON (Jun. 10, 2021), <https://www.wundermanthompson.com/insight/the-tiktok-business-empire>.

8. Louisiana does not recognize the right of publicity today, while Tennessee does. *See* J. THOMAS MCCARTHY & ROGER E. SCHECHTER, 1 THE RIGHTS OF PUBLICITY AND PRIVACY § 1:2 (2d ed. 2001) (May 2022 update).

problem of massive apps misusing these celebrity personas, and content creators now face the terrifying prospect of being unable to control their persona in the modern digital age.

Content creators and small screen celebrities are more at risk than ever of losing control over their name, image, and likeness, especially against internet domain hosts, such as TikTok, Twitter, and Facebook. The right of publicity, which protects these commercially viable personas, currently finds its roots in state law, with no federal statute granting a universal right across the country.⁹ This lack of uniformity has led to increasing litigation surrounding the responsibility of liability on the internet.¹⁰ Who pays the price when someone's persona is stolen, misused, and republished on a website like Facebook?

Karen Hepp, a long-time newscaster and small screen celebrity, had her own persona stolen while merely grocery shopping, with Facebook republicizing and advertising the violation.¹¹ Hepp brought suit against multiple websites for the violation of her right of publicity, as each website had reposted numerous variations of her stolen image to the detriment of her carefully crafted persona.¹² Facebook in particular used the Communications Decency Act, or Section 230, as a defense to any liability.¹³

Section 230 provides statutory immunity to websites that host third-party content.¹⁴ This means that websites – like Facebook, TikTok, and Twitter – cannot be sued for torts, like defamation, when a user defames another online. However, if the website contributes to the tort, it could be liable. The focus of this Comment centers around the intellectual property exception of Section 230, which allows suits against websites if they infringe upon another's intellectual property.¹⁵

Facebook moved to dismiss Hepp's right of publicity claim, stating that the right of publicity was not a *federal* intellectual property law for purposes of a Section 230 analysis.¹⁶ As discussed *infra*, Facebook's use of Section 230 was unsuccessful, and Hepp's right of publicity claim is proceeding on the merits.¹⁷ However, the question remains as to how much immunity websites enjoy under Section 230. In context of the right of publicity, courts are increasingly unclear

9. *See id.* at § 6:2.

10. *See, e.g.,* Hepp v. Facebook, 14 F.4th 204 (3d Cir. 2021).

11. *See generally id.*

12. *Id.* at 206-07.

13. *Id.* at 207-08. Reddit and Igmur were also sued for their users' replications of Hepp's unauthorized image, but their motion to dismiss for lack of personal jurisdiction had merit.

14. THOMAS D. SELZ, ET AL., 2 ENT. L. 3D: LEGAL CONCEPTS AND BUS. PRAC. § 13:53 (3d ed.) (Dec. 2022 update).

15. *See discussion infra* Part I.

16. *See Hepp*, 14 F.4th at 210.

17. *See discussion infra* Part I.

as to how to address and protect an individual right to control and disseminate one's persona in the digital age.

This Comment explores the intersection between the intellectual property exception of Section 230 with the right of publicity. Part I lays the foundation of Section 230, discussing its evolution and the overbroad protections granted to websites like Facebook and TikTok. This Part delineates the history of Section 230, examines the increasing expansion of protection to massive internet hosts by lower courts, and introduces the intellectual property exception.¹⁸

Part II focuses on the circuit split regarding the intellectual property exception. This Part follows the evolution of the circuit split to its modern state, culminating in the case of Karen Hepp. Hepp's plight highlights the need for clarification of the boundaries of Section 230 immunity and the classification of the right of publicity as an intellectual property right.¹⁹

Part III follows the progression of the right of publicity. The purpose of this Part is to demonstrate why the right of publicity should be uniformly accepted as an intellectual property right for purposes of Section 230 analysis while comparing the cause of action to other federally recognized rights. The right of publicity has evolved out of its tort-law roots, now squarely fitting in the realm of intellectual property.²⁰

Part IV calls for clarification from Congress regarding the right of publicity. There is currently no federal right of publicity statute, and the Supreme Court last acknowledged this right in 1977.²¹ Numerous states have differing statutes addressing the right of publicity, varying in protection, duration, and overall requirements.²² A federally recognized right would ameliorate the widening gap of protections afforded to creators between states.

Additionally, Part IV discusses the need for courts to interpret Section 230 as whole, allowing the intellectual property exception to include state causes of action. Specifically confronting § 230(e), this Comment calls for accountability from courts in holding content creating websites, like Facebook, accountable for their unauthorized use of an individual's persona.

PART I: SECTION 230

The Communications Decency Act of 1996 (hereinafter "Section 230") provides vast tort immunity to entities like Facebook and TikTok based on information provided by third-parties.²³ This means a party may not sue TikTok

18. See discussion *infra* Part I.

19. See discussion *infra* Part II.

20. See discussion *infra* Part III.

21. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

22. See discussion *infra* Part III.

23. SELZ et al., *supra* note 14, at § 13:53.

if another user posted a video defaming them online.²⁴ These internet common carriers are deemed “provider[s] of an interactive computer service” that shall not “be treated as the publisher or speaker of any information provided by another information content provider.”²⁵ There is a distinction, however, between an internet service provider “which merely transmit[s] information” and an internet content provider that “create[s] or develop[s], in whole or in part,” the information eventually transmitted by a service provider.²⁶ Pure service providers are akin to the traditional online messaging board, allowing users to post their own information while the website remains a passive conduit.²⁷ Websites that simultaneously host and create content are liable for their own creations.²⁸ Only pure service providers are immune under Section 230, while content creators are fully exposed to liability, even if they sometimes act as service provider.²⁹

Section 230 provides passive service providers with an affirmative defense to state tort liability.³⁰ Unless the entity can also be classified as a “content provider,”³¹ parties seeking to hold websites liable for third-party content must hope the content at issue falls into one of the exceptions carved out by Congress.³² To better understand Section 230, this Part reviews the history of the Act, discusses the modern expansion of its protections created by lower courts, and introduces the intellectual property exception in detail.

The History Behind Section 230

By enacting Section 230, “Congress decided not to treat providers of interactive computer services like other information providers,” such as

24. One of the most common claims barred by § 230 is defamation. *See, e.g.,* Carafano v. Metrosplash.com, 339 F.3d 1119, 1122 (9th Cir. 2003) (“Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party”).

25. 47 U.S.C.A. § 230(c)(1).

26. Curran v. Amazon.com, Inc., No. CIV.A. 2:07-0354, 2008 WL 472433 (S.D.W. Va. Feb. 19, 2008).

27. *See, e.g.,* Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2004) (stating a Network that provides internet access and merely distributes on-line mail submitted by others is immune under § 230).

28. *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008) (holding a website liable for requiring users to fill out its unlawful questionnaire as a condition of use).

29. *Id.*; compare § 230(f)(2) (“the term ‘interactive computer service’ means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet”), with § 230(f)(3) (“the term ‘information content provider’ means any person or entity that is responsible. . . for the creation or development of information provided through the Internet or any other interactive computer service”).

30. *See* Doe v. GTE Corp., 347 F.3d 655, 657 (7th Cir. 2003).

31. § 230(f)(3).

32. *See* § 230(e).

newspapers, magazines, and radio stations “all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others.”³³ As such, courts have repeatedly held that Section 230 “should be construed broadly in favor of immunity” from suit.³⁴

Prior to the enactment of Section 230, websites were liable for their failure to screen out offensive material, if they had previously been proactive in doing so.³⁵ In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, a New York trial court held Prodigy, an internet service provider, liable for its failure to screen out defamatory content from its online messaging board, “Money Talk.”³⁶ In order to attract families to use its services, Prodigy adopted a software to filter out profanity.³⁷ Because Prodigy previously monitored and screened out content, it opened itself up to publisher liability, akin to that of a newspaper exercising “editorial control” over the chosen content, for failing to screen out defamatory content published by a third-party user.³⁸ The trial court found Prodigy had graduated from a distributor – meaning a mere “passive conduit” for third-party information – to a publisher due to the content filtering, resulting in a massive judgment against Prodigy.³⁹

In light of *Stratton*, Congress explicitly “exclude[d] from liability . . . information service providers,” hoping to encourage other websites to actively check for and exclude hateful or tortious conduct online.⁴⁰ Specifically, Congress pushed for the “Good Samaritan” provision of § 230(c) to reward websites that remove unsavory content with immunity, a direct response to the *Stratton* decision.⁴¹ Sponsors of the bill expressed their desire to remove publisher liability to encourage service providers to remove content that is “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”⁴² So long as the site host takes action in good faith, the final version of Section 230 immunizes the service from suit.⁴³ As discussed *infra*, the “Good Samaritan” provision has been read broadly by courts, which have

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

34. 15B AM. JUR. 2D *Computers and the Internet* § 203 (citing *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019)).

35. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup.Ct. May 24, 1995).

36. *Id.* at *7.

37. *Id.* at *2.

38. *Id.* at *3.

39. *Id.*

40. *Blumenthal*, 992 F.Supp. at 52 n.13.

41. See H.R. CONF. REP. 104-458 at 194 (1996) (“one of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy*”).

42. § 230(c)(2)(A); Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 595 (2001).

43. § 230(c)(2).

immunized websites that enable unsavory content to be circulated throughout the internet, the very same content Congress hoped to eliminate.

Congress also sought to make the information superhighway safe for families and children by enacting Section 230.⁴⁴ Concerned with an influx of illicit telecommunications, Congress intended to punish internet users who knowingly and intentionally used platforms to harass individuals.⁴⁵ The entire Telecommunications Act in its original form,⁴⁶ which included Section 230, cast a wide net in prohibiting sexually explicit material spread via the then-nascent internet.⁴⁷ In 1997, the Supreme Court held aspects of the 1996 Act unconstitutional, finding a lack of evidence regarding internet vilification.⁴⁸ The Court also found that prematurely regulating the content of speech on the internet was “more likely to interfere with the free exchange of ideas than to encourage it.”⁴⁹ The Supreme Court did not, however, modify Section 230, as it currently remains intact in its entirety.

The Modern State of Section 230

Today, courts determine whether a website retains immunity by inquiring as to whether the internet service provider is treated as a “publisher” or “speaker.”⁵⁰ Circuits now follow a three-pronged test, created by the Ninth Circuit, to determine a defendant website’s immunity status.⁵¹ To establish immunity, a party must demonstrate (1) it is a provider or user of an interactive computer service, (2) the cause of action treats the website as a publisher of information, and (3) the information at issue was created and provided by another information content provider.⁵² Should the court find that the “claimant’s cause of action . . . reaches the website’s editorial functions,” the website is immunized.⁵³ Because Congress intended to insulate websites from publisher liability, editorial functions like deleting information for accuracy,⁵⁴

44. S. REP. NO. 104-23 at 59.

45. *See id.*

46. 47 U.S.C.A. § 223.

47. Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 404 (2017).

48. *See, e.g., Reno v. Am. C.L. Union*, 521 U.S. 844 (1997) (holding 47 U.S.C. §§ 223(a), (d) unconstitutional).

49. *Id.* at 885.

50. *Supra* note 34.

51. *Id.*

52. *See Barnes v. Yahoo!, Inc.*, F.3d 1096, 1100-01 (9th Cir. 2009).

53. *In re Apple Inc. App Store Simulated Casino-Style Games Litig.*, No. 5:21-CV-02777-EJD, 2022 WL 4009918 *12 (N.D.Cal. Sept. 2, 2022).

54. *See Ben Ezra, Weinstein, & Co., Inc. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000) (noting that deleting stock symbols to correct alerted errors did not constitute content creation or development, merely engaging in an editorial function).

deciding what to post,⁵⁵ and converting addresses to a pin-point on an electronic map⁵⁶ are protected actions under Section 230. Courts across the nation have expanded the boundaries of immunity under Section 230, making it increasingly difficult to designate entities like TikTok and Facebook as original content creators availed to suit.⁵⁷

Section 230 also remains widely construed to provide these entities with extensive insulation from liability for allowing outrageous or lascivious content on their websites.⁵⁸ Courts have consistently stretched the boundaries of Section 230 to protect platforms from accountability, even when they know of or intentionally encourage unlawful activity on their sites.⁵⁹

Additionally, the “findings” and “policy” sections of Section 230 are heavily relied upon to immunize sites that are aware of unsavory, potentially criminal conduct flowing through the platform.⁶⁰ The language of § 230(c) in particular has conferred wide immunity to internet service providers, protecting actions that would convert a website into what scholars have called a “Bad Samaritan.”⁶¹ For example, “platforms have been protected from liability even though they. . . encouraged users to post illegal conduct, changed their design and policies for the purpose of enabling illegal activity, or sold dangerous products.”⁶² While some courts have stuck to a close statutory reading by distinguishing internet service providers from content creators, an overwhelming majority read Section 230 too broadly.⁶³ Several courts continue to note the overbroad protections awarded to entities like Facebook and Google as modern day developments of the internet, including “the data-driven targeting of consumers by big social-media platforms,” which “can hardly be compared to the Internet of 1996.”⁶⁴ The modern expansion of the roles of

55. See *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2004) (determining a listserv moderator cannot be liable for deciding to post content, created by a third-party, which was ultimately defamatory).

56. See *Marshall’s Locksmith Serv., Inc. v. Google, LLC*, 925 F.3d 1263 (D.C. Cir. 2019).

57. See, e.g., *In re Apple*, 2022 WL 4009918 at *18 (noting “the data-driven targeting of consumers by big social-media platforms can hardly be compared to the Internet of 1996 [and these] platforms . . . are more than mere message boards . . . and they should be treated as such”).

58. See, e.g., *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398 (6th Cir. 2014) (immunizing a website owner even though he added new, defamatory commentary via its own manager).

59. *Citron & Wittes*, *supra* note 47, at 406.

60. *Id.*; see also *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006 (in which a website was indemnified for “knowingly host[ing] illegal child pornography”).

61. *Citron & Wittes*, *supra* note 47, at 408.

62. *Id.* (citing *Jones*, 755 F.3d 398; *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016); *Hinton v. Amazon.com., LLC*, 72 F. Supp. 3d 685 (S.D. Miss. 2014)).

63. Compare *Kellman v. Spokeo, Inc.*, No. 3:21-CV-08976-WHO, 2022 WL 1157500 (N.D. Cal. Apr. 19, 2022) (denying § 230 immunity to a website alleged to act as both a service and content provider), with *Jones*, 755 F.3d 398 (6th Cir. 2014) (granting immunity to a website despite its contributions to defamatory material).

64. *In re Apple Inc. App Store Simulated Casino-Style Games Litig.*, No. 5:21-CV-02777-EJD, 2022 WL 4009918 *18 (N.D. Cal. Sept. 2, 2022).

Google, Facebook, and TikTok push these sites past the threshold of a “prototypical service. . . [of] an online message or bulletin board”⁶⁵ that would typically be immunized under Section 230.⁶⁶

Because traditional “First Amendment values [drove] Section 230,” courts are hesitant to punish sites where the line between service provider and content creator is murky, unlike websites that clearly create content on their own.⁶⁷ Courts also continue to grapple with numerous personal jurisdiction issues surrounding hauling an internet service provider into court.⁶⁸ Thus, there are numerous interpretive issues arising out of Section 230, with bipartisan agreement the statute needs ameliorating, but vast disagreement as to how to do so.⁶⁹

The Supreme Court was set to tackle the boundaries of § 230(c) in 2023, but the Court declined to address any potential interpretations as the complaints at issue failed on the merits for reasons independent of Section 230.⁷⁰ Scholars continue to advocate for limiting § 230(c) in particular to “Good Samaritans” only, hoping that website operators who intentionally turn a blind eye to illegality or enable unsavory activity can no longer shield themselves via Section 230.⁷¹ Regardless the statute as a whole remains up for interpretation by lower courts.

The Intellectual Property Exception

With courts broadly interpreting the protections of Section 230, claimants have increasingly relied on the exceptions carved out in § 230(e) in order to move cases forward against internet service providers. The intellectual property exception in particular is widely understood – with the exception of

65. *Supra* note 34.

66. *In re Apple*, 2022 WL 4009918 at *18 (noting that Google, Facebook, and Apple have all evolved into content creators and “should be treated as such”).

67. *Backpage.com, LLC*, 817 F.3d at 29; *see* § 230(b)(2) (“to promote the continued development of the Internet . . . [and] preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation”).

68. *See* Catherine Ross Runham, *Zippos-ing the Wrong Way: How the Internet has Misdirected the Federal Courts in Their Personal Jurisdiction Analysis*, 43 U.S.F.L. REV. 559 (2009).

69. Kate Klonick, *Everything You Need to Know About Section 230*, LAWFARE (July 17, 2020), <https://www.lawfareblog.com/everything-you-need-know-about-section-230> (noting that Section 230 has been a hot button topic with a “remarkable lack of consistency among the law’s critics about its substance,” seeming to “mean[] different things to different people for different reasons”).

70. *Gonzalez v. Google LLC*, 598 U.S. 617 (2023); *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023). Both cases involved allegations against major website domains knowingly providing support to terrorist groups by “recommending” their content to other users, but the failure to plausibly plead allegations of aiding and abetting under 18 U.S.C. § 2333(d)(2) proved fatal to both complaints.

71. *See* Citron & Wittes, *supra* note 47, at 416-17 (discussing the irony of the “Good Samaritan” provision mainly shielding abusive website operators).

the Ninth Circuit – to apply to both federal and state causes of action.⁷² But, an additional question remains as to what exactly constitutes a true state intellectual property cause of action amounting to Section 230 protection.⁷³ Specifically, courts remain uncertain as to how to interpret a right of publicity claim in light of Section 230 because of the right’s lack of federal recognition and imprecise application.⁷⁴

The language of the intellectual property exception is especially broad in context with the statute as a whole, stating “nothing in this section shall be construed to limit or expand *any* law pertaining to intellectual property.”⁷⁵ The other exceptions each specifically reference applicability to state or federal law when attempting to exclude one or the other.⁷⁶ Nonetheless, a circuit split exists regarding the applicability of the intellectual property exception to state law.⁷⁷

PART II: THE CIRCUIT SPLIT

The intellectual property exception codified in § 230(e)(2) has little, but divided, caselaw surrounding its interpretation. As discussed *supra*, the major consensus across the country is that Section 230 should be broadly construed in favor of immunity to prevent a chilling effect online, as websites would be more likely to censor content when facing threats of liability.⁷⁸ A majority of courts, including the First and Third Circuits, have held that the plain meaning of the statute – in addition to several policy concerns – explicitly allows state intellectual property claims to be included in the intellectual property exception of Section 230.⁷⁹ The issue then becomes whether or not the right of publicity fits within the congressionally intended scope of intellectual property law. As discussed *infra*, the overwhelming majority of jurisdictions that have faced this issue have found that the right of publicity is an intellectual property right, qualifying a party to utilize the exception of § 230(e)(2).⁸⁰ Currently the only outlier, as discussed *infra*, is the Ninth Circuit.

72. § 230(e)(2); *see* Atlantic Recording Corp. v. Project Playlist, Inc., F.Supp.2d 690 (S.D.N.Y. 2009); *but see* Perfect10 Inc. v. CCBill, LLC, 488 F.3d 1102 (9th Cir. 2007).

73. *See* discussion *infra* Part II.

74. *See, e.g.,* Almeida v. Amazon.com, Inc., 456 F.3d 1316 (11th Cir. 2006) (declining to rule on the difficult application of § 230 in the context of a state right of publicity claim).

75. § 230(e)(2) (emphasis added).

76. § 230(e)(1) (“or any other Federal criminal statute”); § 230(e)(3) (“State Law”); § 230(e)(4) (“or any similar State law”); § 230(e)(5)(B) (“any charge in a criminal prosecution brought under State law”).

77. *See* discussion *infra* Part II.

78. *See* Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997); *see also* Barrett v. Rosenthal, 146 P.3d 510, 522 (Cal. 2006) (“Congress implemented its intent . . . by broadly shielding all providers from liability” (emphasis in original)).

79. *See generally*, Hepp v. Facebook, 14 F.4th 204 (3d Cir. 2021); Universal Comm’n Sys., Inc. v. Lycos, Inc., 478 F.3d 413 (1st Cir. 2007).

80. *See* discussion Part III *infra*.

The Ninth Circuit: State Intellectual Property Claims Do Not Revoke Website Immunity

In *Perfect 10, Inc. v. CCBill LLC*, the Ninth Circuit held that § 230(e)(2) did not extend to state intellectual property claims.⁸¹ Perfect 10, an online magazine that published adult entertainment, held registered copyrights for the images of models they posted on their website, in addition to other registered trademarks and service marks.⁸² Perfect 10 also was assigned many of the models' rights of publicity.⁸³ Cavcreek Wholesale Internet Exchange ("CWIE") provided users with "webhosting and related Internet connectivity services," allowing customers to connect to the internet "via a data center connection."⁸⁴ "CCBill," and CWIE worked together to operate a website, subsequently posting images originally from Perfect 10's site.⁸⁵ In August of 2001, Perfect 10 sent notices of copyright infringement to both CCBill and CWIE, and in September of 2002, Perfect 10 filed suit.⁸⁶

The Ninth Circuit upheld the district court's granting of summary judgment in favor of CCBill and CWIE for the state claims, finding § 230(e)(2) inapplicable to state intellectual property claims and, thus, entitling the entities to immunity under the statute.⁸⁷ The reasoning of the Court relied heavily on the lack of an express definition of intellectual property within Section 230 and the lack of uniformity of state intellectual property laws.⁸⁸ The Court cited numerous potential discrepancies between state intellectual property causes of action, which precluded utilization of § 230(e)(2).⁸⁹ As a result, the Court found that holding CCBill and CWIE liable "would be contrary to Congress's expressed goal of insulating the development of the Internet from the various state-law regimes."⁹⁰ The federal immunity of § 230(e)(2) could not be, in the eyes of the Ninth Circuit, controlled by "any particular state's definition of intellectual property."⁹¹ Today, this opinion has been heavily relied upon by internet hosts attempting to preclude liability on state causes of action.⁹²

Additionally, the Court amended its original opinion following the

81. *Perfect10, Inc.*, 488 F.3d 1102 (9th Cir. 2007).

82. *Id.* at 1108.

83. *Id.*

84. *Id.*

85. *See generally id.*

86. *Id.*

87. *Id.* at 1119.

88. *Id.* at 1118.

89. *Id.* (citing varying "names...causes of action and remedies, and...purposes and policy goals" as contrary to Congressional intent).

90. *Id.*

91. *Id.* at 1118.

92. *See discussion supra* Part I.

First Circuit's opinion in *Universal Communication Systems, Inc. v. Lycos, Inc.*, distinguishing that, even in *Lycos*, neither party raised the "question of whether state law counts as 'intellectual property' for the purposes of Section 230."⁹³ While the First Circuit could "sidestep" what counts as intellectual property, the Ninth Circuit could not, because the state intellectual property claim raised by Perfect 10 directly affected whether the defendants were availed to suit in light of Section 230.⁹⁴ Fearing confusion amongst litigants as to the applicability of immunity in light of the wide array of state intellectual property claims, the Ninth Circuit deemed state causes of action out of the question in the context of § 230(e)(2).⁹⁵ Thus, even with the decision of *Lycos*, the Ninth Circuit denied the rehearing requested by Perfect 10.⁹⁶

The Majority: Section 230(e)(2) Includes State Intellectual Property Claims

The Third Circuit and Karen Hepp

Contrary to the Ninth, the Third Circuit held that state intellectual property causes of action, including the right of publicity, are encompassed within the intellectual property carve-out of § 230(e)(2) in *Hepp v. Facebook*.⁹⁷ Karen Hepp, the current host of FOX 29's *Good Day Philadelphia*, discovered her photograph was being circulated around the internet without her consent or knowledge.⁹⁸ This photo was taken via security camera in a convenience store.⁹⁹

As a public figure, the Court noted her success partially depended on her reputation and social media following.¹⁰⁰ The use of her image on the cited posts, one for erectile dysfunction and one for dating websites, prompted Hepp to bring suit against several internet hosts under Pennsylvania's right of publicity statute.¹⁰¹

Hepp sued Facebook, Reddit, and Imgur, alleging violations of Pennsylvania's right of publicity statute and common law.¹⁰² The District Court dismissed the entire case with prejudice, holding that § 230(e)(2) did not apply to violations of state law.¹⁰³ Reddit and Igmur were dismissed from the case for additional personal jurisdiction reasons, but Facebook conceded its jurisdiction,

93. *Perfect10, Inc.*, 481 F.3d at 1107, *reh'g en banc denied* (questioning *Universal Commc'n Sys., Inc.*, 478 F.3d 413).

94. *Id.*

95. *Id.*

96. *Id.* at 1108.

97. 14 F.4th 204 (3d Cir. 2021).

98. *Id.* at 206.

99. *Id.*

100. *Id.*

101. *Id.* at 206-07; *see also* 42 PA. CONS. STAT. § 8316.

102. *Hepp*, 14 F.4th at 207.

103. *Id.*

remaining in the suit on the merits.¹⁰⁴ Facebook was specifically under fire for allowing a dating app, FirstMet, to advertise on their platform using Hepp's stolen image.¹⁰⁵ This advertisement targeted Facebook users, encouraging them to "meet and chat with single women."¹⁰⁶

Citing to § 230(c), Facebook argued it was completely immune from suit, as a third-party created the content in question.¹⁰⁷ The Third Circuit disagreed, thoroughly analyzing Section 230 in its entirety and eventually finding Facebook potentially liable to Hepp for its intellectual property violations.¹⁰⁸

Regarding Facebook's immunity claim, the Third Circuit focused on the plain language of Section 230 in its entirety, taking note that federal law was mentioned explicitly throughout the statute when Congress felt it necessary.¹⁰⁹ Reading the statute as a whole, the Third Circuit rejected Facebook's argument that Section 230 only included federal law causes of action unless state law was explicitly mentioned.¹¹⁰ The "natural reading" of the statute suggested that "when Congress wanted to cabin the interpretation about state law, it knew how to do so—and did so explicitly."¹¹¹

The Court also rejected Facebook's policy argument, in which Facebook attempted to rely on a pro-free-market policy to support a purely federal carve-out of § 230(e)(2).¹¹² Facebook contended that the varying state intellectual property laws would undermine Congress' intent "to preserve the vibrant and competitive free market... unfettered by Federal or State regulation."¹¹³ With such variances from state to state, Facebook argued increasing protections on state law grounds would promote censorship, free speech limitations, and an overall impairment on the online marketplace.¹¹⁴

The Court conceded the premise pushed by Facebook was correct: Congress did enact a pro-free-market policy, but Facebook conveniently left out the fact that state contract and property laws also facilitate market exchange.¹¹⁵ Without such laws, the free market would collapse, rendering it virtually impossible for citizens to freely move about the American

104. *Id.* at 208.

105. *Id.* at 207.

106. *Id.*

107. *Id.* at 209.

108. *See generally id.*

109. *Id.* at 211.

110. *Id.* at 210.

111. *Id.* at 210-11.

112. *Id.*

113. *Id.* (quoting 47 U.S.C.A. § 230(b)(2)).

114. *Id.*

115. *Id.*

marketplace without fear from suit. Additionally, Facebook could not provide evidence that allowing suit would undermine this policy.¹¹⁶

Regarding the assertion of the right of publicity, the Third Circuit held the right of publicity is most analogous to an intellectual property claim rather than an invasion of privacy claim.¹¹⁷ Interpreting “intellectual property” as a compound term, the Court concluded that the plain, legal definition recognized a meaning which includes the right of publicity.¹¹⁸ Because the right of publicity is included in the “periphery” of intellectual property and the statute explicitly warrants protection for “any law pertaining to intellectual property,” the Court determined that Hepp’s right of publicity claim was permitted under § 230(e)(2).¹¹⁹

Ultimately, the Third Circuit held that Hepp’s claim fell within the umbrella term of intellectual property, allowing her claim against Facebook to stand.¹²⁰ Additionally, the Court emphasized the “narrowness of [the] holding,” reiterating that it “does not threaten free speech.”¹²¹ Finding a “striking” similarity between trademark law and the right of publicity, the Third Circuit determined that there would be no issue with allowing the right of publicity to qualify as an intellectual property right under § 230(e)(2).¹²² Additionally, Hepp’s claim was “about the commercial effect on her intellectual property, not about protected speech,” therefore quelling any potential First Amendment concerns.¹²³ As such, Hepp’s claim remains alive and is currently proceeding with discovery, as Facebook’s motion to dismiss based on Section 230 immunity was untenable.¹²⁴

New York and Project Playlist

Another recent ruling came out of the Southern District of New York in 2009, *Atlantic Recording Corp. v. Project Playlist, Inc.*¹²⁵ Six of the largest recording companies in the world brought suit against Playlist, the owner and operator of projectplaylist.com, for copyright infringement.¹²⁶ Playlist provided internet users with an index of songs and links to download them on third-party sites for free, even prompting users with a disclaimer that some works could be

116. See *id.* at 211 (stating that over a decade has passed since *Perfect 10* without any of the concerns occurring laid out in the Ninth Circuit’s opinion).

117. See *id.*

118. *Id.* at 213.

119. *Id.* at 214 (quoting ANTONIN SCALIA & BRYAN A. GARNER, *Reading Law: The Interpretation of Legal Texts* 417 (2012)).

120. *Id.* at 212.

121. *Id.* at 214.

122. *Id.*

123. *Id.*

124. *Id.*

125. 603 F.Supp.2d 690 (S.D.N.Y. 2009).

126. *Id.* at 692-93.

copyrighted.¹²⁷ Playlist built its song index via user submission, allowing third-parties to submit song links directly to Playlist.¹²⁸ After denying Playlist's motion to transfer venue, the court considered Playlist's claim of statutory immunity under Section 230.¹²⁹

The Court agreed with Playlist that it was not an information content provider in accordance with Section 230, as they were not responsible for creating content.¹³⁰ Playlist did not create or develop the songs copyrighted by the recording companies.¹³¹ As such, Playlist was entitled to immunity under § 230(c)(1), unless the state-law claims fell within the carve-out of § 230(e)(2).¹³²

Playlist argued that § 230(e)(2) should be construed to limit only any federal intellectual property law, which the court determined to be without merit.¹³³ Playlist also advanced an alternative theory that § 230(e)(3) preempted "all state laws relating to intellectual property because those laws are inconsistent with Section 230."¹³⁴ The Court found the preemption argument unavailing, as the very same subsection allows states to enforce any state law consistent with Section 230.¹³⁵ This argument failed on the grounds that Playlist did not demonstrate how or why the state intellectual property claims alleged were inconsistent with Section 230.¹³⁶

Playlist also relied on the policy argument that the Ninth Circuit found compelling in *Perfect10*, but to no avail.¹³⁷ While the court pointed out Playlist's correct assertion regarding Congress' intent to preserve the internet "unfettered by Federal or State Regulation," reading the statute in its entirety completely undermined this contention.¹³⁸ The Court noted that, "in four different points in § 230(e), Congress specified whether it intended a subsection to apply to local, state, or federal law."¹³⁹ Because Section 230 clearly intended both state and federal causes of action through the use of "any law," there was no use in advancing any policy or historical argument whatsoever: Congress

127. *Id.* at 693.

128. *Id.* at 694.

129. *Id.* at 698.

130. *Id.* at 699.

131. *Id.* at 701.

132. *Id.* at 702.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 703 (referencing the Ninth Circuit's policy determination about how including state intellectual property law under the umbrella of § 230(e)(2) could "threaten the development of the internet," because state intellectual property law can "vary significantly" unlike the "relative[] uniform[ity]" of federal law).

138. *Id.*

139. *Id.* (citing §§ 230(e)(1) ("any other *Federal* criminal statute"), (3) ("any *State* law" and "any *State* or *local* law"), (4) ("any similar *State* law") (emphasis added in all)).

codified its intent in § 230(e)(2) unambiguously.¹⁴⁰ As such, Playlist was not shielded by Section 230, and the state intellectual property claims could proceed.¹⁴¹

The First Circuit and Lycos

In *Lycos*, Universal Communication Systems (“UCS”) and its chief executive officer brought suit for defamatory content posted by “pseudonymous screen names on an Internet message board operated by Lycos.”¹⁴² Numerous posts smearing the financial situation and prospects of UCS appeared on the messaging board.¹⁴³ UCS sued Lycos for the posts of its constituents, with the pertinent claim involving trademark dilution.¹⁴⁴

As *Lycos* was a website operator, a title squarely within the title of a provider of an interactive computer service as required under Section 230, the First Circuit immunized *Lycos* from suit based on the defamatory content posted by its users.¹⁴⁵ Additionally, the First Circuit clarified certain exceptions, each of which would have held Lycos liable for certain defamatory content.¹⁴⁶ UCS further argued Lycos provided “culpable assistance,” arguing against immunity for actively inducing subscribers to post unlawful content; but the Court found this argument without merit as well.¹⁴⁷

The First Circuit did, however, assert that a proper state cause of action for intellectual property infringement could revoke Lycos’ immunity.¹⁴⁸ UCS’s trademark dilution claim, brought under Florida law, was untenable and not truly an intellectual property claim, because the damages stemmed from criticism on the messaging board, not improper association between the mark and other products.¹⁴⁹ Thus, the true allegation against Lycos was akin to that of defamation rather than trademark infringement.¹⁵⁰ The injury occurred out of criticism on Lycos’ domain, not from encouragement to users to exploit UCS’s trademark, and, therefore, Section 230 immunized Lycos from suit.¹⁵¹

Punishing only criticism would raise serious First Amendment concerns, as “permitting a trademark owner to enjoin the use of his mark in a

140. *Id.* at 704.

141. *Id.*

142. 478 F.3d 413, 415 (1st Cir. 2007).

143. *Id.* at 416.

144. *Id.*

145. *Id.* at 419.

146. *See id.* (quoting *Anthony v. Yahoo! Inc.*, 421 F.Supp.2d 1257 (N.D.Cal.2006) (holding an online dating service liable for manufacturing false profiles)).

147. *Id.* at 421.

148. *Id.* at 422.

149. *Id.* at 423.

150. *See id.* (stating that the allegation of criticism would be pertinent to a defamation claim rather than a trademark infringement claim).

151. *Id.*

noncommercial context found to be negative” completely undermines the freedom of speech.¹⁵² As such, the Court dismissed UCS’s claims based on immunity under Section 230 and failure to state any tenable claims, but it is pertinent to note the clear interpretation of § 230(e)(2) that would allow a state intellectual property claim if the facts were applicable.¹⁵³ The First Circuit explicitly stated, “claims based on intellectual property laws are not subject to Section 230 Immunity,” implying that a proper trademark dilution claim would have stripped Lycos of their immunity under Section 230.¹⁵⁴

PART III: THE EVOLUTION OF THE RIGHT OF PUBLICITY

While the Third Circuit felt that the right of publicity clearly fell within the exception of § 230(e)(2), the issue is still up for debate in several states. The right of publicity grew out of the state law right of privacy, which is recognized today by all states, either at common law or by statute.¹⁵⁵ Over thirty states recognize a right of publicity for living persons, and about twenty of those recognize a post-mortem right.¹⁵⁶ On the other hand, some legal commentators have taken issue with the rapid expansion of the right of publicity over the last century.¹⁵⁷

In general, the nature of the right is at odds with the First Amendment, especially when the claim involves an artistic, rather than purely commercial, usage.¹⁵⁸ Because right of publicity jurisprudence recognizes the property right associated with an individual’s name, image, and likeness, the constitutional command of the First Amendment to safeguard political, informative, and entertainment works, creates a conflict that courts continue to grapple with today.¹⁵⁹ Despite these tensions, this right is at its most favorable when protecting identity in a commercial setting, as “courts have found that it is in the public interest to allow a person to control his [or her] image, and, thus, to enforce his [or her] right of publicity.”¹⁶⁰ Explicitly commercial speech has long been said to be undeserving of First Amendment protection,¹⁶¹ but courts

152. *Id.* (quoting *Berlin v. E.C. Publ’ns, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964)).

153. *Id.*

154. *Id.* at 422-23 (citing 47 U.S.C. § 230(e)(2)).

155. *See MCCARTHY & SCHECHTER*, *supra* note 8, § 1:2.

156. *Id.* at § 6:6.

157. *See, e.g.*, K.J. Greene, *Intellectual Property Expansion: The Good, the Bad, and the Right of Publicity*, 11 CHAP. L. REV. 521 (2008).

158. *See id.*

159. *See, e.g.*, Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47 (1994).

160. Gil Peles, *The Right of Publicity Gone Wild*, 11 UCLA ENT. L. REV. 301, 306 (2004).

161. Claire E. Gorman, *Publicity and Privacy Rights: Evening Out the Playing Field for Celebrities and Private Citizens in the Modern Game of Mass Media*, 53 DEPAUL L. REV. 1247, 1262 (2004).

continue to deal with commercial speech as the ugly step-sibling of First Amendment analysis, with commercial speech now receiving a “lesser degree of protection” than traditional protected speech related to political, social, and other entertainment concepts.¹⁶² In the case of Karen Hepp, the use of her image had no First Amendment issues in context of the right of publicity claim because her image was used in a purely commercial setting: as an unauthorized advertisement.¹⁶³

This Part traces the right of publicity from its origin to modern day, highlighting the differences between this right and other federally recognized intellectual property causes of action while distinguishing the right of publicity from its former tort roots.

The History of the Right of Publicity

The first mention of the “right of publicity” came out of the Second Circuit in *Haelan Laboratories, Inc., v. Topps Chewing Gum, Inc.*¹⁶⁴ Haelan Laboratories contracted with a famous baseball player for the exclusive right to use his image on their chewing gum packaging.¹⁶⁵ Topps, a rival producer, printed their labels with the exact same player while knowing of the original contract with Haelan.¹⁶⁶ While the player could have sued Topps directly, the real legal question at play was whether or not Haelan, as the assignee, had a right of redress.¹⁶⁷ The Court found that “prominent persons” were entitled to make “an exclusive grant which barred any other advertiser from using their pictures.”¹⁶⁸

On the heels of this decision came the article by Professor Melville B. Nimmer, which is largely accredited with being the “foundation stone of the right of publicity.”¹⁶⁹ In this article, Professor Nimmer detailed how the right of publicity was the “reverse side of the coin of privacy” without an adequate traditional legal remedy to protect it.¹⁷⁰ Privacy infringement was simply insufficient in addressing the commercial value and assignability of a person’s public image.¹⁷¹ Even the fields of traditional trademark and service mark law

162. See generally, MCCARTHY & SCHECHTER, *supra* note 8.

163. See Hepp v. Facebook, 14 F.4th 204, 214 (3d Cir. 2021).

164. 202 F.2d 866 (2d Cir. 1953).

165. *Id.* at 867.

166. *Id.*

167. See *id.*; see also David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 CARDOZO ART & ENT. L.J. 71, 77 (2005) (discussing *Haelan* and the implications leading to the coinage of “right of publicity”).

168. *Haelan*, 202 F.2d at 868.

169. MCCARTHY & SCHECHTER, *supra* note 8, at §1:27.

170. Melville B. Nimmer, *The Right of Publicity*, 19 LAW AND CONTEMP. PROBS. 203, 204 (1954).

171. See *id.* at 209.

required a showing of likelihood of confusion caused by a defendant, which would be inapplicable.¹⁷²

The coinage of “the right of publicity” by Judge Franks in *Haelan* grew out of the personal interest in being left alone, known today as the right to privacy.¹⁷³ There are four established torts that emerged from the right to privacy: intrusion upon seclusion, publication of private facts, false light, and the right against appropriation of one’s personality.¹⁷⁴ It is the latter tort from which the right of publicity took root.¹⁷⁵ As discussed *supra*, the right of publicity has been referred to as “the reverse side of the coin of privacy.”¹⁷⁶

The Supreme Court acknowledged the state law right of publicity for the first, and only, time in *Zacchini v. Scripps-Howard Broadcasting Co.*¹⁷⁷ The famous human-cannonball case involved the broadcast of a performer’s entire act, without his consent, on television.¹⁷⁸ Zacchini brought suit under his Ohio-based right of publicity, with the news station citing First and Fourteenth Amendment defenses.¹⁷⁹ Noting that the performer was seeking compensation for damages, rather than an injunction, the Court distinguished the sanctions of the freedom of the press in light of the right of publicity.¹⁸⁰ There was no danger in Zacchini seeking an injunction for broadcasting his act since, similar to patent and copyright law, he had an individual right “to reap the reward of his endeavors.”¹⁸¹ As such, Zacchini could recover, and allowing recovery did not risk infringement of the broadcasting company’s freedom of the press.¹⁸²

While enforcing Zacchini’s cause of action, the Court also noted the economic value inherent in the right of exclusive control over the publicity given to his performance.¹⁸³ The protection by the Ohio law “provides an economic incentive” for performers to produce something of interest to the public.¹⁸⁴ The Court explicitly stated that the aforementioned incentive is the “same consideration underl[ying] the patent and copyright laws long enforced by this Court.”¹⁸⁵

172. See MCCARTHY & SCHECHTER, *supra* note 8, § 1:2.

173. LOUIS ALTMAN & MARIA POLLACK, CALLMANN ON UNF. COMP., TRADEMARKS, AND MONOPOLIES § 22:34 (4th ed.) (Dec. 2022 update).

174. *Id.* at § 1:12.

175. *Id.* at § 22:34.

176. Nimmer, *supra* note 170, at 204.

177. 433 U.S. 562 (1977).

178. *Id.* at 563.

179. *Id.* at 565.

180. *Id.* at 573-74.

181. *Id.* at 573.

182. *Id.* at 578.

183. *Id.* at 575.

184. *Id.* at 576.

185. *Id.*

Currently, the right of publicity is purely a state-law right; there is no federal statute guaranteeing a right of publicity, hence the murky waters of this cause of action in conjunction with Section 230.¹⁸⁶ Modern day courts recognize this right as one protecting the property interest of individuals in their identities, making an identity a commercially identifiable and protectable form of property.¹⁸⁷ Still, some courts hesitate to recognize the right of publicity as an intellectual property right.¹⁸⁸

Transitioning from a Tort to a Personal Property Right

The right of publicity originated from the same cause of action as the tort of misappropriation.¹⁸⁹ While both of these protect an individual's exclusive use of his or her identity, the protections and recoverable damages differ.¹⁹⁰ When searching for an injury, the difference, albeit subtle, between these two is what exactly gets damaged.¹⁹¹ Misappropriation claims allow plaintiffs to recover for emotional distress in addition to monetary loss, but only when it directly affects the person bringing suit.¹⁹² Some states even allow recovery for punitive damages if it can be proven the defendant acted with malice.¹⁹³ On the other hand, a right of publicity action focuses purely on either the monetary loss of the plaintiff or the unjust enrichment of the defendant, and this can include assignees.¹⁹⁴

Additionally, the right to privacy is a "personal and mental right," while the right to publicity is "a commercial and business right."¹⁹⁵ Appropriation "centers on damage to human dignity," and thus cannot contain the right of publicity within its sphere because of the right of publicity's focus on "commercial damage to the *business value* of human identity."¹⁹⁶ While the right of publicity has the same roots as appropriation, it has evolved substantially and earned its place as an individual property right.

186. Traci S. Jackson, *How Far Is Too Far? The Extension of the Right of Publicity to A Form of Intellectual Property Comparable to Trademark/copyright*, 6 TUL. J. TECH. & INTELL. PROP. 181, 183 (2004).

187. *Id.* at 182-83.

188. *See* Perfect10, Inc. v. CCBill, LLC, 488 F.3d 1102, 1120 (9th Cir. 2007).

189. *See* ALTMAN & POLLACK, *supra* note 173, at § 22:34.

190. *Id.*

191. *Id.* (discussing the differences between the right of publicity and the tort of misappropriation as looking towards an "injury to the pocketbook" versus an "injury to the psyche").

192. *Id.*

193. *See* Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9 (5th Cir. 1962) (holding that under Florida law punitive damages were recoverable for misappropriation under circumstances implicating malice).

194. ALTMAN & POLLACK, *supra* note 173, at § 22:34.

195. J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNF. COMP. § 28:6 (5th ed.) (Dec. 2022 update).

196. *Id.*

Because “the right of publicity is the inherent human right. . . to control the commercial use of his or her identity . . . every person has a right of publicity” that can potentially be alienated.¹⁹⁷ However, alienation was not always an aspect of the right of publicity.¹⁹⁸ In 1935, one court held that baseball players could not exclusively assign the right to use their name on a baseball bat under a premature right of publicity theory.¹⁹⁹ The Middle District of Georgia found that the players had “a property right to their names . . . capable of assignment . . . exclusively, irrespective of any trademark or unfair competition law.”²⁰⁰ The Fifth Circuit was “unwilling to go so far,” recognizing there was a right to use one’s “own name fairly on his own goods” but not a right to “prohibit others from using his name or likeness publicly without his consent,” unless trademark or unfair competition was implicated.²⁰¹ Stating that “fame is not merchandise,” the Court concluded that the law did not protect the names and likenesses of the players, and, therefore, they could not claim infringement of an exclusive license.²⁰²

Judge Frank’s subsequent opinion in *Haelan Laboratories* was significant, not only for recognizing the right of publicity, but also for creating it in a way “that was not constrained by the old parameters of a privacy rights claim.”²⁰³ This right was alienable and assignable, a direct departure from the baseball scenario roughly two decades earlier.²⁰⁴ Haelan, who was assigned the right to use the baseball player’s image, could directly sue the infringing company if on remand it could be determined that the “defendant used that player’s photograph during the term of plaintiff’s grant and with knowledge of it.”²⁰⁵ Because traditional privacy rights were non-assignable, the creation of the new right of publicity was warranted for alienability alone, further converting the tort action into a property action.²⁰⁶

Some legal scholars have posited that courts “viewing commercial endorsement and advertising licenses as no more than a personal waiver of a tort was a misperception of the commercial realities.”²⁰⁷ Traditionally, these “commercial licenses were viewed only as waivers of the right to sue for invasion of privacy.”²⁰⁸ As such, vesting the right of publicity in a property

197. *Id.*

198. *See, e.g.,* Hanna Mfg. Co. v. Hillerich & Bradsby Co., 78 F.2d 763 (5th Cir. 1935).

199. *Id.* at 766.

200. *Id.*

201. *Id.*

202. *Id.* at 766-67.

203. Westfall & Landau, *supra* note 167, at 77.

204. *Id.* at 76.

205. Haelan Lab’ys, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 869 (2d Cir. 1953).

206. *See* MCCARTHY & SCHECHTER, *supra* note 8, at § 10:5.

207. *Id.*

208. *Id.*

rather than tort theory makes issues such as standing, transferability, and choice of law more adaptable to the current commercial climate in light of technological changes.²⁰⁹ Numerous state statutes define the right of publicity as a property right,²¹⁰ in addition to courts consistently holding this view.²¹¹ Classifying the right of publicity as intellectual property “recognizes a property right in identity that can be legally separated from the person in a way that privacy rights cannot.”²¹²

While statutes provide the baseline for protection, courts have expanded the right of publicity through the common law, going so far as to protect attributes that squarely identify the person in question.²¹³ The protectable aspect of identity has evolved overtime, with courts shifting to describe this as a “persona.”²¹⁴ This term is more so for convenience when determining if infringement has occurred, because even seemingly small takings, such as using a person’s unique voice, body movement, or costume, could be enough to assert a cause of action given the facts at hand.²¹⁵ The definition of “name or likeness” is too narrow in the context of this right, because people can be identified by means other than the traditional method of name, image, or likeness.²¹⁶ A person’s “identity may be appropriated in various ways,” hence the evolution of the word “persona” when determining infringement.²¹⁷ As such, the evolution of the persona has morphed into a protectable intellectual property right.

Policy rationales support an intellectual property classification as well. Economically, granting a property right in one’s identity “will result in the best and most efficient use of that name and likeness.”²¹⁸ Some scholars advance an

209. *Id.* at § 10:6.

210. *See, e.g.*, Tenn. Code Ann. § 47-25-1103(b) (1984) (“The individual rights provided for . . . constitute property rights.”).

211. *See, e.g.*, *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1323-24 (11th Cir. 2006) (finding that there is “no dispute that the right of publicity is a type of intellectual property right.”); *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 967 (10th Cir. 1996) (holding that “the right of publicity involves a cognizable property interest.”); *State ex rel. Elvis Presley Intern. Mem’l Found. v. Crowell*, 733 S.W.2d 89, 97 (Tenn. Ct. App. 1987) (stating that the right of publicity is “a species of intangible personal property.”).

212. MCCARTHY & SCHECHTER, *supra* note 8, at § 1:3.

213. *Id.* at 94; *see, e.g.*, *Carson v. Here’s Johnny Portable Toilets*, 698 F.2d 831, 835-37 (6th Cir. 1983) (protecting Johnny Carson’s catch phrase “Here’s Johnny”); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 137-38 (Wis. 1979) (protecting a famous football star’s nickname “Crazylegs”).

214. MCCARTHY & SCHECHTER, *supra* note 8, at § 4:46.

215. *Id.*; *see, e.g.*, *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (finding a right of publicity action tenable for commercial exploitation of a sound-alike due to the distinctive nature of Bette Midler’s voice).

216. MCCARTHY & SCHECHTER, *supra* note 8, at § 4:46.

217. *Carson*, 698 F.2d at 837.

218. MCCARTHY & SCHECHTER, *supra* note 8, at § 2.7; *accord* Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U.

incentive rationale, as the right of publicity incentivizes “effort in constructing the celebrity persona.”²¹⁹ Developing one’s celebrity takes valuable time, effort, and resources, and “rewarding these efforts . . . is entirely consistent with America’s long-standing respect for individualism.”²²⁰ As discussed *supra*, Addison Rae departed from LSU in order to devote her entire career to her persona.²²¹ Economic incentives continue to inspire even the youngest generation to put effort into their personas and create a commercially viable form of intellectual property, further encouraging American individualism.

Finally, a theory of “the right of autonomous self-definition” supports the right of publicity.²²² Protecting against “unauthorized commercial uses of a person’s identity that interfere with meanings and values that the public associates with that person” allows individuals to protect their character in conjunction with their persona.²²³ If courts denied publicity claims to non-celebrities, “personality rationales of personhood” would severely undermine not only economic incentive to create a public personality, but also the right of autonomous self-definition.²²⁴

Some opponents to the right of publicity argue for the eradication of the right as a whole, with one scholar going so far as to posit that the right “is unconstitutional as to all noncommercial speech and perhaps even to commercial advertising as well.”²²⁵ Other scholars suggest that, in light of the First Amendment, there should not be a right of publicity claim when a plaintiff’s persona is used in advertising or an underlying protected work.²²⁶ This proposal is too limiting: courts must balance these rights, not eviscerate the right of publicity in its entirety. The free speech concerns in the context of the right of publicity have been “a concern . . . for decades.”²²⁷ These concerns are continually addressed by judges on a case-by-case basis by balancing “the need to keep ideas flowing freely and to keep competition alive generally.”²²⁸ The balancing of valid free speech concerns quells the call to dismiss the right

CHI. L. REV. 411, 414 (1983); Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 411 (1978).

219. Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 41 (1997).

220. *Id.* at 41-42.

221. Haasch, *supra* note 2.

222. See M.P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. OF PITTSBURGH L. REV. 225 (2005).

223. MCCARTHY & SCHECHTER, *supra* note 8, at § 2:9.

224. Greene, *supra* note 157, at 538.

225. Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903, 930 (2003).

226. Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute is Necessary*, COMM. L. 14, 18 (Aug. 2011).

227. MCCARTHY & SCHECHTER, *supra* note 8, at § 2:4.

228. Baird, *supra* note 218, at 420.

of publicity completely, as judges can continue to rectify the two interests even in cases “in which free speech balancing is difficult.”²²⁹

Despite the fact that the “roots of the right of privacy and the right of publicity are intertwined...two distinct causes of action have emerged in American jurisprudence.”²³⁰ The right of publicity’s economic incentives, protected subject matter, and policy reasonings tip the scales in favor of recognition of this right as intellectual property. Numerous policy positions support recognizing this right in the first place, as doing so prevents against fraudulent business advertising, provides incentive to enter the public eye, and protects the public at large.²³¹

Vesting the right of publicity in intellectual property, rather than in tort, creates actual remedies for unauthorized use of one’s commercial identity outside the narrow constraints allowed by the tort of misappropriation. “The misappropriation of name tort protects against intrusion upon an individual’s private self-esteem and dignity,”²³² but does not provide widespread, commercial protection or allow for alienability, unlike intellectual property rights.²³³ As such, the classification of the right of publicity as an intellectual property right has been slowly solidifying over the years, but the question remains as to how to deal with the right on a federal level.

How to Succeed on a Right of Publicity Claim

Today, a plaintiff must demonstrate three things to establish a prima facie case for infringement of the right of publicity: (1) ownership of an enforceable right in the identity of a human being, (2) usurpation by the defendant of some statutorily protected²³⁴ aspect of that identity, in a way that necessarily identifies the plaintiff, and (3) actual or probable damages caused by the defendant’s use to the commercial value of that identity.²³⁵ The broad language of an “enforceable right” explicitly differentiates the right of publicity from misappropriation, allowing for parties, aside from the original owner of the identity, to bring suit so long as “they own an enforceable right.”²³⁶

While it is incredibly difficult to prove damages when the publicity

229. MCCARTHY & SCHECHTER, *supra* note 8, at § 2:4.

230. Gorman, *supra* note 161, at 1261.

231. See generally Ericka H. Spears, *Strangers with Our Faces: How the Communications Decency Act Can Prevent Right of Publicity Stunts*, 79 U. CIN. L. REV. 409 (2010) (discussing the policy benefits in having a right of publicity).

232. ALTMAN & POLLACK, *supra* note 173, at § 22:34.

233. See discussion *infra* section IV.

234. All State statutes granting the right to publicity exclude that of a corporation, as these rights were created for “real, flesh and blood human persons, not for entities artificially treated as legalistic ‘persons.’” MCCARTHY & SCHECHTER, *supra* note 8, at § 4:41.

235. MCCARTHY, *supra* note 195, at § 28:7; see also MCCARTHY & SCHECHTER, *supra* note 8, at § 4:20.

236. MCCARTHY, *supra* note 195, at § 28:7.

right of a non-celebrity is implicated, each and every person has this right.²³⁷ One scholar notes “the right of publicity tends to under-protect non-celebrities.”²³⁸ Because “a non-celebrity’s harms will be wholly non-economic in nature” on account of the lack of any marketable, commercial value,²³⁹ the non-celebrity has a right that is “merely theoretical.”²⁴⁰ This difficulty was irrelevant in the case of Karen Hepp, because she built up the commercial value of her persona as a public newscaster and local celebrity, but this is important to note, nonetheless.

*Finding a Home for the Right of Publicity in Modern Day*²⁴¹

With the evolution of this relatively new right comes the challenge that courts face today: categorizing the right of publicity in light of the traditional categories of federally protected intellectual property rights. Trademark law is the right of publicity’s closest stepsibling, as they both arise out of the idea of unfair competition.²⁴² One similarity is that both of these causes of action “distinguish between commercial and noncommercial uses of the mark to determine infringement.”²⁴³ A right of publicity claim regarding a commercial usurpation is much stronger than a non-commercial one,²⁴⁴ and trademark law requires the use of the mark be in commerce to be viable.²⁴⁵ Both trademark law and the right of publicity “can be used for quality assurance purposes” to protect the consumer from fraudulent products or endorsement.²⁴⁶

At the core of trademark law, however, is the primary purpose of protecting the *consumer* from being defrauded.²⁴⁷ This purpose is vastly different from the right of publicity’s aim to protect unwanted use of an individual’s identity.²⁴⁸ While the right of publicity can be used to prevent

237. Greene, *supra* note 157, at 536.

238. *Id.*

239. *Id.* at 538.

240. *Id.* at 536.

241. While this Section only compares the right of publicity with trademark and copyright law, other similar intellectual property rights, such as patent law, could be comparable but are beyond the scope of this article.

242. MCCARTHY, *supra* note 195, at § 28:8.

243. Jackson, *supra* note 186, at 192.

244. See generally J. Eugene Salomon, Jr., *The Right of Publicity Run Riot: The Case for A Federal Statute*, 60 S. CAL. L. REV. 1179, 1198 (1987) (discussing how the individual with public recognition is more likely to face commercial exploitation and damages more than the non-celebrity).

245. 15 U.S.C.A. § 1051(a)(1) (“the owner of a trademark used in commerce may request registration of its trademark.”). While § 1051(b) allows for applications for intent to use the mark in commerce, the applicant must subsequently show that the mark has been used to successfully keep a pre-registered trademark; see § 1051(d).

246. Jackson, *supra* note 186, at 192.

247. *Id.*

248. *Id.*

companies from misleading their consumers into believing a celebrity has endorsed the product, consumer protection is not the main goal.²⁴⁹ Additionally, trademark is a source of goods identifier, while the right of publicity protects a persona, identifying that person specifically.²⁵⁰ Finally, the right of publicity is inherent in all natural persons, another departure from the realm of trademark law.²⁵¹

While these causes of action could be classified as stepsiblings, the “differences outweigh the similarities.”²⁵² Trademark law has its origin in the tort of fraud, unlike the privacy origins of the right of publicity.²⁵³ The line between the two has been blurred by courts,²⁵⁴ but the causes of action are distinctive and should be classified separately.

Another federally recognized intellectual property right commonly equated by scholars with the right of publicity is that of copyright.²⁵⁵ The right of publicity incentivizes individuals to invest in creative activities that will be beneficial in the eyes of the public;²⁵⁶ “this same consideration underlies the patent and copyright laws long enforced” by the Supreme Court.²⁵⁷ Both doctrines focus on prevention of “unauthorized appropriation of valuable property rights” by “restricting forms of expression which infringe” upon these rights.²⁵⁸

There are, however, distinctions widening the gap between copyright law and the right of publicity. For starters, copyright finds its roots vested in the Constitution.²⁵⁹ Additionally, the justifications for copyright law are rooted in the idea that the protection provided produces a wide array of public enrichment, from music all the way to computer programs.²⁶⁰ In contrast, there is a “weakness” regarding “the rationales generally proffered for the right of publicity.”²⁶¹ The economic incentive theory that is the predominant basis for copyright and trademark protection is tenuous in context of the right of

249. *Id.*

250. *Id.*

251. *Id.*

252. MCCARTHY, *supra* note 195, at § 28:8.

253. *Id.*

254. *See, e.g.,* Lugosi v. Universal Pictures, P.2d 425 (Cal. 1979) (holding that a right of publicity requires “secondary meaning” to pass after death).

255. *See, e.g.,* Salomon, Jr., *supra* note 244 (discussing the “copyright-publicity law tension” and how areas of both aspects intersect); *see also* Jackson, *supra* note 186, at 193.

256. Kwall, *supra* note 159, at 58.

257. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576 (1977).

258. Kwall, *supra* note 159, at 58-59.

259. U.S. Const. art. 1, § 8, cl. 8.

260. Greene, *supra* note 157, at 528.

261. F. Jay Dougherty, *All the World's Not A Stooge: The “Transformativeness” Test for Analyzing A First Amendment Defense to A Right of Publicity Claim Against Distribution of A Work of Art*, 27 COLUM. J.L. & ARTS 1, 69 (2003).

publicity, with the Supreme Court only touching upon this concept once in *Zacchini*.²⁶²

Therefore, because there is no clear “twin” at the federal level that automatically recognizes the right, it is up to Congress to rectify this increasingly widening gap between various state recognitions of the right of publicity.

PART IV: ANALYSIS AND SOLUTION

Congress should elect to create a federal right of publicity to clear up the confusion amongst courts and create uniformity. The rise of social media has created numerous small screen “celebrities,” whose content reaches across state borders. These individuals should not fear losing their right to protect their persona simply because the state they live in does not have a right of publicity statute. With the vast array of statutes, tests, and confusion permeating through the lower courts, a federal statute is necessary to delineate the boundaries of protection for the individual persona and guarantee protection across state borders.²⁶³

Technology is increasingly forcing courts to examine Section 230 and rightfully so: with the advent of social media came the rise of internet torts and their progeny. The case of Karen Hepp reveals the need for clarity regarding the right of publicity in the context of § 230(e)(2). Additionally, the outdated, overreaching protections to websites by Section 230 must be reined in to protect “individuals [and] families . . . who use the Internet” from loss of their individual rights, including their right of publicity.²⁶⁴ This Part calls for Congress to enact a federal right of publicity statute and discusses the implications of the right of publicity in light of Section 230.

Creating a Federal Right of Publicity

The right of publicity varies from state to state;²⁶⁵ however, at its core, the right of publicity “is the inherent right of every human being to control the commercial use of his or her identity.”²⁶⁶ While the form of redress for infringement is akin to the tort of unfair competition, the actual right protected

262. Greene, *supra* note 157, at 528; *see Zacchini*, 433 U.S. at 562.

263. *See generally* Peles, *supra* note 160 (comparing differing analytical approaches to the right of publicity via Florida and California law).

264. 47 U.S.C.A. § 230(b).

265. *Compare* Tenn. Code Ann. § 47-25-1103 (stating “every individual has a property right in the use of that person’s name, photograph, or likeness in any medium in any manner”), *with* 42 PA. CONS. STAT. § 8316 (vesting the right in “any natural person whose name or likeness has commercial value and is used for any commercial or advertising purpose”).

266. MCCARTHY & SCHECHTER, *supra* note 8, § 1:2.

is “a state-law created intellectual property right.”²⁶⁷ This right is an investment in the commercialization of one’s identity, an intangible, valuable economic right.²⁶⁸ Therefore, while the initial push for the right of publicity incorporated aspects of privacy, property, and tort law, this right should be, and mostly is, viewed as a type of intellectual property in modern day.²⁶⁹

Several circuits have been forced to confront the right of publicity and have deemed it an undisputed intellectual property right.²⁷⁰ While it takes its roots in the tort of misappropriation, the right of publicity has evolved into a property right held by all individuals.²⁷¹ Other intellectual property laws also originated in tort, eventually earning property based recognition to promote economic efficiency.²⁷² Trademark law is still connected to the tort of unfair competition, and the right of publicity’s connection to misappropriation should not be a bar to its recognition as an intellectual property right.²⁷³ The continued evolution of the right of publicity calls for Congress to federally recognize the right.

First, a federal right of publicity should preempt state law and eradicate the confusion and patchwork of laws created by the states. Preemption has already been an issue regarding state law claims, with the copyright right to distribution and public display at odds with publicity rights.²⁷⁴ Congress is best suited to address these tensions and create a statute that balances the interests of the individual controlling their persona while also balancing the right of copyright holders to potentially exploit their copyright. Federal preemption would eradicate the vast array of state statutes, effectively limiting overbroad protections while expanding underinclusive statutes.

Second, as discussed *supra*, all individuals have a right of publicity. The statute created by Congress must include all; the damages resulting from any claim, therefore, will depend “upon the degree of fame attained by the plaintiff.”²⁷⁵ Allowing every individual a federal right will incentivize creating an economically viable and profitable persona and encourage individualism. Commercial identity is increasingly valuable given the social media age: even children are able to create a persona using social media platforms such as

267. *Id.*

268. Peles, *supra* note 160, at 304.

269. *Id.*

270. *See, e.g.*, ETW Corp v. Jireh Publ’g. Inc., 332 F.3d 915, 928 (6th Cir. 2003) (“the right of publicity is an intellectual property right of recent origin which has been defined as the inherent right of every human being to control the commercial use of his or her identity”).

271. *See* discussion *supra* Part III.

272. William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J. L. & ECON. 265-66 (1987).

273. *Id.*

274. *See* Salomon, Jr., *supra* note 244, at 1187-89 (discussing how the exclusive right of a copyright holder would be destroyed by a fully protected publicity right in certain circumstances).

275. Nimmer, *supra* note 170, at 217.

TikTok. Creating a right of publicity would encourage individuals to engage with the market and cultivate their image as they so choose.

While all individuals will have the right of publicity, only those with economically viable personas will reap the benefits. A federal right of publicity statute should require the plaintiff to demonstrate economic damages in order to recover. This premise balances the need for such a right with the concern of clogging courts with needless litigation.

Interpreting Section 230 and Clarifying the Intellectual Property Exception

With Section 230 at the forefront of potential legal change, § 230(e) should also be examined, especially in conjunction with the right of publicity. Courts continue to stray away from the plain meaning of Section 230, specifically the language of § 230(f)(3), which states the term “‘information content provider’ means any person or entity that is responsible, *in whole or in part*, for the creation or development of information.”²⁷⁶ The “too-common practice of reading extra immunity” into Section 230 must end: internet service providers that contribute to content or infringe upon intellectual property rights should lose their immunity.²⁷⁷

Section 230 should be “construed as a whole” when ascertaining the meaning of individual sections.²⁷⁸ Reading § 230(e) “as a whole” indicates Congress intentionally barred immunity for websites infringing upon another’s intellectual property, regardless of whether the right was vested in state or federal law. The word “any” must be “understood in [its] ordinary, everyday meaning[.]” as there is no indication that the context warrants a technical definition.²⁷⁹ The everyday meaning of any is “one or some indiscriminately.”²⁸⁰ Based on this definition in conjunction with typical canons of construction, courts should construe § 230(e)(2) to include the state intellectual property right of publicity. “Any” intellectual property law includes the right of publicity, as Congress intended for intellectual property laws to be outside the bounds of Section 230 immunity indiscriminately.

Congress clearly intended for § 230(e)(2) to apply to *any* cause of action, but now the question remains as to the true scope of the term

276. § 230(f)(3) (emphasis added); *see, e.g.*, Jones v. Dirty World Ent. Recordings LLC, 755 F.3d 398 (6th Cir. 2014) (immunizing a website owner even though he added new, defamatory commentary via its own manager).

277. *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 208 L. Ed. 2d 197 (2020) (Thomas, J. concurring in denial of certiorari).

278. ANTONIN SCALIA & BRYAN A. GARNER, *Reading Law: The Interpretation of Legal Texts* 167-69 (2012).

279. *Id.* at 169.

280. *Any*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/any> (last visited Dec. 31, 2022).

“intellectual property law.”²⁸¹ While some internet providers, like Facebook, would advocate for the exception to include only federal law, the plain meaning promotes inclusion of state causes of action that differ from the exclusively defined, federal intellectual property laws.²⁸² The right of publicity should be included within the definition of “any intellectual property law,” because of the close relation to traditional federal intellectual property causes of action, regardless of whether Congress elects to enact a statute.²⁸³

Even if Congress does not elect to create a federal right of publicity, Karen Hepp, and other media stars like her, should not be barred by Section 230 when a website damages their carefully cultivated persona. Disregarding likeness interests on the internet diminishes “incentives to build an excellent commercial reputation for endorsements.”²⁸⁴ As such, massive websites should not be able to hide behind Section 230 when damaging another’s intellectual property.²⁸⁵

The Third Circuit correctly analyzed Section 230 in light of the right of publicity, reading the statute as a whole while keeping in mind various policy concerns.²⁸⁶ Congress intentionally made § 230(e) broad in order to protect intellectual property disseminated via the internet, and the statute should be read as such. Consequently, the overbroad protections of Section 230 must be limited in order to protect individual intellectual property rights.

CONCLUSION

The case of Karen Hepp illuminates two important legal issues that need clarification: the right of publicity and the intellectual property exception of Section 230. First, lower courts need guidance on how to apply § 230(e)(2), especially in light of state-recognized rights. Second, while the call for a federal right of publicity statute has been made for decades, Congress has not made any strides in creating such a right. Congress should undertake the creation of a federal right of publicity statute to preempt the various state statutes, creating clarity and uniformity for courts and citizens alike while simultaneously protecting the right under § 230(e)(2).

Immunity and concepts of intellectual property are not limitless. Technology will continue to evolve and force courts and Congress to create new rights that co-exist with longstanding legal principles. There is always another app for mass media consumption on the horizon; therefore, clarification

281. MCCARTHY & SCHECHTER, *supra* note 8, at § 3:19.

282. *See Hepp v. Facebook*, 14 F.4th 204, 211 (3d Cir. 2021).

283. *See discussion supra* Part III.

284. *Hepp*, 14 F.4th at 211.

285. *See id.* (discussing how *Lycos* and *Atlantic Recording* were passed over a decade ago without creating any confusion on the contours of § 230 immunity or a chilling effect on the marketplace of ideas).

286. *See discussion supra* Part II.

is required as to how far persona protections extend, even in uncharted waters. With new insight from Congress, a helpful boundary could transform spiraling areas of law into vehicles for productive use by society.