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## Breaking a Piece from the Castle Wall: The Multi-Circuit Split Over § 230(e)(2) of the Communications Decency Act and its Expansion of Liability for Interactive Computer Services

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**Breaking a Piece from the Castle Wall: The Multi-Circuit Split Over § 230(e)(2) of the Communications Decency Act and its Expansion of Liability for Interactive Computer Services**

*Julien LeBlanc*\*

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## INTRODUCTION

On January 26, 2020, Kobe Bryant and his 13-year-old daughter, Gianna Bryant, were on a helicopter ride to their Mamba Sports Academy in Thousand Oaks, California.<sup>1</sup> During the flight, the helicopter pilot flew blindly into clouds, became disoriented, and plunged into the Southern California hillside, killing all passengers on board.<sup>2</sup> Following the accident, the Los Angeles County Sheriff's and Fire Department's employees captured and shared gruesome photographs of the helicopter crash involving Kobe and Gianna.<sup>3</sup> The photographs were shared with employees, spouses, and in one case a bartender at a bar where a Sheriff's deputy was drinking.<sup>4</sup> Vanessa Bryant, the widow of Kobe Bryant, sued Los Angeles County and testified that she lives in fear that the abhorrent photographs may appear on social media and that her daughters may see the photographs as they scroll through the websites.<sup>5</sup> Moreover, if the photographs are shared on social media, Kobe and Gianna Bryant's name, image, and legacy could be negatively impacted.<sup>6</sup> A Los Angeles County jury found that the Sheriff's and Fire Departments caused Vanessa emotional distress and invaded her privacy through taking and disseminating the photographs.<sup>7</sup> Subsequently, the jury awarded Vanessa \$16 million in damages.<sup>8</sup> However, if these photographs appear on social media websites, it is unclear whether Kobe Bryant's estate can sue those

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1. Stefanie Dazio et al., *US officials: Pilot error caused Kobe Bryant chopper crash*, ASSOCIATED PRESS (Feb. 9, 2021), <https://apnews.com/article/kobe-bryant-helicopter-crash-cause-2c87b04d28961fd277927eea8e8e5564> [https://perma.cc/H99S-LALB].

2. *Id.*

3. Andrew Dalton, *Lawyer: Photos of Kobe Bryant's remains shared 'for a laugh'*, ASSOCIATED PRESS (Aug. 10, 2022), <https://apnews.com/article/kobe-bryant-entertainment-sports-lawsuits-los-angeles-7baab2a304ed9c6a153225b56dffffc6> [https://perma.cc/U6HS-V32D].

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

social media companies for a violation of Kobe and Gianna's right of publicity due to varied interpretations of § 230 of the Communications Decency Act.<sup>9</sup>

Title 47 U.S.C. § 230 of the Communications Decency Act (CDA) grants online platforms immunity from liability for the content posted by its users.<sup>10</sup> For example, if a Facebook user defames another person, Facebook is immune from liability for that user's defamatory posts. However, § 230(e)(2) provides an exception to that immunity for "any law pertaining to intellectual property."<sup>11</sup> *Intellectual property* is an umbrella term which includes the legal regimes of patent, copyright, and trademark law.<sup>12</sup>

Currently, the United States Courts of Appeals are split on language within § 230 of the CDA.<sup>13</sup> The circuit split at issue rests on the proper interpretation of 47 U.S.C. § 230(e)(2) which states, "[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property."<sup>14</sup> Specifically, the issue is whether 47 U.S.C. § 230(e)(2) includes federal *and* state intellectual property laws in its exception to § 230(c)'s immunity; and, if so, whether a state's right of publicity pertains to intellectual property under § 230(e)(2).

While the United States Court of Appeals for the First Circuit in *Universal Communication Systems v. Lycos* hinted that federal *and* state intellectual property claims can apply through § 230(e)(2)'s exception, the

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9. The Bryants' non-profit organization, the Mamba and Mambactia Sports Foundation, is "[f]ounded through the vision and loving memory of Kobe and Gianna 'Gigi' Bryant." MAMBA & MAMBACITA SPORTS FOUNDATION, <https://mambaandmambacita.org/#mission> [<https://perma.cc/CZK3-XZ9Z>] (last visited Sept. 22, 2022). It relies on the image of Kobe and Gianna, also known as Mamba and Mambacita, to fund their goal. *Id.* The foundation has no remedy against potential social media sites that host the image in the Ninth Circuit. *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118–19 (9th Cir. 2007). Nike made a deal with Bryant's estate to use his name, image, and likeness. Nick DePaula, *Kobe Bryant's estate reaches new long-term deal with Nike*, ESPN (Mar. 24, 2022), [https://www.espn.com/nba/story/\\_/id/33588078/kobe-bryant-estate-reaches-new-long-term-deal-nike](https://www.espn.com/nba/story/_/id/33588078/kobe-bryant-estate-reaches-new-long-term-deal-nike) [<https://perma.cc/6RNR-SA2B>]. Like the non-profit, Nike has no remedy in the Ninth Circuit against potential social media sites that host the image. *Perfect 10*, 488 F.3d at 1118–19.

10. 47 U.S.C. § 230(c)(1).

11. *Id.* § 230(e)(2).

12. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1035 (2005).

13. *See generally Perfect 10*, 488 F.3d 1102; *Hepp v. Facebook*, 14 F.4th 204 (3d Cir. 2021).

14. 47 U.S.C. § 230(e)(2).

court only briefly addressed the issue.<sup>15</sup> The *Lycos* court placed its holding on the issue in a footnote and dismissed the case on First Amendment grounds.<sup>16</sup> Further, the First Circuit in *Jane Doe No. 1 v. Backpage.com* displayed hesitancy of its own assertion on § 230(e)(2)'s exception and noted that the exception's application to state intellectual property law is not free from doubt.<sup>17</sup> Therefore, the First Circuit's position on the issue is in flux.<sup>18</sup>

Within the Second Circuit, the United States District Court for the Southern District of New York in *Atlantic Recording Corp. v. Project Playlist, Inc.* held that federal and state intellectual property law apply through § 230(e)(2).<sup>19</sup> The district court reasoned that "[b]ecause the plain language of the CDA is clear, as 'any law' means both state and federal law, the court need not engage in an analysis of the CDA's legislative history or purpose."<sup>20</sup> While the Second Circuit has not weighed in on the issue, the Third Circuit found the district court's opinion in *Atlantic Recording Corp.* to be persuasive.<sup>21</sup>

In *Hepp v. Facebook*, the United States Court of Appeals for the Third Circuit held that § 230(e)(2)'s exception applies to both federal and state intellectual property law.<sup>22</sup> The court utilized a textual reading of the statute like the New York district court in *Atlantic Recording Corp.*<sup>23</sup> Additionally, the court held that the right of publicity is considered an intellectual property right because it is analogous to trademark law and because *Black's Law Dictionary* defines *intellectual property* to include *publicity rights*.<sup>24</sup>

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15. *Universal Comm'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 422–23, 423 n.7 (1st Cir. 2007).

16. *Id.* ("Thus, 'the pivotal issue for consideration here is whether Plaintiff's complaint would withstand a motion to dismiss even in the absence of § 230.' We hold that, because of the serious First Amendment issues that would be raised by allowing USC's claim here, the claim would not survive, even in the absence of Section 230.") (citations omitted).

17. *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 26 n.9 (1st Cir. 2016).

18. *Id.*

19. *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009).

20. The Communications Decency Act is codified at 47 U.S.C. § 230. *Atlantic Recording Corp.*, 603 F. Supp. 2d at 704.

21. *Hepp v. Facebook*, 14 F.4th 204, 210–12 (3d Cir. 2021).

22. *Id.* at 211.

23. *Id.* at 213–14; *Atlantic Recording Corp.*, 603 F. Supp. 2d at 704.

24. *Hepp*, 14 F.4th at 211–12; *Intellectual Property*, BLACK'S LAW DICTIONARY (11th ed. 2019).

In *Perfect 10 v. CCBill*, the United States Court of Appeals for the Ninth Circuit is clearly split with the First Circuit, the Second Circuit's district court, and the Third Circuit.<sup>25</sup> The Ninth Circuit held that § 230(e)(2)'s exception only applies to federal intellectual property law, such as trademark, copyright, or patent law.<sup>26</sup> The Ninth Circuit warned that state laws classified as intellectual property are by no means uniform and have various names, various causes of action and remedies, and various purposes and policy goals.<sup>27</sup> Moreover, the court reasoned that no litigant will know if its nationally reaching website is entitled to immunity until a court addresses whether the state statute or common law right falls under the classification of intellectual property.<sup>28</sup>

*Intellectual property* is an umbrella term which includes the legal regimes of patent, copyright, and trademark law.<sup>29</sup> However, some "neighboring bodies of law" such as trade secrets, the right of publicity, misappropriation, and unfair competition are sometimes granted the title of intellectual property through state jurisprudence or legislation.<sup>30</sup> The Ninth Circuit was specifically concerned that those neighboring bodies of laws could be characterized as intellectual property through case law, and subsequently, an online platform's § 230 immunity would vary state by state.<sup>31</sup>

The inconsistent rulings and reasonings from the circuits defeat the purpose of § 230's uniform immunity and expose interactive computer

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

26. *Id.*

27. *Id.* at 1118.

States have any number of laws that could be characterized as intellectual property laws: trademark, unfair competition, dilution, right of publicity and trade defamation, to name just a few. Because such laws vary widely from state to state, no litigant will know if he is entitled to immunity for a state claim until a court decides the legal issue.

*Id.* at 1119 n.5.

28. *Id.* at 1118–19, 1119 n.5.

29. Lemley, *supra* note 12, at 1035.

30. *Id.*

31. The court noted that trademark, unfair competition, dilution, right of publicity and trade defamation all can be characterized as *intellectual property*. *Perfect 10*, 488 F.3d at 1118–19, 1119 n.5.

services<sup>32</sup> to a geographically determined liability.<sup>33</sup> Conversely, injured plaintiffs are left with unclear remedies against interactive computer services in certain parts of the nation.<sup>34</sup> Further, if § 230(e)(2) includes state intellectual property laws in its exception to § 230's immunity, some scholars—and judges—question whether a state's right of publicity law should be considered a form of intellectual property under § 230.<sup>35</sup> If the right of publicity pertains to intellectual property under § 230(e)(2), then online platforms are open to a heightened and varying liability, while plaintiffs have an avenue to more remedies against online platforms and their deeper pockets.<sup>36</sup>

Under the United States Court of Appeals for the Third Circuit's interpretation of 47 U.S.C. § 230(e)(2) and its identification of the right of publicity as an intellectual property right, Kobe Bryant's estate would have a remedy against the applicable online platforms.<sup>37</sup> However, in the estate's most convenient forum of California, the United States Court of Appeals for the Ninth Circuit's the interpretation of 47 U.S.C. § 230(e)(2) leaves the estate with no redress against the social media companies for a

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32. *Interactive computer service* is the legislative term of art for an online platform. Specifically, interactive computer services are “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 and such systems operated or services offered by libraries or educational institutions.” 47 U.S.C. § 230(f)(2). This includes websites like Facebook, YouTube, X (formerly Twitter), and Reddit. “[C]ourts have interpreted [the] definition [of interactive computer services] to cover many entities operating online, including broadband Internet access service providers (e.g., Verizon FIOS and Comcast Xfinity), Internet hosting companies (e.g., DreamHost and GoDaddy), search engines (e.g., Google and Yahoo!), online message boards, and many varieties of online platforms.” KATHLEEN ANN RUANE, CONG. RSCH. SERV., LSB10082, *HOW BROAD A SHIELD? A BRIEF OVERVIEW OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT* (2018).

33. See Julio Sharp-Wasserman, *Section 230(c)(1) of the Communications Decency Act and the Common Law of Defamation: A Convergence Thesis*, 20 COLUM. SCI. & TECH. L. REV. 195, 233–36 (2018).

34. The plaintiffs' unclear remedies spawn from the existing circuit split, the remaining circuits' silence, and the question surrounding the right of publicity. See generally *Perfect 10*, 488 F.3d 1102; *Hepp v. Facebook*, 14 F.4th 204 (3d Cir. 2021).

35. Matthew Bunker & Emily Erickson, *Of Circuit Splits, Dictionaries & Legal Essences: The Right of Publicity as “Intellectual Property”*, 29 UCLA ENT. L. REV. 1, 7 (2021); *Hepp*, 14 F.4th at 216 (Cowen, J., dissenting in part).

36. Bunker & Erickson, *supra* note 35, at 19.

37. See generally *Hepp*, 14 F.4th 204.

violation of Bryant's right of publicity.<sup>38</sup> Further, the United States Court of Appeals for the First Circuit's position on 47 U.S.C. § 230(e)(2)'s meaning is unclear, while the United States Court of Appeals for the Second Circuit has not addressed the issue.<sup>39</sup>

Currently, interactive computer services have a geographically dependent liability due to a multi-circuit split over § 230(e)(2)'s scope.<sup>40</sup> Further, plaintiffs with state intellectual property injuries are left with an unclear remedy or cause of action against interactive computer services.<sup>41</sup> This Comment will argue that Congress should rewrite 47 U.S.C. § 230(e)(2) of the Communications Decency Act to adjust and allow state laws that are coextensive with federal intellectual property laws to escape § 230's immunity for interactive computer services. This proposed adjustment of the statute will grant interactive computer services a consistent and clear immunity while also granting plaintiffs a state and federal avenue to sue online platforms under patent, copyright, and trademark law.

Alternatively, Congress should revisit § 230(e)(2) to clarify whether the phrase "any law pertaining to intellectual property" encompasses state laws pertaining to intellectual property rights or just federal intellectual property laws.<sup>42</sup> At a minimum, the clarification will give interactive computer services notice of their immunity status. If Congress clarifies the law to blanketly include state laws pertaining to intellectual property rights, without more guidance, then interactive computer services will have their immunity determined state by state. While this scenario is not ideal for consistency, it stabilizes the current ambiguous condition of the interactive computer services' immunity and removes the issue from the courts.

Absent a congressional clarification or revision of § 230(e)(2), the Supreme Court of the United States should address the multi-circuit split to bring consistency to § 230(e)(2)'s interpretation. Further, if the Supreme Court addresses the right of publicity in tandem with § 230(e)(2),

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38. See *Perfect 10*, 488 F.3d at 1118–19.

39. See *Universal Commc'n Sys. v. Lycos, Inc.*, 478 F.3d 413, 422–23, 423 n.7 (1st Cir. 2007); *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 26 n.9 (1st Cir. 2016); *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009).

40. See generally *Universal Commc'n Sys.*, 478 F.3d 413; *Perfect 10*, 488 F.3d 1102; *Atlantic Recording Corp.*, 603 F. Supp. 2d 690; *Hepp*, 14 F.4th 204.

41. The plaintiffs' unclear remedies spawn from the existing circuit split, the remaining circuits' silence, and the question surrounding the right of publicity. See *Perfect 10*, 488 F.3d 1102; *Hepp*, 14 F.4th 204.

42. 47 U.S.C. § 230(e)(2).



then it should reanalyze the classification of the right as intellectual property through the more concrete theoretical analogy of trademark law. However, the Supreme Court cannot provide the necessary statutory adjustment of § 230(e)(2). Therefore, Congress is best suited to resolve the issue.

Part I of this Comment will introduce the basics and history of intellectual property law, as well as the right of publicity. Part II will discuss the legislative and judicial history of 47 U.S.C. § 230. Part III will explore § 230(e)(2), the circuits' varying analyses and interpretations of § 230(e)(2), and the hesitant application of the right of publicity through § 230(e)(2). Part IV will propose a statutory revision of § 230(e)(2) to add consistency and clarity to the decades old law, while solving the recent hesitation in the right of publicity's application through § 230(e)(2)'s exception. Part IV will alternatively argue that the Supreme Court of the United States should address the multi-circuit split to bring consistency to § 230(e)(2)'s interpretation and reanalyze the right of publicity's classification as intellectual property under the more concrete theoretical analogy of trademark law.

#### I. THE DEVELOPMENT OF THE TERM INTELLECTUAL PROPERTY

An essential component of any property right is the power to exclude others from use.<sup>43</sup> *Intellectual property* is the power to exclude others from the use of intangible information and extends to “[c]ertain creations of the human mind.”<sup>44</sup> These intellectual creations are given the exclusionary aspects of property rights.<sup>45</sup> *Intellectual property* has become an “all-encompassing term;” however, the term traditionally includes the federal legal regimes of patent, copyright, and trademark.<sup>46</sup>

Patent and copyright were established within Article I, § 8, clause 8 of the United States Constitution.<sup>47</sup> That clause, which is now referred to as the Intellectual Property Clause, enables Congress to grant limited

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43. L.J. PRESS, INTELLECTUAL PROPERTY LAW § 1.01 (2022).

44. *Intellectual Property*, MCCARTHY'S DESK ENCYCLOPEDIA OF INTELLECTUAL PROPERTY (2004) [hereinafter McCarthy's Intellectual Property Encyclopedia]; Lemley, *supra* note 12, at 1034.

45. McCarthy's Intellectual Property Encyclopedia, *supra* note 44.

46. McCarthy's Intellectual Property Encyclopedia, *supra* note 44; Lemley, *supra* note 12, at 1035.

47. “Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

monopolies in patent and copyright to authors and inventors.<sup>48</sup> Federal trademark protections are enacted through the Commerce Clause of the Constitution.<sup>49</sup>

Notably, patent, copyright, and trademark were not always considered *intellectual property*.<sup>50</sup> Patent and copyright law existed within the United States since the creation of the Constitution and before the term *intellectual property* connected the legal regimes.<sup>51</sup> In 1967, the World Intellectual Property Organization (WIPO), a specialized agency of the United Nations, was formed and defined *intellectual property* to include “rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.”<sup>52</sup> WIPO’s use of the term *intellectual property* popularized the term’s use in the United States.<sup>53</sup> Patent, copyright, and trademark fell within WIPO’s definition of *intellectual property* because patent was considered industrial property, copyright was considered literary property, and trademark was explicitly mentioned in the organization’s definition.<sup>54</sup>

While the term *intellectual property* unifies distinct areas of law dealing with exclusive rights in intangible information, the term has expanded to encompass neighboring bodies of law that rely on the legal and economic understanding of tangible property for its theoretical

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48. A *trademark* is a designation used “‘to identify and distinguish’ the source of goods and services of a person or company.” J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 3:1 (5th ed. 2022); 15 U.S.C. § 1127. Copyright laws protect one’s expression of an idea. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 254 (1918) (Brandeis, J., dissenting). A *patent* is a government granted right to exclude others from making, using, or selling an invention. *Patent*, U.S. PATENT & TRADEMARK OFF., <https://www.uspto.gov/learn/ing-and-resources/glossary#sec-P> [<https://perma.cc/YK4A-8VLC>] (last visited Aug. 31, 2023).

49. U.S. CONST. art. I, § 8, cl. 3; Lanham Act, 15 U.S.C. §§ 1051–1141.

50. Lemley, *supra* note 12, at 1033.

51. *Id.*

52. See Convention Establishing the World Intellectual Property Organization art. 2(viii) (July 14, 1967); Lemley, *supra* note 12, at 1033 n.4.

53. Lemley, *supra* note 12, at 1033.

54. Convention Establishing the World Intellectual Property Organization art. 2(viii) (July 14, 1967) (“‘[I]ntellectual property’ shall include the rights relating to: literary, artistic and scientific works, performances of performing artists, phonograms, and broadcasts, inventions in all fields of human endeavor, scientific discoveries, industrial designs, *trademarks*, service marks, and commercial names and designations, protection against unfair competition, and all other *rights resulting from intellectual activity in the industrial, scientific, literary, or artistic fields.*”) (emphasis added); Lemley, *supra* note 12, at 1033 n.4.

foundation.<sup>55</sup> J. Thomas McCarthy—a respected intellectual property scholar and founder of the McCarthy Institute for Intellectual Property—recognized the term *intellectual property* to widely include the following fields of law in his intellectual property encyclopedia: “patent, trademark, unfair competition, copyright, trade secret, moral rights, and the right of publicity.”<sup>56</sup> However, some scholars argue that the term misguidedly encompasses the right of publicity, and other areas of law, because its theoretical foundation strays from patent, copyright, and trademark’s utilitarian underpinnings.<sup>57</sup>

#### A. *The Right of Publicity*

The right of publicity grants people the ability to control the commercial use of one’s identity and is commonly referenced as someone’s name or likeness.<sup>58</sup> The right of publicity originates from the right of privacy.<sup>59</sup> William Prosser divided the right of privacy into four claims: (1) an intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs; (2) a public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and most important for the purposes of this Comment, (4) an appropriation of the plaintiff’s name or likeness.<sup>60</sup> The tort of appropriation—the fourth right of privacy claim—was first designated the title “right of publicity” in *Haelan Laboratories v. Topps Chewing Gum*.<sup>61</sup>

In *Haelan*, the United States Court of Appeals for the Second Circuit found that celebrities had a claim for pecuniary worth in their “right of publicity” to protect their likeness from being “bruised.”<sup>62</sup> The court expressed that the value in a right of publicity is the right’s exclusive

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55. Lemley, *supra* note 12, at 1035.

56. McCarthy’s Intellectual Property Encyclopedia, *supra* note 44.

57. See Lemley, *supra* note 12, at 1032–35; Bunker & Erickson, *supra* note 35, at 16–17.

58. Bunker & Erickson, *supra* note 35, at 3; J. THOMAS MCCARTHY & ROGER E. SCHECHTER, RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2022); Stacey L. Dogan & Mark A. Lemley, *What the Right Of Publicity Can Learn From Trademark Law*, 58 STAN. L. REV. 1161, 1162 (2006).

59. See Bunker & Erickson, *supra* note 35, at 3. Samuel Warren and Louis Brandies popularized the right of privacy through their article “The Right to Privacy.” See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

60. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

61. *Id.* See *Haelan Lab’ys, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

62. *Haelan Lab’ys*, 202 F.2d at 868.

nature which bars unwanted commercial use of a person's image.<sup>63</sup> The United States Supreme Court first recognized the right of publicity as an intellectual property right in *Zacchini v. Scripps-Howard Broadcasting*.<sup>64</sup> In *Zacchini*, the Supreme Court found that a state's interest in the right of publicity is closely analogous to the goals of patent and copyright because it focuses "on the right of the individual to reap the reward of his endeavors" instead of "protecting feelings or reputation."<sup>65</sup> In doing so, the Supreme Court analogized the right of publicity to copyright through a market lens rather than a tortious lens.<sup>66</sup> Therefore, the Supreme Court cemented the *right of publicity* within the umbrella term of *intellectual property*, rather than its previous privacy tort classification.<sup>67</sup>

However, in *Zacchini*'s aftermath, scholars noted that without a consistent and clear theoretical foundation connecting the right of publicity to patent, copyright, and trademark, the right of publicity's meaning grew to include "any reference to an individual that brings financial benefit to someone else."<sup>68</sup> A traditional intellectual property right, such as copyright, is theoretically based and limited through the following economic rationale: if the government provides a limited property right in the created work, then a market incentive is generated that furthers innovation and creativity through forming a motivation to invest more energy and talent.<sup>69</sup> Scholars argue that the expanded meaning of the right of publicity falls outside of intellectual property's market incentive theoretical foundation.<sup>70</sup>

Some scholars and judges have argued that the right of publicity has a stronger theoretical foundation with trademark law rather than copyright

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63. *Id.*

64. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977).

65. *Id.*

66. *Id.*

67. *Id.*

68. Dogan & Lemley, *supra* note 58, at 1162 n.1 ("Indeed, some states suggest that any advantage—economic or otherwise—can lead to a right of publicity violation. *See, e.g.,* Newton v. Thomason, 22 F.3d 1455, 1460 n.4 (9th Cir. 2005); White v. Samsung Elec. Am., Inc., 971 F.2d 1395, 1397 (9th Cir. 1992)"); Bunker & Erickson, *supra* note 35, at 3.

69. Dogan & Lemley, *supra* note 58, at 1188.

70. *See id.* Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 43–44 (2004) (listing reasons why the right of publicity does not create incentives to fame); Richard A. Posner, *Misappropriation: A Dirge*, 50 HOUS. L. REV. 621, 634 (2003).

or patent law.<sup>71</sup> The right of publicity—like trademark law—similarly lacks the market incentive rational of copyright and patent law; however, trademark’s ultimate market benefits are its reduction of transaction costs and incentivization of quality goods through easing product identification for consumers.<sup>72</sup> The same cannot be said for the right of publicity.<sup>73</sup> The enforcement of one’s publicity right may look more akin to the protection of one’s image from damage or harm.<sup>74</sup> Although, in some scenarios, the right of publicity may be analogized to trademark law’s protection for famous marks from certain harms.<sup>75</sup>

Owners of famous marks—such as Mercedes-Benz, Exxon, Amazon, and so on—gain heightened protection of their trademarks within the market through trademark dilution claims.<sup>76</sup> Specifically, famous marks have access to defend their trademark against two types of harmful dilution: blurring and tarnishment.<sup>77</sup> Blurring occurs when a trademark is similar enough to a famous mark that it impairs the distinctiveness of that famous mark.<sup>78</sup> Tarnishment occurs when a famous mark is harmed through association with a similar mark.<sup>79</sup> Similar to tarnishment, the right of publicity may provide a claim when the celebrity’s name or likeness is tarnished through a disreputable or harmful connection with another.<sup>80</sup>

Scholars question the right of publicity’s place within intellectual property because the right does not fit squarely within one singular legal regime.<sup>81</sup> Some right of publicity claims draw upon the traditional concept of the tort as a privacy right rather than a property-based right for commercial protection.<sup>82</sup> For example, when a tattoo parlor posted

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71. Dogan & Lemley, *supra* note 58, at 1165; Hepp v. Facebook, 14 F.4th 204, 213 (3rd Cir. 2021) (citing Edison v. Edison Polyform Mfg. Co., 67 A. 392, 393–94 (N.J. Ch. 1907) (“analogized the right in one’s likeness to trademark”)).

72. “Trademarks contribute to the public good by preventing consumer confusion and allowing consumers to reliably identify their favorite producers of goods and services in the marketplace.” Bunker & Erickson, *supra* note 35, at 15.

73. *Id.*

74. See Universal Commc’n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 423 n.7 (1st Cir. 2007); Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1119 n.5 (9th Cir. 2007). See also Bunker & Erikson, *supra* note 35, at 16.

75. Dogan & Lemley, *supra* note 58, at 1165, 1197–99.

76. *Id.* at 1197.

77. *Id.*

78. 15 U.S.C. § 1125(c)(2)(B).

79. *Id.* § 1125(c)(2)(C).

80. Dogan & Lemley, *supra* note 58, at 1165.

81. See Bunker & Erickson, *supra* note 35, at 7.

82. Dogan & Lemley, *supra* note 58, at 1166 n.12; Minnifield v. Ashcraft, 903 So. 2d 818, 824 (Ala. Civ. App. 2001).

unauthorized photographs of a client's tattoo, the client utilized the invasion of privacy tort to protect her right of publicity.<sup>83</sup> Importantly, courts and scholars have noted that when the right of publicity strays from protecting a commercial right—like protecting one's image from damage or harm—the asserted right begins to look more akin to a defamation claim.<sup>84</sup> Harm to one's reputation is the essence of defamation law, and “defamation law is the absolute paradigm case of Section 230 immunity for online platforms.”<sup>85</sup> On first reading, the incorporation of the right of publicity through the theoretical foundation of trademark law may not seem questionable; however, the right of publicity's inclusion in the umbrella term consequently impacts statutory language that relies on intellectual property as an identifier, like § 230 of the Communications Decency Act.<sup>86</sup>

## II. § 230 OF THE COMMUNICATIONS DECENCY ACT

Section 230 of the CDA<sup>87</sup> immunizes online platforms from liability for what its users post.<sup>88</sup> Specifically, § 230(c)(1) establishes that “[n]o

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83. *Minnifield*, 903 So. 2d at 823–24.

84. *See* *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 423 n.7 (1st Cir. 2007); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 n.5 (9th Cir. 2007). *See also* *Bunker & Erikson*, *supra* note 35, at 16.

85. *Bunker & Erikson*, *supra* note 35, at 16. The early internet cases that prompted Congress's passage of § 230 involved interactive computer services' liability for defamatory posts on their websites. *See generally* *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991); *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 031063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). *See also infra* Part II and discussion in note 103.

86. *See* 47 U.S.C. § 230.

87. Justice Thomas, in a denial of writ, stated that “[c]ourts have long emphasized nontextual arguments when interpreting § 230, leaving questionable precedent in their wake.” *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020). Justice Thomas's concern regarding lower courts' use of policy rationale rather than a textual interpretation of § 230 potentially foreshadows the Justice's outlook on § 230(e)(2) and the current circuit split. In *Gonzalez v. Google*, the Supreme Court granted certiorari to address the application of § 230 of the Communications Decency Act. *See generally* *Gonzalez v. Google*, 598 U.S. 617 (2023). However, in a Per Curiam opinion, the Court found that the plaintiff's claim failed to state a plausible claim for relief and did not address the Ninth Circuit's application of § 230. *Id.* Thus, the Supreme Court has not addressed its potential interpretive concerns surrounding § 230.

88. *See* 47 U.S.C. § 230.

provider or user of an *interactive computer service*<sup>89</sup> shall be treated as the publisher or speaker of any information provided by another *information content provider*.<sup>90</sup> Further, § 230(c)(2) grants online platforms immunity from civil liability if the platforms restrict access to objectionable material in good faith.<sup>91</sup> For example, if a company such as Facebook removes content which violates its community guidelines, the company is protected from civil liability that may arise from removing such content.<sup>92</sup> Ultimately, § 230(c) allows websites to evade liability for what its users post and protects moderation decisions made by the websites.<sup>93</sup>

Moreover, courts have interpreted § 230(c) to grant two broad “liability shields” in §§ 230(c)(1) and 230(c)(2) that allow for an early dismissal of legal claims against online platforms.<sup>94</sup> The courts’ broad interpretation of immunity is to effectuate Congress’s policy goals of “promot[ing] the continued development of the Internet” and “to preserve the vibrant and competitive free market [on the] Internet.”<sup>95</sup> Further, courts have found that Congress chose not to impose tort liability on companies as a means to deter harmful speech made by the platform’s users.<sup>96</sup> Congress drafted § 230 of the CDA and crafted its underlying policy goals in response to the broadening of interactive computer services’ liability through a series of cases, including *Stratton Oakmont, Inc. v. Prodigy Services Co.*<sup>97</sup>

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89. *Interactive computer services* are “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 and such systems operated or services offered by libraries or educational institutions.” *Id.* § 230(f)(2). This includes websites like Facebook, YouTube, X (formerly Twitter), and Reddit.

90. *Id.* § 230(c)(1) (emphasis added). *Information content providers* are “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” *Id.* § 230(f)(3). This includes almost all users of Facebook, YouTube, X (formerly Twitter), and Reddit.

91. *Id.* § 230(c)(2).

92. *Id.*

93. *Id.* § 230(c).

94. VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW 8 (2021).

95. 47 U.S.C. § 230(b)(1)–(2).

96. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997); *Universal Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007).

97. *Netchoice, L.L.C. v. Paxton*, 49 F.4th 439, 466 (5th Cir. 2022) (“Congress disagreed with [*Prodigy*] and abrogated it by enacting § 230. *See* H.R. REP. NO. 104-458, at 194 (1996) (‘One of the specific purposes of [§ 230] is to overrule

In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, Prodigy, an online platform, used an automated moderation system for its online forum.<sup>98</sup> Prodigy removed user posts that violated its “content guidelines” through the automated moderation system, such as posts that insulted, harassed, or contained offensive language.<sup>99</sup> An unidentified user of Prodigy’s bulletin board posted comments that Stratton Oakmont, a securities investment banking firm, “committed criminal and fraudulent acts” and that Stratton Oakmont was a “cult of brokers who either lie for a living or get fired.”<sup>100</sup> Stratton Oakmont sued Prodigy for defamatory statements issued by the unidentified forum user because the comments were posted on Prodigy’s online platform.<sup>101</sup>

The New York Supreme Court for Nassau County analogized online platforms—like Prodigy—to distributors—like a bookstore or a library—where distributors display a publisher’s content without monitoring the contents of every item that is displayed.<sup>102</sup> However, if a bookstore took specific editorial control over the books on its shelves, then it may be labeled as a publisher.<sup>103</sup> Therefore, if an online distributor—like Prodigy—made content decisions that equal editorial control, then the online distributor will be held as the publisher of the content.<sup>104</sup> The court found that Prodigy was a “publisher rather than a distributor” of the user generated content because Prodigy “held itself out to the public and its members as controlling the content of its computer [forums]” through its editorial control.<sup>105</sup> The court reasoned that Prodigy opened itself to greater liability when it controlled user content through moderation and

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*Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.’.)” (second alteration in original).

98. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 031063/94, 1995 WL 323710, at \*1 (N.Y. Sup. Ct. May 24, 1995).

99. *Id.* at \*2.

100. *Id.* at \*1.

101. *Id.*

102. *Id.* at \*4. *See* *Cubby Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991). *See generally* *Smith v. California*, 361 U.S. 147 (1959).

103. “It is PRODIGY’s own policies, technology and staffing decisions which have altered the scenario and mandated the finding that it is a publisher.” *Stratton Oakmont*, 1995 WL 323710, at \*5.

104. *Id.* at \*4.

105. *Id.*



gained the benefits of editorial control.<sup>106</sup> Therefore, Prodigy was found liable as a publisher for any defamatory comments its users posted.<sup>107</sup>

The *Prodigy* court dismissed the fear that its holding “will compel all computer networks to abdicate control of their bulletin boards.”<sup>108</sup> However, Congress responded to that fear and recognized that the *Prodigy* opinion created the “Moderator’s Dilemma.”<sup>109</sup> Online platforms had two choices for moderation: “(1) exercise full editorial control over user content and accept liability for whatever legally problematic content they miss, or (2) minimize potential liability by exercising no editorial control over user content.”<sup>110</sup> In consequence, the *Prodigy* decision motivated Congressmen Christopher Cox and Ron Wyden to amend the Communications Decency Act and create § 230.<sup>111</sup>

The 1995 Cox-Wyden amendment had two primary goals.<sup>112</sup> First, it was meant to protect Good Samaritans<sup>113</sup> on the internet and online service providers from liability for good faith moderation to avoid situations like *Prodigy*.<sup>114</sup> Second, the amendment aimed to minimize control of the Federal Government or the Federal Communications Commission to regulate internet content.<sup>115</sup> The Congressional House Rules Committee, in granting the Cox-Wyden amendment, summarized the amendment as “protecting from liability those providers and users seeking to clean up the Internet and prohibiting the [Federal Communications Commission] from imposing content or any regulation of the Internet.”<sup>116</sup> Congress codified

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106. *Id.* at \*5.

107. *Id.* at \*4.

108. *Id.* at \*5.

109. 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). See *Hearing on Latest Developments in Combating Online Sex Trafficking Before the Subcomm. on Communications and Technology of H. Comm. on Energy and Commerce*, 115th Cong. 3 (2017) (written remarks of Professor Eric Goldman) [hereinafter *Hearing on Latest Developments in Combating Online Sex Trafficking*].

110. *Hearing on Latest Developments in Combating Online Sex Trafficking*, *supra* note 109, at 3.

111. 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

112. *Id.*

113. A Good Samaritan is one who voluntarily renders aid to another with no duty to do so. *Good Samaritan*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Good%20Samaritan> [<https://perma.cc/YF2G-26P9>] (last visited Oct. 7, 2022). An example of an internet Good Samaritan is a Reddit moderator.

114. 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

115. *Id.*

116. H.R. REP. NO. 104-223, at 3 (1995).

the 1995 Cox-Wyden amendment as § 230 of the Communications Decency Act.<sup>117</sup>

### III. 47 U.S.C. § 230(E)(2) AND THE CIRCUITS' VARIED INTERPRETATIONS

While § 230 grants online platforms immunity from liability for the content posted by its users, § 230(e) carves out five exceptions to that immunity; in other words, § 230 lists five areas in which the CDA creates no legal immunity for an online service provider.<sup>118</sup> Section 230(e) provides that § 230's immunity has no effect on: (1) criminal law; (2) intellectual property law; (3) state law consistent with § 230; (4) communications privacy law; and (5) sex trafficking law.<sup>119</sup> More particularly, § 230(e)(2)'s exception to immunity for intellectual property law—entitled *No Effect on Intellectual Property Law*—establishes that “[n]othing in [§ 230] shall be construed to limit or expand any law pertaining to intellectual property.”<sup>120</sup> The United States Courts of Appeals, however, are split on the meaning of § 230(e)(2).<sup>121</sup> Specifically, whether “any law pertaining to intellectual property” establishes that both federal and state intellectual property laws are not immunized according to § 230's exceptions.<sup>122</sup> The First Circuit, Second Circuit's Southern District of New York, Third Circuit, and Ninth Circuit each have varying interpretations of § 230(e)(2), some more divergent than others.<sup>123</sup>

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117. See 47 U.S.C. § 230. Section 230 was passed in 1996, during the time of America Online, and before Google. BRANNON & HOLMES, *supra* note 94, at 1; Lily Rothman, *A Brief Guide to the Tumultuous 30-Year History of AOL*, TIME (May 22, 2015), <https://time.com/3857628/aol-1985-history/> [<https://perma.cc/97CT-8XE5>]; *From the garage to the Googleplex*, GOOGLE, [https://about.google/intl/ALL\\_us/our-story/](https://about.google/intl/ALL_us/our-story/) [<https://perma.cc/2QES-EYMT>] (last visited Sept. 22, 2022).

118. 47 U.S.C. §§ 230(c)(1), 230(e).

119. *Id.* § 230(e)(1)–(5).

120. *Id.* § 230(e)(2).

121. See generally *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007); *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009); *Hepp v. Facebook*, 14 F.4th 204 (3d Cir. 2021).

122. 47 U.S.C. § 230(e)(2) (emphasis added).

123. See generally *Universal Commc'n Sys.*, 478 F.3d 413; *Perfect 10*, 488 F.3d 1102; *Atlantic Recording Corp.*, 603 F. Supp. 2d 690; *Hepp*, 14 F.4th 204.

*A. The First Circuit's Approach*

The United States Court of Appeals for the First Circuit briefly addressed § 230(e)(2)'s "somewhat ambiguous" language in *Universal Communications Systems v. Lycos*.<sup>124</sup> In *Lycos*, Universal Communication Systems (UCS) brought suit against Lycos, an online platform, for "a series of allegedly false and defamatory postings" made on Lycos's internet forum about UCS.<sup>125</sup> Specifically, UCS brought a dilution claim under Florida trademark law.<sup>126</sup> UCS sought to enjoin the noncommercial use of its name in a negative or offensive manner on Lycos's forums.<sup>127</sup> Lycos argued that it was immune from the dilution claim under § 230 and that its activities "fall squarely within those that Congress intended to immunize."<sup>128</sup> In *Lycos*, the United States District Court for the District of Massachusetts found that UCS's state trademark dilution claim was "effectively . . . a defamation claim in the guise of an antidilution claim."<sup>129</sup> Therefore, Lycos was protected from liability because UCS failed to state a proper trademark dilution claim.<sup>130</sup> The court further supported its holding by referencing that Congress's primary purpose and catalyst for § 230 was the protection of online platforms from civil liability for defamatory posts made by its users.<sup>131</sup> Through this reasoning, the *Lycos* district court did not need to address the state intellectual property claim's applicability through § 230(e)(2).<sup>132</sup>

On appeal, the United States Court of Appeals for the First Circuit addressed the applicability of § 230(e)(2)'s intellectual property exception for UCS's state trademark claim in a footnote.<sup>133</sup> The First Circuit noted that UCS's state trademark claim was a valid exception to § 230's immunity through § 230(e)(2).<sup>134</sup> However, like the district court, the First

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124. See generally *Universal Commc'n Sys.*, 478 F.3d 413; BRANNON & HOLMES, *supra* note 94, at 25.

125. *Universal Commc'n Sys.*, 478 F.3d at 415.

126. *Id.* at 423.

127. *Id.*

128. *Id.* at 415.

129. *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, No. 05-11172-REK, 2005 WL 5250032, at \*4 (D. Mass. Dec. 21, 2005).

130. *Id.*

131. *Id.* See 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

132. See generally *Universal Commc'n Sys.*, 2005 WL 5250032.

133. *Universal Commc'n Sys.*, 478 F.3d at 422–23, 423 n.7.

134. *Id.* at 422–23. The court also recognized the district court's concern that "UCS's trademark claim was 'effectively . . . a defamation claim in the guise of an antidilution claim.'" *Id.* at 423 n.7.

Circuit reasoned that UCS's allegations for its state trademark dilution claim were more relevant to a defamation claim than a trademark claim.<sup>135</sup> The court concluded that UCS's claim did not survive on the merits and was properly dismissed in district court for a failure to state a claim.<sup>136</sup>

Almost a decade later, the First Circuit discussed its *Lycos* opinion in *Jane Doe v. Backpage.com*.<sup>137</sup> The court noted that § 230(e)(2)'s application to state intellectual property claims was not free from doubt.<sup>138</sup> Further, the court stated that the *Lycos* opinion applied the § 230(e)(2) intellectual property exception to state trademark law "without [a] detailed analysis" and put the circuit's holding on § 230(e)(2)'s meaning in flux.<sup>139</sup> Further, the First Circuit acknowledged the inevitable circuit split as the Ninth Circuit held that state law claims pertaining to intellectual property are not covered through § 230(e)(2)'s exception.<sup>140</sup>

### *B. The Ninth Circuit's Approach*

In *Perfect 10 v. CCBill*, the United States Court of Appeals for the Ninth Circuit held that § 230(e)(2)'s exception only applied to federal intellectual property law, such as trademark, copyright, or patent law.<sup>141</sup> In *Perfect 10*, an adult entertainment company brought federal copyright and trademark claims, along with California unfair competition, false advertising, and right of publicity claims, against CCBill and CWIE for "providing services to websites that posted images stolen from Perfect 10's magazine and website."<sup>142</sup> The Ninth Circuit ruled that Perfect 10's state law claims for unfair competition, false advertising, and right of publicity violations were barred by § 230's immunity because § 230(e)(2)'s intellectual property exception does not apply to state intellectual property

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135. *Id.* at 423.

136. *Id.* at 425; The *Lycos* court denotes its discussion of § 230(e)(2) in a footnote as a holding, however, the proposition was not necessary for the court to reach its conclusion on the trademark law claim. Therefore, the discussion of § 230(e)(2) is dicta. *Id.* at 422–23, 423 n.7 ("[H]olding that even though Section 230 immunity does not apply, the claim was properly dismissed as a matter of trademark law.").

137. *See generally* *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016).

138. *Id.* at 26 n.9.

139. *Id.*

140. *Id.* *See* *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118–19 (9th Cir. 2007). The Ninth Circuit also stated that the *Lycos* court "simply [has] assumed" that "state law counts as 'intellectual property' for purposes of § 230." *Id.* at 1107.

141. *Perfect 10*, 488 F.3d at 1118–19.

142. *Id.* at 1108.

law.<sup>143</sup> The Ninth Circuit reasoned that allowing state laws that protect intellectual property to bypass immunity would counter Congress's policy goal of "insulating the development of the Internet from the various state-law regimes."<sup>144</sup> The court cited § 230's findings and policy subsections—§ 230(a) and § 230(b)—where Congress wanted "minimum . . . government regulation" to interfere with the internet.<sup>145</sup>

The Ninth Circuit warned that state laws pertaining to intellectual property are by no means uniform and have various names; various causes of action and remedies; and various purposes and policy goals.<sup>146</sup> The court listed trademark, unfair competition, dilution, right of publicity, and trade defamation as a handful of state laws "that could be characterized as intellectual property laws."<sup>147</sup> Moreover, the court warned that no litigant will know if its nationally reaching website is entitled to immunity until a court addresses whether the state statute or common law right falls under the classification of intellectual property.<sup>148</sup>

Further, the Ninth Circuit in *Perfect 10* directly addressed the First Circuit's *Lycos* opinion.<sup>149</sup> The *Perfect 10* court noted that *Lycos* "demonstrates the difficulties inherent in allowing state laws to count as intellectual property for CDA purposes."<sup>150</sup> The district court in *Lycos* "struggled" to determine whether a state trademark dilution claim "counted as intellectual property for purposes of the CDA."<sup>151</sup> Before the First Circuit Court of Appeals ruled on other grounds, the *Lycos* district court found that the Florida trademark dilution claim was more akin to a defamation claim than a trademark claim.<sup>152</sup> Therefore, the state claim would plausibly fall outside § 230(e)(2)'s intellectual property exception and § 230's immunity would block the claim.

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143. *Id.* at 1118–19.

144. *Id.* at 1118.

145. 47 U.S.C. § 230(a)(4); *Perfect 10*, 488 F.3d at 1118 (citing *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003)).

146. *Perfect 10*, 488 F.3d at 1118, 1119 n.5.

States have any number of laws that could be characterized as intellectual property laws: trademark, unfair competition, dilution, right of publicity and trade defamation, to name just a few. Because such laws vary widely from state to state, no litigant will know if he is entitled to immunity for a state claim until a court decides the legal issue.

*Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1119 n.5.

150. *Id.*

151. *Id.*

152. *Id.*

In *Enigma Software v. Malwarebytes*, the Ninth Circuit further narrowed § 230(e)(2)'s intellectual property exception.<sup>153</sup> In *Enigma*, a computer security software company sued its direct competitor for making false and misleading statements about the company toward consumers.<sup>154</sup> Specifically, the company sued under the false advertising provision of the Lanham Act—the body of law governing trademarks.<sup>155</sup> While the Lanham Act established federal trademark law, the United States District Court for the Central District of California in *Enigma* found that plaintiff's false advertising claim “did not relate to any type of intellectual property.”<sup>156</sup> Specifically, plaintiff's false advertising claim did not allege that Enigma owned trademarks or had other forms of intellectual property.<sup>157</sup> Therefore, the district court found the defendant immune from liability under § 230 and held that the false advertising portion of the Lanham Act did not apply to § 230(e)(2)'s exemption because the claim itself was not an intellectual property claim.<sup>158</sup>

The Ninth Circuit Court of Appeals upheld the district court's decision and reasoning.<sup>159</sup> The Ninth Circuit broke the Lanham Act into two parts: (1) governing trademark infringement; and (2) governing false designation of origin, false descriptions, and dilution, with the latter being “one of the few provisions [of the Lanham Act] that goes beyond trademark protection.”<sup>160</sup> The Ninth Circuit mirrored its policy rationale from *Perfect 10* and reasoned that “because Congress did not define the term ‘intellectual property law,’ [§ 230(e)(2)] should be construed narrowly to advance the CDA's express policy of providing broad immunity.”<sup>161</sup> Therefore, the *Enigma* court held that § 230(e)(2) only encompasses claims pertaining to an “established intellectual property right” under federal law such as patent, copyright, and trademark.<sup>162</sup> Further, the court held that § 230(e)(2)'s exception to immunity does not encompass *this*

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153. *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1053–54 (9th Cir. 2019).

154. *Id.* at 1048.

155. 15 U.S.C. § 1125(a)(1)(B); *Enigma Software*, 946 F.3d at 1048.

156. *Enigma Software*, 946 F.3d at 1049.

157. *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, No. 5:17-cv-02915, 2017 WL 5153698, at \*3 (N.D. Cal. Nov. 7, 2017).

158. *Enigma Software*, 946 F.3d at 1048–49.

159. *Id.* at 1053–54.

160. *Id.* at 1053. Compare 15 U.S.C. § 1114 (trademark infringement), with 15 U.S.C. § 1125 (the rest).

161. *Enigma Software*, 946 F.3d at 1053 (citing *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007)).

162. *Id.*

false advertising claim brought under § 1125(a) of the Lanham Act because it did not involve intellectual property.<sup>163</sup> The Ninth Circuit's narrowed interpretation of § 230(e)(2) requires that the claim pertain to an established intellectual property right under *federal* law.<sup>164</sup> If the claim does not fit within the narrowed federal intellectual property category, then the claim against the online service provider will be blocked through § 230's immunity.<sup>165</sup>

*C. The Second Circuit's Southern District of New York's Approach*

In *Atlantic Recording Corp. v. Project Playlist, Inc.*, the United States District Court for the Southern District of New York held that federal and state intellectual property laws can escape § 230 immunity from liability through § 230(e)(2)'s intellectual property exception.<sup>166</sup> In *Atlantic Recording*, six of the world's largest record companies sued Project Playlist for copyright infringement and unfair competition for allowing users to compile playlists and download songs from third-party websites.<sup>167</sup> Project Playlist argued that § 230 blocked the record companies' state intellectual property law claims because § 230(e)(2)'s exception only applies to *federal* intellectual property claims.<sup>168</sup> Project Playlist heavily relied on the Ninth Circuit's *Perfect 10* holding that, absent a definition from Congress, the term *intellectual property* means *federal intellectual property*.<sup>169</sup>

The *Atlantic Recording* court reasoned that Playlist's argument lacked "any support in the plain language of the CDA" and proceeded with a textualist analysis.<sup>170</sup> Specifically, the court noted that Congress specified whether it intended local, state, or federal law to apply in four different portions of § 230(e): § 230(e)(1) says, "any other *Federal* criminal statute," § 230(e)(3) says, "any *State* law" and "any *State* or *local* law," and § 230(e)(4) says, "any similar *State* law."<sup>171</sup> However, in § 230(e)(2), Congress stated "[n]othing in this section shall be construed to limit . . . any law pertaining to intellectual property," without a

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163. *Id.*

164. *Id.* at 1053–54.

165. *See id.*

166. *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009).

167. *Id.* at 692–93.

168. *Id.* at 702.

169. *Id.* at 703.

170. *Id.*

171. *Id.* *See* 47 U.S.C. § 230(e)(1)–(4) (emphasis added).

designation of local, state, or federal law.<sup>172</sup> Moreover, the court noted that § 230(e)(2) uses the modifier “any” in conjunction with “law pertaining to intellectual property,” without any limiting language.<sup>173</sup> Therefore, the court found the statute has expansive language that offers no indication that Congress intended for a limiting construction of § 230(e)(2).<sup>174</sup> The *Atlantic Recording* court held that “because the plain language of the CDA is clear, as ‘any law’ means both state and federal law, the court need not engage in an analysis of the CDA’s legislative history or purpose.”<sup>175</sup> Therefore, the court held that § 230(e)(2) applies to both federal *and* state intellectual property and § 230’s immunity would not block any state intellectual property claims.<sup>176</sup> While the Second Circuit—in which the Southern District of New York sits—has not weighed in on the issue, the Third Circuit found the district court’s opinion persuasive.<sup>177</sup>

#### *D. The Third Circuit’s Approach*

In *Hepp v. Facebook*, the United States Court of Appeals for the Third Circuit held that § 230(e)(2) leaves online platforms open to civil liability under both federal *and* state intellectual property law.<sup>178</sup> *Hepp* centered around a Philadelphia newscaster named Karen Hepp whose image was taken and used—without her knowledge or consent—in online advertising for a dating website on Facebook and Reddit where “indecent user commentary” took place.<sup>179</sup> In response, Hepp sued Facebook, Reddit, and Imgur for violating her right of publicity under Pennsylvania state law.<sup>180</sup> The United States District Court for the Eastern District of Pennsylvania dismissed the plaintiff’s complaint and reasoned that § 230(e)(2)’s exception only allows federal intellectual property law claims to survive CDA immunity, to which Hepp promptly appealed.<sup>181</sup> On appeal, Facebook argued that the Third Circuit should affirm the district court’s

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172. 47 U.S.C. § 230(e)(2) (emphasis added); *Atlantic Recording Corp.*, 603 F. Supp. 2d at 703.

173. 47 U.S.C. § 230(e)(2); *Atlantic Recording Corp.*, 603 F. Supp. 2d at 704.

174. *Atlantic Recording Corp.*, 603 F. Supp. 2d at 704 (quoting *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 299 (D.N.H. 2008)).

175. *Id.* See *Lee v. Bankers Tr. Co.*, 166 F.3d 540, 544 (2d Cir.1999).

176. *Atlantic Recording Corp.*, 603 F. Supp. 2d at 704; *Lee*, 166 F.3d at 544.

177. *Hepp v. Facebook*, 14 F.4th 204, 210–12 (3d Cir. 2021).

178. *Id.* at 213–14.

179. *Id.* at 206–07.

180. *Id.* at 207. Imgur and Reddit were dismissed for lack of Personal Jurisdiction. *Id.* at 207–08.

181. The district court mirrored the Ninth Circuit’s approach. *Id.* at 210.



ruling on three bases: (1) the text and structure of § 230(e); (2) the statute's own policy provision in § 230(b); and (3) the practical policy reasons.<sup>182</sup>

First, Facebook urged the court to read § 230's text as an integrated whole by reading the various sections together and analyzing how specific words are used.<sup>183</sup> Second, Facebook argued that under the statute's policy section—§ 230(b)(2)—Congress intended to avoid subjecting online platforms from a “web of inconsistent, ‘fettering’ state regulations like the laws governing rights of publicity.”<sup>184</sup> Third, Facebook argued that the court's reading would “increase uncertainty about the precise contours of immunity in cases involving state intellectual property law.”<sup>185</sup> The Third Circuit rejected Facebook's three-pronged argument and held that § 230(e)(2) applies to state intellectual property law claims.<sup>186</sup> Therefore, § 230 immunity does not prevent state intellectual property claims brought against interactive computer services within the Third Circuit.<sup>187</sup>

First, the Third Circuit found that Facebook's reading of § 230(e)(2) strayed too far from a “natural reading” of the statute.<sup>188</sup> The court disagreed that “‘any law pertaining to intellectual property’ should be read to mean ‘any *federal* law pertaining to intellectual property.’”<sup>189</sup> Further, Facebook's reliance on the structure of the statute “cuts both ways.”<sup>190</sup> The court noted that in multiple locations, the statute distinguishes whether a provision pertains to federal law, state law, or both.<sup>191</sup> Therefore, “when Congress wanted to cabin the interpretation about state law,” it did so explicitly.<sup>192</sup> When Congress wanted a provision to specifically address federal law or state law, it explicitly stated it within § 230(e).<sup>193</sup> Further, § 230(e)(2)'s text says “any law” without reference to a state or federal distinction.<sup>194</sup> Thus, the text and structure of § 230(e) informed the Third Circuit that the statute can apply to federal *and* state laws because it did

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182. *Id.*

183. *Id.*

184. *Id.* at 211.

185. *Id.*

186. *See id.* at 210–12.

187. *Id.* at 211–12.

188. *Id.* at 210.

189. *Id.* at 210–11.

190. *Id.* at 211.

191. *Id.*

192. *Id.*

193. *Id.* *See* 47 U.S.C. § 230(e).

194. 47 U.S.C. § 230(e)(2).

not “cabin” § 230’s interpretation through an explicit state or federal distinction.<sup>195</sup>

Second, the court addressed Facebook’s interpretation of the statute’s policy provision, § 230(b)(2).<sup>196</sup> Section 230(b)(2) provides that “it is the policy of the United States— . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>197</sup> Facebook argued that, because rights of publicity may vary from state to state, interactive service providers would have inconsistent and fettering state regulations that would impair the online marketplace.<sup>198</sup> The court disagreed and analogized intellectual property rights to traditional property rights.<sup>199</sup> It reasoned that state property rights “facilitate market exchange” and that § 230(e)(2), if read to include state intellectual property law, encourages Congress’s pro-free-market goal.<sup>200</sup>

Third, the court addressed Facebook’s policy arguments beyond the statute’s text.<sup>201</sup> Facebook argued that allowing state intellectual property law to apply through § 230(e)(2) would increase uncertainty among online platforms over what immunity § 230 grants.<sup>202</sup> In response, the Third Circuit stated that “policy considerations cannot displace the text.”<sup>203</sup> Further, relying on the aftermath of *Lycos* and *Atlantic Recording*, the Third Circuit found that there was no evidence of the potential disarray or uncertainty in allowing state laws protection of intellectual property through § 230 immunity.<sup>204</sup>

After the court held that § 230(e)(2)’s exception to § 230’s immunity applied to state intellectual property law, the court considered whether Hepp’s right of publicity claim fell under a “law pertaining to intellectual property.”<sup>205</sup> The court held that the right of publicity arises out of

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

196. *Id.*

197. 47 U.S.C. § 230(b)(2).

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

199. *Id.*

200. *Id.*

201. *Id.*

202. Facebook relied on the Ninth Circuit’s reasoning in *Perfect 10* for its argument. *Id.* See *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 n.5 (9th Cir. 2007).

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

204. *Id.* See *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 423 n.7 (1st Cir. 2007). See generally *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009).

205. *Hepp*, 14 F.4th at 212; 47 U.S.C. § 230(e)(2).

intellectual property law and thus escapes § 230 immunity through § 230(e)(2).<sup>206</sup> In its reasoning, the Third Circuit surveyed legal definitions of *intellectual property* and found that *Black's Law Dictionary* “defines ‘intellectual property’ to include ‘publicity rights.’”<sup>207</sup> After a survey of other legal dictionaries, the Third Circuit found “strong evidence that the term ‘intellectual property’ included Pennsylvania’s statutory right of publicity” within the classification’s umbrella.<sup>208</sup>

The Third Circuit then discussed *Zacchini v. Scripps-Howard Broadcasting*, the first Supreme Court case that acknowledged the right of publicity as an intellectual property right.<sup>209</sup> The Supreme Court in *Zacchini* found that the “State’s interest in permitting a ‘right of publicity’” is “closely analogous to the goals of patent and copyright law” because it fixates “on the right of the individual to reap the reward of his endeavors and [has] little to do with protecting feelings or reputation.”<sup>210</sup> In *Hepp*, the Third Circuit found that protecting the right of publicity prevents “unjust enrichment by the theft of goodwill,” and thus, benefits the market.<sup>211</sup> The court analogized the right of publicity’s protection of commercial goodwill to trademark’s ability to secure commercial goodwill and concluded that “the right of publicity and trademark are close analogues.”<sup>212</sup> Consequentially, the Third Circuit held that Hepp’s state claim for a violation of her right of publicity arose out of a law pertaining to intellectual property.<sup>213</sup> Therefore, the right of publicity escapes § 230’s immunity through § 230(e)(2)’s intellectual property exception.<sup>214</sup>

Finally, the Third Circuit addressed perceived concerns with its ruling.<sup>215</sup> The court emphasized the narrowness of its holding and that its holding did not “threaten free speech.”<sup>216</sup> The court side-stepped the

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206. *Hepp*, 14 F.4th at 214.

207. *Id.* at 212; *Intellectual Property*, BLACK’S LAW DICTIONARY (11th ed. 2019).

208. *Hepp*, 14 F.4th at 213.

209. *Id.* See generally *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

210. *Zacchini*, 433 U.S. at 573.

211. *Hepp*, 14 F.4th at 213 (quoting *Zacchini*, 433 U.S. at 575–76).

212. *Id.* (citing *USPTO v. Booking.com*, 140 S. Ct. 2298, 2302 (2020)). “For an academic account, see Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1164, 1190 (2006) (contending trademark law ‘is by far the closest analogy to the right of publicity’).” *Id.* at 213 n.2.

213. *Id.* at 214.

214. 47 U.S.C. § 230(e)(2).

215. *Hepp*, 14 F.4th at 214.

216. *Id.*

looming First Amendment question and stated that Hepp’s right of publicity claim regarded the “commercial effect on her intellectual property, not about protected speech.”<sup>217</sup> The court drew more comparisons to trademark law stating that misappropriations of Hepp’s identity could create consumer confusion and that trademark claims “typically avoid violating free speech by addressing misleading commercial speech.”<sup>218</sup> Further, it stated that its holding would not open the floodgates because it only provided a cause of action for those who have a valuable interest in their likeness “developed through the investment of time, effort, and money.”<sup>219</sup> Moreover, the court expressed that it offered no opinion about other states’ rights of publicity, only Pennsylvania’s right of publicity statute.<sup>220</sup>

Judge Cowen of the Third Circuit dissented in part from the majority opinion, stating that § 230(e)(2) leaves online platforms open to civil liability under federal intellectual property laws—patent, copyright, and trademark laws—and, at most, state laws that are co-extensive with federal laws.<sup>221</sup> First, Judge Cowen acknowledged that the majority misidentified a circuit split between the First Circuit in *Lycos* and the Ninth Circuit in *Perfect 10*.<sup>222</sup> Judge Cowen identified that the First Circuit in *Lycos* only briefly addressed § 230(e)(2)’s application to state law in a footnote.<sup>223</sup> Further, in *Lycos*, the state claim at issue was under Florida trademark law, which is co-extensive with federal intellectual property law.<sup>224</sup> Judge Cowen argued that the majority not only created the circuit split with the Ninth Circuit, but would expand accepted intellectual property under § 230(e)(2) to include the right of publicity.<sup>225</sup> Next, Judge Cowen argued that the majority opened the door for state law and undermined Congress’s broad policy objectives codified in § 230.<sup>226</sup> He questioned whether Congress would “grant immunity from a wide range of state and federal laws . . . yet permit claims to go forward under the nebulous (and

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217. *Id.*

218. *Id.*

219. 42 PA. CONS. STAT. § 8316(e) (2024); *Hepp*, 14 F.4th at 214.

220. *Hepp*, 14 F.4th at 214.

221. *Id.* at 216 (Cowen, J., dissenting in part).

222. *Id.* at 218–19 (Cowen, J., dissenting in part). *See generally* *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007).

223. *Hepp*, 14 F.4th at 218–19 (Cowen, J., dissenting); *Universal Commc’n Sys.*, 478 F.3d at 423 n.7.

224. *See Universal Commc’n Sys.*, 478 F.3d at 423 n.7.

225. *Hepp*, 14 F.4th at 218–19 (Cowen, J., dissenting).

226. *Id.* at 219 (Cowen, J., dissenting in part).

expansive) category of state ‘intellectual property’” or right of publicity laws.<sup>227</sup> Judge Cowen agreed with Facebook’s concerns that, despite the majority’s claim of a narrow holding, the opinion would bring uncertainty and confusion to companies’ liability status which may pressure companies to restrict speech.<sup>228</sup> Ultimately, Judge Cowen found that the matters decided by the majority are better left for Congress to address.<sup>229</sup>

#### IV. STABILIZING THE MULTI-CIRCUIT SPLIT

Throughout the United States, interactive computer services have increased uncertainty over what immunity § 230 grants due to a multi-circuit split over § 230(e)(2).<sup>230</sup> Further, plaintiffs with state intellectual property claims are left with a shifting remedy or cause of action against interactive computer services.<sup>231</sup> A statutory revision of § 230(e)(2) is necessary to solve the circuit split and bring consistency, clarity, and uniformity to the statute for potential plaintiffs and interactive computer services throughout the country.

##### *A. Solution One: Statutory Revision of 47 U.S.C. § 230(e)(2)*

Congress should rewrite 47 U.S.C. § 230(e)(2) of the Communications Decency Act to allow state laws that are coextensive with federal intellectual property laws to escape § 230’s immunity for interactive computer services. In order to effectuate these goals, Congress should revise 47 U.S.C. § 230(e)(2) with the following language:

Nothing in this section shall be construed to limit or expand any federal law, or state law coextensive with federal law, pertaining to intellectual property.

This proposed adjustment of the statute will grant interactive computer services a consistent and clear immunity while also granting plaintiffs a

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227. *Id.* at 220 (Cowen, J., dissenting in part).

228. *Id.* at 225 (Cowen, J., dissenting in part).

229. *Id.*

230. *See generally* Universal Commc’n Sys., Inc. v. Lycos, Inc., 478 F.3d 413 (1st Cir. 2007); Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (9th Cir. 2007); Atlantic Recording Corp. v. Project Playlist, Inc., 603 F. Supp. 2d 690 (S.D.N.Y. 2009); *Hepp*, 14 F.4th 204.

231. The plaintiffs’ unclear remedies spawn from the existing circuit split, the remaining circuits’ silence, and the question surrounding the right of publicity. *See generally* Perfect 10, 488 F.3d 1102; *Hepp*, 14 F.4th 204.

state and federal avenue to sue online platforms under patent, copyright, and trademark law.

### *1. Consistency*

First, the proposed language creates consistency and resolves the present confusion over whether 47 U.S.C. § 230(e)(2) includes state intellectual property laws in its exception to immunity.<sup>232</sup> If adopted, any federal law pertaining to intellectual property will escape § 230's immunity. Federal laws pertaining to intellectual property include patent, copyright, and trademark laws.<sup>233</sup> Further, under the proposed language, only state laws that are coextensive of those federal intellectual property laws will escape § 230's immunity. This revision would bring consistency and uniformity across the 50 states by applying a rule that all courts can utilize.

One of § 230's purposes was to allow internet services to comply with a single national standard, increase their legal certainty, and reduce their legal compliance costs.<sup>234</sup> However, some scholars argue that the circuit-to-circuit differences in § 230's interpretation undermine its uniformity and consequently hurt its primary purpose.<sup>235</sup> Further, it is illogical to reason that Congress would grant online platforms an immunity from a wide range of state laws, yet choose to permit the nebulous and ever-expansive category of state intellectual property or right of publicity laws to escape that immunity.<sup>236</sup> The proposed language brings consistency and uniformity to § 230(e)(2) and provides plaintiffs with appropriate remedies against harms to their intellectual property.

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232. See generally *Universal Commc'n Sys.*, 478 F.3d 413; *Perfect 10*, 488 F.3d 1102; *Atlantic Recording Corp.*, 603 F. Supp. 2d 690; *Hepp*, 14 F.4th 204.

233. Lemley, *supra* note 12, at 1035.

234. Eric Goldman, *Why Section 230 Is Better Than The First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 44 (2019).

235. Sharp-Wasserman, *supra* note 33, at 233–36. “[T]elecommunications . . . involve areas where there is need for uniform national regulation, not many different state approaches. The internet is too important for free speech, too complex, and too geographically diverse to place it under the control of state regulation.” Alex Chemerinsky & Erwin Chemerinsky, *Misguided Federalism: State Regulation of the Internet and Social Media*, 102 N.C. L. REV. 1, 60 (2023). (This excerpt is in Part III.B of the Chemerinskys’ article titled “States Should Not Regulate the Internet,” and it is part of a larger piece on the regulation of the internet and social media.)

236. *Hepp*, 14 F.4th at 220 (Cowen, J., dissenting in part).

## 2. *Clarity*

Second, the proposed language creates clarity as to the meaning of the statute and quells interactive computer services' uncertainty regarding the status of their § 230 immunity against state intellectual property claims. Under the current multi-circuit split, litigants are uncertain if they are entitled to § 230's immunity against a state claim until a court decides the legal issue.<sup>237</sup> However, under the proposed language, plaintiffs may seek relief through state law if it coincides with existing federal law.<sup>238</sup> The proposed language also restrains state claims against online platforms and makes these claims predictable. For example, if a plaintiff sues Facebook for a trademark violation on its website, then the plaintiff can bring a claim under the federal Lanham Act that pertains to intellectual property and any State claim that is coextensive with that federal trademark law without being blocked through § 230's immunity.<sup>239</sup> The statutory adjustment brings clarity and certainty to § 230(e)(2) because the proposed language includes a strict limit on state intellectual property claims that may apply through the statute's exception.

## 3. *The Right of Publicity and 47 U.S.C. § 230(e)(2)*

Third, the proposed language resolves and removes scholars' and judges' skepticism regarding the right of publicity's application through § 230(e)(2) by disallowing state laws that are not coextensive of federal intellectual property laws.<sup>240</sup> Currently, the right of publicity's place within 47 U.S.C. § 230(e)(2) is in flux as federal law does not recognize a right of publicity.<sup>241</sup> It is unclear which circuits allow state laws pertaining

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237. *Perfect 10*, 488 F.3d at 1107.

238. This will likely only apply to state laws which are coextensive with the Lanham Act as any state law that is coextensive of federal patent and copyright law is preempted through Article I, § 8 of the Constitution in accordance with the Supremacy Clause in Article VI of the Constitution. "Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8; *id.* art. VI.

239. 15 U.S.C. §§ 1051–1141.

240. Bunker & Erickson, *supra* note 35, at 7; *Hepp*, 14 F.4th at 216 (Cowen, J., dissenting in part).

241. See generally *Hepp*, 14 F.4th 204; *Perfect 10*, 488 F.3d 1102. A recent bipartisan bill titled "Nurture Originals, Foster Art, and Keep Entertainment Safe Act of 2023" (NO FAKES Act) was proposed in the Senate Judiciary Subcommittee on Intellectual Property to combat AI deepfakes and to "protect the image, voice, and visual likeness of individuals, and for other purposes." NO

to intellectual property rights to escape § 230's immunity through § 230(e)(2).<sup>242</sup> If state claims pertaining to intellectual property are allowed, then the next issue is whether the right of publicity is truly an intellectual property right under § 230(e)(2).<sup>243</sup> If the publicity claim takes a form that is not "pertaining to intellectual property," then it is unlikely to escape § 230's broad immunity.<sup>244</sup> Moreover, if the right of publicity claim's purpose is analogous to a tort in privacy, trademark dilution, false advertising, or defamation claim, then it is also unlikely to escape § 230's immunity for the same reasoning.<sup>245</sup>

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FAKES Act of 2023 – Draft Text, <https://www.coons.senate.gov/download/no-fakes-act-draft-text> [<https://perma.cc/6XPB-F5MF>]. If passed, this act will create a federal right of publicity and grant a property right in one's image that disallows the unauthorized digital replica of one's image, voice, or visual likeness. *Id.* In section (f) titled "Rule of Construction" the draft bill explicitly states, "This section shall be considered to be a law pertaining to intellectual property for the purposes of section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. 230(e)(2))." *Id.*

If this draft bill is enacted, it will mark the first federal right of publicity law. Importantly, the NO FAKES Act would explicitly allow for plaintiffs to bypass interactive computer services' § 230 immunity through § 230(e)(2)'s intellectual property exception. Under this proposed bill, a plaintiff could directly sue companies such as Facebook, YouTube, X (formerly Twitter), and Reddit for a user's unauthorized digital replica of the plaintiff's image, voice, or visual likeness. *Id.* Without discussing if this is good policy, the draft bill does provide the uniform national protection that is needed for any internet regulation. *See* Chemerinsky & Chemerinsky, *supra* note 235 (discussing the importance of uniform federal regulation of the internet as opposed to state regulation). This proposed federal right of publicity provides the consistency, clarity, and uniformity that is currently absent when applying state right of publicity laws through § 230's immunities. Further, while the NO FAKES Act would increase liability for interactive computer services, it is consistent with one of § 230's core purposes—to allow internet services to comply with a single national standard, increase their legal certainty, and reduce their legal compliance costs. Goldman, *supra* note 234, at 44.

242. *See generally Hepp*, 14 F.4th 204; *Perfect 10*, 488 F.3d 1102; *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016).

243. 47 U.S.C. § 230(e)(2).

244. *See generally Hepp*, 14 F.4th 204; *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019). *See* *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 423 n.7 (1st Cir. 2007).

245. This list is illustrative. *See generally Hepp*, 14 F.4th 204; *Enigma Software*, 946 F.3d 1040; *Universal Commc'n Sys.*, 478 F.3d at 423 n.7; *Perfect 10*, 488 F.3d 1102.



Judges have justifiably cast doubt on the right of publicity and other laws' application through § 230(e)(2). In *Enigma*, the Ninth Circuit denied a false advertising claim under the Lanham Act because it did not relate to intellectual property.<sup>246</sup> Further, the district court in *Lycos* found the plaintiff's trademark claim was "effectively . . . a defamation claim in the guise of an antidilution claim," thus, § 230's immunity would necessarily block the claim because it is not "pertaining to intellectual property."<sup>247</sup> In *Hepp v. Facebook*, Judge Cowen dissented and argued that the right of publicity resembles a privacy protection that is atypical of intellectual property's original, commercial nature, while the majority argued the right is similar to trademark.<sup>248</sup>

To some scholars, the right of publicity is closer conceptually to the law of defamation and further from copyright or patent.<sup>249</sup> To others, the right of publicity should not be considered intellectual property at all.<sup>250</sup> Intellectual property rights are monopolies given to the creator to contribute to the public good and the market, "not the private well-being or wealth of the creator."<sup>251</sup> The more a right of publicity claim resembles a privacy protection based in tort, the more the right strays from intellectual property law and looks more akin to a defamation claim—the absolute paradigm case for § 230 immunity.<sup>252</sup> Ultimately, the explicit removal of *any* state law pertaining to intellectual property from § 230(e)(2)'s exception rectifies the current confusion of the right of publicity's interaction with § 230(e)(2) by disallowing the state law right's applicability through the intellectual property exception.

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246. *Enigma Software*, 946 F.3d at 1048.

247. *Universal Commc'n Sys.*, 478 F.3d at 417, 423 n.7; 47 U.S.C. § 230(e)(2).

248. *Hepp*, 14 F.4th at 223–24 (Cowen, J., dissenting in part); *id.* at 214.

249. *Bunker & Erickson*, *supra* note 35, at 16–17. *See* *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (analogizing the right of publicity to copyright or patent law).

250. *See generally* *Bunker & Erickson*, *supra* note 35.

251. *Id.* at 13.

252. *Bunker & Erikson*, *supra* note 35, at 16. The early internet cases that prompted Congress's passage of § 230 involved interactive computer services' liability for defamatory posts on their websites. *See generally* *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991); *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 031063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). *See also infra* Part II and discussion in note 103.

#### 4. Congress's Alternative

Alternatively, Congress should revisit § 230(e)(2) to clarify if “any law pertaining to intellectual property” encompasses all state laws pertaining to intellectual property rights, or just federal intellectual property laws.<sup>253</sup> At a minimum, Congress’s clarification will give interactive computer services notice of their immunity status; however, this solution is not ideal.

If Congress only allows federal laws pertaining to intellectual property to pass through § 230(e)(2)’s exception to the § 230 immunity, then plaintiff’s remedies against online platforms will be further limited.<sup>254</sup> No state claim would apply through § 230 and it would disallow States from crafting intellectual property rights to protect its citizens. While this scenario is not ideal for plaintiffs, it stabilizes the current ambiguous condition of the interactive computer services’ immunity and removes the issue from the courts.

If Congress clarifies the law to blanketly include federal *and* state laws pertaining to intellectual property, without more guidance, then interactive computer services will have their immunity determined state by state. State intellectual property laws could subsequently act to regulate intellectual property related conduct on the Internet. This scenario offends Congress’s policy goal to preserve the Internet from more Federal or State regulation.<sup>255</sup> Further, if state laws—recognized as intellectual property laws by the state’s legislature—bypass § 230’s immunity through § 230(e)(2), then online platforms would be forced to bear the costs of litigation under a wide variety of state statutes that could arguably be classified as *intellectual property*.<sup>256</sup> Moreover, the term intellectual property is a non-technical, non-concrete umbrella term that is ever developing.<sup>257</sup> The inclusion of all state laws pertaining to intellectual property will expose interactive computer services to an unconfined, ever-growing list of laws and include rights deemed to be intellectual property by state courts and legislatures, like the right of publicity. While this scenario is not ideal for consistency across the nation and strains Congress’s policy intentions, it stabilizes the current ambiguous condition of interactive computer services’ immunity and provides the courts with clearer guidelines.

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253. 47 U.S.C. § 230(e)(2).

254. *Id.*

255. *Id.* § 230(b)(2).

256. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1107–08 (9th Cir. 2007).

257. *See* McCarthy’s Intellectual Property Encyclopedia, *supra* note 44; *Intellectual Property*, BLACK’S LAW DICTIONARY (11th ed. 2019); Lemley, *supra* note 12, at 1034.

*B. Solution Two: A Writ of Certiorari to the Supreme Court of the United States*

Absent a Congressional clarification or revision of § 230(e)(2), the Supreme Court of the United States should grant a writ of certiorari to address the multi-circuit split to bring consistency to § 230(e)(2)'s interpretation. The Supreme Court could take one of the two contrasting paths displayed in the Ninth Circuit's approach in *Perfect 10 v. CCBill* and the Third Circuit's approach in *Hepp v. Facebook*.<sup>258</sup> The Supreme Court could read § 230(e)(2) to include federal *and* state claims pertaining to intellectual property,<sup>259</sup> or it could read § 230(e)(2) to only include federal laws pertaining to intellectual property.<sup>260</sup>

Both avenues for clarification will give interactive computer services clear notice of their immunity's status. However, as shown in the alternative solution for Congress, both avenues do not wholly solve the issue, and instead, force plaintiffs to lose potential remedies or have online platforms' § 230 immunity determined state by state. Therefore, the issue is best solved through a Congressional rewrite of § 230(e)(2).

*1. Revisiting the Right of Publicity*

If the Supreme Court takes up a case involving § 230(e)(2) and the right of publicity, while ultimately finding that state *and* federal claims pertaining to intellectual property apply through § 230's immunity, then the Supreme Court should reanalyze its theoretical foundation for the right of publicity's incorporation into intellectual property law. While the Supreme Court recognized the right of publicity as an intellectual property right through analogy with patent and copyright law, the right of publicity has more in common with trademark law.<sup>261</sup> The right of publicity functions like trademark law because the right protects someone's interest in their image and likeness, while giving the rights-holder "some measure of control" over their identities.<sup>262</sup>

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258. See generally *Perfect 10*, 488 F.3d 1102; *Hepp v. Facebook*, 14 F.4th 204 (3d Cir. 2021).

259. See generally *Hepp*, 14 F.4th 204.

260. See generally *Perfect 10*, 488 F.3d 1102.

261. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977); *Dogan & Lemley*, *supra* note 58, at 1164.

262. *Dogan & Lemley*, *supra* note 58, at 1164.

Additionally, the Lanham Act's claim for dilution is analogous to the right of publicity.<sup>263</sup> Dilution protects a famous mark from two harms: blurring and tarnishment.<sup>264</sup> Blurring occurs when a trademark is similar enough to a famous mark that it impairs the distinctiveness of that famous mark.<sup>265</sup> Tarnishment occurs when a famous mark is harmed through association with a similar mark.<sup>266</sup> Similar to tarnishment, the right of publicity may provide a claim when the celebrity's name or likeness is tarnished through a disreputable or harmful connection with another.<sup>267</sup> Further, in *Hepp v. Facebook*, the United States Court of Appeals for the Third Circuit found that courts have used trademark law in situations seemingly touching the right of publicity for over a century.<sup>268</sup> If the Supreme Court addresses the right of publicity, it should reanalyze the right's classification as intellectual property through the more concrete theoretical analogy of trademark law.

#### CONCLUSION

The current multi-circuit split concerns whether § 230(e)(2) of the Communications Decency Act includes federal *and* state intellectual property laws in its exception to § 230(c)'s immunity; and, if so, whether the state right of publicity pertains to intellectual property under § 230(e)(2). Because of the multi-circuit split, interactive computer services are uncertain as to their immunity status under § 230.<sup>269</sup> Conversely, plaintiffs with state intellectual property injuries are left with

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263. The Lanham Act is the federal law controlling trademarks. 15 U.S.C. § 1125(c)(2)(B)–(C); Dogan & Lemley, *supra* note 58, at 1164.

264. 15 U.S.C. § 1125(c)(2)(B)–(C).

265. *Id.* § 1125(c)(2)(B).

266. *Id.* § 1125(c)(2)(C).

267. Dogan & Lemley, *supra* note 58, at 1165.

268. *Hepp v. Facebook*, 14 F.4th 204, 213 (3d Cir. 2021) (“analogized the right in one’s likeness to trademark” (citing *Edison v. Edison Polyform MFG. Co.*, 67 A. 392, 393–94 (N.J. Ch. 1907))); *id.* (“granted an injunction to stop the ‘deceptive use of the Emperor Franz Josef’s name and portrait’ because it falsely implied his endorsement” (citing *Von Thodorovich v. Franz Josef Beneficial Ass’n*, 154 F. 911, 913 (C.C.E.D. Pa. 1907))); *id.* (“harm caused by a right to publicity violation is that ‘it associates the individual’s name or ... personality with something else’” (citing *Tyne v. Time Warner Ent. Co.*, 901 So. 2d 802, 806 (Fla. 2005))).

269. See generally *id.* See *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007); *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009).

an unclear remedy or cause of action against interactive computer services.<sup>270</sup> Further, some scholars—and judges—question whether a state's right of publicity law should be considered a form of intellectual property under § 230.<sup>271</sup> Accordingly, Congress should rewrite § 230(e)(2) of the Communications Decency Act to allow state laws that are coextensive with federal intellectual property laws to escape § 230's immunity for interactive computer services. The statutory adjustment will bring consistency and clarity to online platforms' immunity and plaintiffs' causes of action. Moreover, the statutory adjustment will resolve the current confusion regarding the right of publicity's status in conjunction with § 230(e)(2). Alternatively, the Supreme Court of the United States, in addressing the multi-circuit split, should bring consistency to § 230(e)(2)'s interpretation and refocus the Supreme Court's theoretical foundation for the right of publicity to trademark law. The proposed solutions disentangle the intersection of law between § 230(e)(2), intellectual property, and the right of publicity; while reestablishing the Communication Decency Act's uniform application to interactive computer services.

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270. The plaintiffs' unclear remedies spawn from the existing circuit split, the remaining circuits' silence, and the question surrounding the right of publicity. *See generally Perfect 10*, 488 F.3d 1102; *Hepp*, 14 F.4th 204.

271. Bunker & Erickson, *supra* note 35, at 7; *Hepp*, 14 F.4th at 216 (Cowen, J., dissenting in part).