ANALYZING THE CIRCUIT SPLIT OVER CDA SECTION 230(E)(2): WHETHER STATE PROTECTIONS FOR THE RIGHT OF PUBLICITY SHOULD BE BARRED

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INTRODUCTION

In 2018, coworkers notified Karen Hepp, a newscaster and co-anchor for the local Fox affiliate’s morning news program Good Day Philadelphia, that a screenshot of her smiling at a hidden security camera taken about fifteen years ago was being used in various online advertisements for erectile dysfunction and dating apps. 1 Hepp was not previously aware that her photo had been taken or that her photo was posted and shared online on platforms such as Facebook, Reddit and Imgur. 2 Hepp’s photo was used to solicit Facebook users to “meet and chat with single women.” 3 The photo was also featured on Imgur under the heading “milf,” a derogatory and degrading term that refers to a sexually attractive woman with young children, and a Reddit user under the handle “pepsi_next” posted Hepp’s photo to a Reddit subgroup “r/obsf,” which is a repository for risqué photos of older women. 4 Though Hepp did not allege that Facebook, Imgur, or Reddit had any role in creating or directly publishing this content, she argued that the platforms’ actions have caused “serious, permanent and irreparable harm” to her reputation brand, and image. 5 Hepp filed claims against Facebook, Imgur, and Reddit for violations of a Pennsylvania state statute that codifies a right of publicity through causes of action for an unauthorized use of one’s name or likeness and the Pennsylvania common law right of publicity. 6

Because there is no federal law protecting a right of publicity, states that have adopted the right of publicity have done so by statute, judicial decision, or both. 7 The right of publicity is the right to control the commercial use and value of one’s persona, but the right significantly varies from state to state. Generally, a claim “requires three elements to be actionable: (1) the use of an individual’s persona; (2) for commercial purposes; and (3) without plaintiff’s consent.” 8 The Pennsylvania statute creates a cause of action for “any natural person whose name or likeness has commercial value and is used for any commercial or advertising purpose without the written consent

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3. Id.
4. Id.
5. Id.
6. Id. at 495–96; see also 42 PA. CONS. STAT. § 8316 (2022).
8. Id.
of such natural person.”9 In Hepp v. Facebook, Facebook, Reddit, and Imgur filed a motion to dismiss the suit under Federal Rule of Civil Procedure 12(b)(6), and the District Court for the Eastern District of Pennsylvania granted the motion, holding that Hepp’s statutory and common law right of publicity claims were barred by the section 230(c) of the Communications Decency Act (“CDA”).10

Section 230 of the CDA states, “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,” and it expressly preempts any state law to the contrary.11 Essentially, this means interactive service providers are generally immune from liability related to content posted or shared by third parties. Therefore, section 230 “creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.”12 However, there are some exceptions to this immunity, including causes of action under “any law pertaining to intellectual property.”13

In granting the motion to dismiss, the district court in Hepp followed the Ninth Circuit’s interpretation of section 230(e)(2) in holding that only federal intellectual property claims are excluded from the scope of CDA section 230 immunity, so state rights of publicity claims are barred by section 230(c).14 Hepp argued that the District Court for the Eastern District of Pennsylvania should instead follow other district courts in New Hampshire and New York in holding that section 230(e)(2) includes state intellectual property claims, such as a state right of publicity claim.15 Hepp subsequently appealed her case to the Third Circuit, which held that it would “adhere to the most natural reading of section 230(e)(2)’s text” so that “a state law can be a ‘law pertaining to intellectual property,’ too.”16 This created a circuit split between the Ninth and Third Circuits with regard to subsection (e)(2).

The argument to limit interpretation of the intellectual property

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9. 42 PA. CONS. STAT. § 8316(a) (2022).
14. Hepp, 465 F. Supp. 3d. at 501; see Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1118–19 (9th Cir. 2007).
exemption in section 230(e)(2) to federal law is most strongly supported by the broader congressional intent to create a broad liability shield for interactive computer service users and providers in enacting section 230. Federal laws are well-established with clear scopes of application, but state laws protecting intellectual property are far from uniform, so state laws are much less predictable and could lead to significantly different outcomes between jurisdictions. State laws may cover different causes of action rooted in different legal theories, have varying purposes and policy goals, and provide for different remedies, all assuming that a state legislature has decided to enact a law at all. Consequently, if varying state laws are exempt from section 230 immunity, the integrity of section 230 would be severely compromised. Policy-wise, the Ninth Circuit’s interpretation to exclude state intellectual property laws could very likely prevent individuals harmed by infringing content from having any redress as third-party users who typically post such content are generally very difficult to identify. On the other hand, we must also defer to Congress’s express statutory language and assume that the literal language of the statute accurately reflects Congress’s intent. Therefore, because subsection (e)(2) states that “any law pertaining to intellectual property” is not included within section 230 immunity, and Congress explicitly named federal and state law multiple times within subsection (e), we must conclude that Congress did not actually intend to limit the intellectual property exemption, which should apply its most literal meaning.

There is also a potential argument that the right of publicity is not even an intellectual property right at all, in which case the exception to immunity for claims related to intellectual property laws would not even apply. Furthermore, there has been intense controversy over section 230 coming from both sides of the political aisle, so the statute may be amended or even repealed entirely in the relatively near future. Also, the entire landscape of the internet and the public’s relationship with the internet have been shaped by section 230, so changes to the law or differing applications of the law could compromise our understanding of the right and the internet. However, the current proposed changes to section 230 do not directly address the issue over how subsection (e)(2) should be interpreted with regard to state intellectual property laws, so the circuit split described in this Note will likely still be relevant.

18. Meghan Anand, Kiran Jeevanjee, Daniel Johnson, Quinta Jurecic, Brian Lim, Irene Ly, Matt Perault, Etta Reed, Jenna Ruddock, Tim Schmeling, Niharika Vattikonda, Brady Worthington, Noelle Wilson & Joyce Zhou, All the Ways Congress Wants to Change Section 230, SLATE (Mar. 23, 2021,)
In the absence of federal protection, whether claims regarding the right of publicity are actionable is increasingly important with the growth and expansion of the internet, particularly social media. The rise of “influencers,” individuals who essentially monetize and make a career out of their personas and relationships with branded or commercial content, and the rise of “deep fakes,” which utilize technology to synthesize fake pictures or videos that convincingly appear to depict specific individuals or celebrities, are deeply linked to the interest in one’s self, which is protected by the right of publicity. Though lawsuits over right of publicity have historically been brought almost exclusively by celebrities, the age of social media has created many more opportunities for members of the general public to have a commercial interest in their name, image, likeness, or persona. Social media has proven to be extremely lucrative, and content can generate significant value from a business standpoint. Companies and internet platforms will presumably adapt their own policies regarding allegedly infringing content depending on the prevailing interpretation of section 230(e)(2) in order to avoid as much liability as possible, which would create consequences for the millions of users that access those sites and platforms every day.

Part I of this Note will provide background and context to the right of publicity and how it developed in common law to provide a remedy for individuals, typically celebrities, whose likenesses have been misappropriated without their consent. I will analyze the right of publicity as codified in individual state statutes with an emphasis on how these often significantly different statutes create unpredictability in enforcement and litigation. I will also distinguish the right of publicity from causes of action regarding copyright and compare the Digital Millennium Copyright Act (“DMCA”) to section 230 of the CDA. Part II will provide an overview of section 230 and discuss legislative history and intent. Within Part II, I will also examine both sides of the circuit split from the Ninth and Third Circuits’ contrary interpretations of CDA section 230(e)(2) and each side’s underlying tradeoffs involving the lack of uniformity in state intellectual property laws and the potential effects of precluding claims from such laws as compared to potentially refraining from expanding beyond the congressional purpose of CDA section 230. Finally, I will address the arguments over whether section 230 should still exist in its current form and proposed reforms.

I. THE RIGHT OF PUBLICITY

Hepp sued Facebook, Reddit, and Imgur for allegedly violating her right of publicity as granted by Pennsylvania state statute and common law. The right of publicity is defined as “the inherent right of every human being to control the commercial use of his or her identity.” The right of publicity is generally regarded as an intellectual property right, though interactive service providers such as the defendants in Hepp have argued to the contrary. The right of publicity allows all individuals, celebrity or not, to recover for unpermitted uses of their likeness or persona for commercial gain. The right is valuable in that it provides individuals the opportunity to protect the commercial use of their identities as many people, especially celebrities, generate significant income by authorizing others to use their identities in exchange for payment.

A. ORIGINS AND DEVELOPMENT

The right of publicity originally developed as the other side of the coin of the laws and theories surrounding the right of privacy. Samuel D. Warren and Louis Brandeis first recognized the right of privacy as a right potentially rooted in common law in a law review article in 1890. The right of privacy was designed to protect people from uninvited public attention and create a cause of action for people who suffered emotional harm from unwanted publicity. However, because the right to privacy is generally a right “to be let alone,” there was difficulty in enforcing and applying this right to cases involving individuals who were already in the public spotlight. Some courts held that individuals who sought out publicity through their career choices must waive any right of privacy, while others concluded that while celebrities may be the subject of news stories, they maintain a right of privacy that allows them a shield from unwanted, non-newsworthy publicity. Therefore, the term “right of publicity” was first coined by Judge

20. Id. §§ 1:3, 4:16.
25. Id. at 389.
26. Compare O’Brien v. Pabst Sales Co., 124 F.2d 167, 170 (5th Cir. 1941) (holding that a football player who sought out publicity had no right of privacy to allow him to recover for an unauthorized publication of his name and likeness in a brewing company’s football calendar), and Martin v. F.I.Y. Theatre Co., 10 Ohio Op. 338, 338–39 (Cuyahoga Cnty. Ct. C.P. 1938) (holding that an individual’s choice to pursue acting as a career and her pursuit for publicity deprived her of a right of privacy), with Birmingham Broadcasting Co. v. Bell, 68 So. 2d 314, 319 (Ala. 1953) (holding that a picture may be
Jerome Frank in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* in order to address “the economic potential of a celebrity’s identity.”

In *Haelan*, a chewing-gum manufacturer made a contract with a baseball player for the exclusive right to use the player’s photograph in connection with sales of its gum. However, a rival chewing gum manufacturer knew of the contract and deliberately induced the player to authorize the rival manufacturer to use the player’s photograph in connection with the sales of the rival’s gum. The Second Circuit held that an individual has a right in the publicity value of their photograph—that is, the right to grant the exclusive privilege of publishing their picture—and that this right, which is particularly relevant for prominent figures in the public eye, “might be called a ‘right of publicity.’” *Haelan* distinguished itself from prior case law due to the opinion’s emphasis on the economic interest at stake as the plaintiffs, rather than not wanting their photographs to be withheld from public viewing entirely, simply did not want their photographs to be sold for profit by third parties. The right of publicity is significantly distinct from the right of privacy because the right of privacy is not assignable, and as such, the two rights are independent from each other.

Though the right of publicity has clear roots in privacy rights, Professor Melville Nimmer associated the right of publicity with unfair competition and property law. Nimmer stated an individual is entitled to “the fruit of his labors unless there are important countervailing public policy considerations . . . [and] persons who have long and laboriously nurtured the fruit of publicity values may be deprived of them, unless judicial recognition is given to what is here referred to as the right of publicity.” Thus, Nimmer linked the right of publicity to the commercial aspects of a public figure’s “personality.” In contrast, in 1960, William Prosser advocated for the

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29. *Id.*
30. *Id.* at 868.
31. *Id.*
32. *Id.* at 867.
33. Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 203–04 (1954) ("[The right of privacy] is not adequate to meet the demands of the second half of the twentieth Century . . . Public personality has found that the use of his name, photograph, and likeness has taken on a pecuniary value undreamt of at the turn of the century.").
34. *Id.* at 215–16.
35. *Id.*
recognition of the tort of privacy appropriation and suggested that an individual could have the right to control the use of their identity from the appropriation of others. Unlike Nimmer’s analysis of the right of publicity, the tort of misappropriation is not a property right. This analysis lends support to the minority view that the right of publicity should not be considered an intellectual property right.

B. FEDERAL INFLUENCES

In 1977, the U.S. Supreme Court recognized the right of publicity in *Zacchini v. Scripps-Howard Broadcasting Co.*, the first and only Supreme Court case to address the right of publicity. In *Zacchini*, an entertainer performed a fifteen-second human cannonball act and sued a local television station after the station taped and broadcast the entire act on the news without the entertainer’s permission. The Court considered whether the station was immunized from damages by the First and Fourteenth Amendments of the Constitution and ultimately held that Ohio could grant a state law remedy against the station or give immunity to the press but was not required to do so either by the First and Fourteenth Amendments. The rationale behind protecting the right of publicity, according to the Court, was simple: to prevent unjust enrichment by the theft of good will as broadcasting an entertainer’s entire act “poses a substantial threat to the economic value of that performance.” The Court clearly emphasized the proprietary interest of the individual and compared the purpose of the right of publicity to the economic philosophy behind granting patent and copyright ownership, which is to encourage individuals to produce inventions and creative works in order to foster innovation and benefit the public.

*Zacchini*, as the only Supreme Court case on the subject, provided some federal influence on the right of publicity, and another source of federal influence is section 43(a)(1) of the Lanham Act, the federal unfair competition act. Rights of publicity cases also regularly implicate the Lanham Act because unauthorized appropriations of celebrities’ identities often involve issues of confusion over sponsorship. Congress amended the Lanham Act in 1988 to codify judicial decisions that had interpreted the Act

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38. *Id.* at 563–64.
39. *See id.*
40. *Id.* at 575.
to allow for false endorsement claims, and the amendment provides celebrities with a clearer statutory foundation for alleging the applicability of the Lanham Act in right of publicity actions. The Lanham Act is also important as a federal law because the CDA has a preemption clause that preserves federal claims of false endorsement, so hypothetical plaintiffs could potentially still have an avenue for redress under this federal law even if causes of action under the state right of publicity are barred. Thus, in order to attempt to avoid being barred, some types of cases are now more likely to also be rooted in the Lanham Act for the nationwide coverage, clear remedy, and wide scope of damages.

C. INCONGRUENCE AMONG STATES

Currently, twenty-five states have passed statutory protections for the right of publicity, and many other states have held that their respective common law would protect the right. Of the courts that have directly addressed the issue, some states have recognized a distinct right of publicity and distinguished it from a right from misappropriation while others treat the right of publicity as synonymous with the tort of appropriation as expressed in the Restatement (Second) of Torts. As previously stated, Prosser wrote


Any person who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.


44. Stack, supra note 27, at 1197; see also infra, Section II.B (discussing White v. Samsung Elecs. Am. Inc., 971 F.2d 1395, 1399–1401 (9th Cir. 1992) and the difference between confusion-based and association-based relationships).

45. Jennifer E. Rothman, Rothman’s Roadmap to the Right of Publicity, Right of Publicity State-by-State, UNIV. OF PA. L. SCH., https://rightofpublicityroadmap.com/ [https://perma.cc/4NZS-UJZF]; see ALA. CODE §§ 6-5-771, 6-5-772 (2022); ARIZ. REV. STAT. §§ 12-761, 13-3726 (2022); ARK. CODE ANN. §§ 4-75-1101 to 4-75-1113 (2022); CAL. CIV. CODE § 3344 (West 2022); FLA. STAT. ANN. § 540.08 (2022); HAW. REV. STAT. ANN. §§ 482P-1 to 482P-8 (2022); 765 ILL. COMP. STAT. ANN. §§ 1075/1–1075/60 (2022); IND. CODE ANN. §§ 32-36-1-1 to 32-36-1-20 (2022); KY. REV. STAT. ANN. § 391.170 (West 2022); LA. REV. STAT. ANN. § 14:102.21 (2022); MASS. ANN. LAWS ch. 214, § 3A (2022); NEB. REV. STAT. ANN. §§ 20-201 to 20-211 (2022); NEV. REV. STAT. ANN. §§ 597.770–597.810 (2022); N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2022); OHIO REV. CODE §§ 2741.01–2741.99 (West 2022); OKLA. STAT. tit. 12 §§ 1448–1449 (2022); 42 PA. CONS. STAT. § 8316 (2022); 9 R.I. GEN. LAWS § 9-1-28 (2022); S.D. CODIFIED LAWS §§ 21-64-1 to 21-64-12 (2022); TENN. CODE ANN. §§ 47-25-1101 to 47-25-1108 (2022); TEX. PROP. CODE ANN. §§ 26.001–26.015 (West 2021); UTAH CODE ANN. §§ 45-3-1 to 45-3-6, 76-9-407 (LexisNexis 2022); VA. CODE ANN. §§ 8.01-40, 18.2-216.1 (2022); WASH. REV. CODE ANN. §§ 62.60.010–62.60.080 (2022); WIS. STAT. § 995.50 (2022).

about the right to privacy in 1960 and argued it is composed of four subparts, one of which being the right to protection against misappropriation of one’s likeness.\(^{47}\) Later, the American Law Institute adopted these four subcategories in the Restatement (Second) of Torts.\(^{48}\) The tort of misappropriation protects the “interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others.”\(^{49}\) Though this right is in the nature of a property right, misappropriation is rooted in the common form of invasion of privacy.\(^{50}\)

The scope of the right of publicity varies from state to state, so the extent that a right of publicity might be protected greatly depends on the state in which a person is attempting to assert that right, as well as the state in which that person is domiciled. For example, individuals in most states, such as California,\(^{51}\) can assert their right of publicity during their lifetimes, while individuals in Texas cannot, as their statutory right is protected only postmortem.\(^{52}\) Further, there is a wide range of duration periods within state statutes that provide for the right of publicity to survive after an individual’s death.\(^{53}\) Moreover, some state statutes only protect the right of publicity for certain types of people, such as soldiers\(^{54}\) or “public figures.”\(^{55}\) Perhaps most notably, what exactly is protected under the right of publicity varies greatly among states. For example, in Virginia, the statutory right of publicity is limited to a person’s name, portrait, or picture;\(^{56}\) whereas in New York, the right protects a person’s “name, portrait, picture or voice”\(^{57}\) but does not extend to that person’s likeness. In contrast, the California statute is much broader and protects against unauthorized use of an individual’s “name, voice, signature, photograph, or likeness, in any manner.”\(^{58}\) Even further, Indiana’s statute grants a property interest in an individual’s name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or

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38 (2d Cir. 2020), and Restatement (Second) of Torts § 652C (Am. L. Inst. 1977).
47. Prosser, supra note 24, at 389.
49. Restatement (Second) of Torts § 652C cmt. a (Am. L. Inst. 1977).
50. Id. § 652C cmts. a–b.
51. See, e.g., CAL. CIV. CODE § 3344 (West 2022).
53. See ARK. CODE ANN. § 4-75-1107 (2022) (50 years); FLA. STAT. § 540.08 (2022) (40 years); IND. CODE § 32-36-1-8 (2022) (100 years); 42 PA. CONS. STAT. § 8316 (2022) (30 years); S.D. CODIFIED LAWS § 21-64-2 (2022) (70 years); TENN. CODE ANN. § 47-25-1104 (2022) (10 years); VA. CODE ANN. § 8.01-40 (2022) (20 years).
55. KY. REV. STAT. § 391.170 (West 2022).
57. N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2022).
58. CAL. CIV. CODE § 3344 (West 2022).
mannerisms.\textsuperscript{59}

Significantly, there is currently no federal statute to protect the right of publicity or otherwise provide a uniform approach to the right. Due to the reach of social media and other technological advancements, and the fact that those most likely to assert their right of publicity are celebrities and public figures whose identities could be recognized across the entire country, litigation is unpredictable.\textsuperscript{60} Generally speaking, a right of publicity claim involves (1) the use of an individual’s “persona,” (2) for commercial purposes, and (3) without the individual’s consent.\textsuperscript{61} For the purposes of this Note and to determine whether a state’s right of publicity statute might fit into the carve-out of CDA section 230 immunity, I will largely limit the discussion to statutory protections and judicial applications of such protections.

D. APPLICATION

Each state’s statutory differences in turn lead to very different judicial outcomes in application that do not necessarily strictly adhere to the statutory language. In \textit{Midler v. Ford Motor Co.}, for example, actress and singer Bette Midler sued for an alleged violation of her right of publicity when Ford and its advertising agency used a sound-alike of Midler, but neither her name nor her picture, in a television commercial.\textsuperscript{62} Though the advertising agency had properly licensed Midler’s song from the copyright holder, the sound-alike was directed to “sound as much as possible like the Bette Midler record” after Midler herself refused the gig.\textsuperscript{63} Thus, the only issue in the case was whether Midler’s voice was protected.\textsuperscript{64} The lower court granted summary judgment in favor of the agency due to the fact that although California’s statute would have protected Midler’s voice if it were used without her consent, the audio in the commercial was not actually Midler’s voice.\textsuperscript{65} Ultimately, the Ninth Circuit reversed and held that “to impersonate her voice is to pirate her identity,” so the defendants committed a tort of misappropriation by intentionally seeking an attribute of Midler’s identity, valued at what the market would have paid for Midler to have actually sung

\textsuperscript{59} IND. CODE § 2-36-1-6 (2022).
\textsuperscript{61} Marlin, \textit{supra} note 7, at 426.
\textsuperscript{62} Midler \textit{v. Ford Motor Co.}, 849 F.2d 460, 461–62 (9th Cir. 1988).
\textsuperscript{63} \textit{Id.} at 461.
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{Id.} at 462–63.
the commercial.\textsuperscript{66} However, there was no statutory violation of Midler’s right of publicity as the term “likeness” refers to a visual image rather than a vocal imitation.\textsuperscript{67}

Similarly, in \textit{White v. Samsung Electronics}, plaintiff Vanna White, the co-host of \textit{Wheel of Fortune}—“one of the most popular game shows in television history” to which an estimated forty million people tune in daily—sued after Samsung ran an advertisement without consent from or payment to White.\textsuperscript{68} Samsung referred to the advertisement as the “Vanna White” advertisement, which depicted a robot outfitted to specifically resemble White in her famed stance next to the “instantly recognizable” \textit{Wheel of Fortune} game show set.\textsuperscript{69} White argued that the advertisement used her “likeness” in violation of section 3344 of the California Civil Code, but because the advertisement featured a robot with mechanical features and not White’s “precise features,” the Ninth Circuit held that the robot did not constitute White’s “likeness” within the statutory meaning and affirmed the dismissal of White’s claim.\textsuperscript{70} However, the common law right of publicity has a broader umbrella of protection as it “does not require that appropriations of identity be accomplished through particular means to be actionable,” and in this case, the aspects of the advertisement leave “little doubt about the celebrity the ad is meant to depict,” so the district court erred in rejecting White’s common law right of publicity claim on summary judgment.\textsuperscript{71}

Furthermore, White also brought a claim under the Lanham Act, for which she was required to show that the defendants created a likelihood of confusion as to whether White was endorsing the products in the advertisement.\textsuperscript{72} The Ninth Circuit applied an eight-factor test from the trademark case \textit{AMF Inc. v. Sleekcraft Boats}.\textsuperscript{73} The eight factors are as follows: “(1) strength of the plaintiff’s mark; (2) relatedness of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) likely degree of purchaser care; (7) defendant’s intent in selecting the mark; [and] (8) likelihood of expansion of the product lines.”\textsuperscript{74} Based on the evidence White provided, the first, second, fifth, sixth, and

\textsuperscript{66} \textit{Id.} at 463.
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{White v. Samsung Elecs. Am., Inc.}, 971 F.2d 1395, 1396 (9th Cir. 1992).
\textsuperscript{69} \textit{Id.}
\textsuperscript{70} \textit{Id.} at 1397.
\textsuperscript{71} \textit{Id.} at 1398–99.
\textsuperscript{72} \textit{Id.} at 1399–1400.
\textsuperscript{73} \textit{Id.} at 1400.
\textsuperscript{74} \textit{Id.}
seventh factors supported finding that there was a likelihood of confusion.\textsuperscript{75} The Ninth Circuit found that a jury could reasonably conclude that there was an underlying intent to persuade consumers that White was endorsing the products, so White properly raised a genuine issue of material fact and the lower court erred in rejecting her claim at the summary judgment stage.\textsuperscript{76} Thus, even if state right of publicity claims are barred by section 230, a potential plaintiff may be able to assert a similar but distinct claim.

E. \textsc{Distinguishing the Right of Publicity from Causes of Action for Copyright Infringement}

Copyright law and the right of publicity, though seemingly similar, are very different rights that are rooted in different textual and theoretical foundations, especially regarding copyright law’s constitutional basis.\textsuperscript{77} The federal Copyright Act grants authors of original works the exclusive rights to reproduce, distribute, display, and perform their work.\textsuperscript{78} Copyright law also gives rights to the public, such as the right to use ideas and the right to resell lawfully purchased works.\textsuperscript{79} In contrast, as previously stated in this section, the right of publicity is protected by state statutes and common law and allows an individual to recover for unauthorized use of a person’s name or likeness for a commercial purpose. The right of publicity is most often asserted by celebrities, but most state statutes grant all individuals this right. There is also “a critical distinction between a commercial transaction for a photograph, itself, and a commercial transaction where a photograph is used to promote or sell another product or service.”\textsuperscript{80}

Jennifer Rothman, a leading scholar on the right of publicity, has argued that though copyright and the right of publicity both strive to protect creative artists and to incentivize them to create works, the two rights seriously conflict.\textsuperscript{81} Rothman argued that the right of publicity “conflicts not only with explicit provisions of the Copyright Act, but also with the implicit grant of affirmative rights to copyright holders and the public,” particularly because the right of publicity has grown to cover “persona,” so the scope of the right has expanded beyond just an individual’s name or likeness.\textsuperscript{82} One’s

\begin{itemize}
\item \textsuperscript{75} \textit{Id.} at 1400–01.
\item \textsuperscript{76} \textit{Id.} at 1401.
\item \textsuperscript{77} Adkins, supra note 60, at 539–40.
\item \textsuperscript{78} See 17 U.S.C. §§ 102, 106.
\item \textsuperscript{79} See 17 U.S.C. §§ 102(b), 109(a)–(c).
\item \textsuperscript{80} Scott J. Sholder, \textit{Copyright Trumps Right of Publicity—Permitting Display and Download of Basketball Photographs (Maloney v. T3Media, Inc.),} COWAN, DEBAETS, ABRAHAMS & SHEPPARD LLP (April 8, 2015), https://cdas.com/right-of-publicity/ [https://perma.cc/5EX6-CHW3].
\item \textsuperscript{81} Jennifer E. Rothman, \textit{Copyright Preemption and the Right of Publicity,} 36 U.C. DAVIS L. REV. 199, 204 (2002).
\item \textsuperscript{82} \textit{Id.} at 204–205.
\end{itemize}
“persona” could be implicated in a use where a viewing audience is simply reminded of the person even when neither the person’s name nor likeness is used.  

Section 301 of the Copyright Act sets out a test to determine whether copyright law preempts a state law claim, such as a right of publicity claim: the content of the protected right must fall within the subject matter of copyright as specified by sections 102 and 103 of the Copyright Act, and the right asserted under state law must be “equivalent to any of the exclusive rights within the general scope of copyright” as specified by section 106 of the Copyright Act. Therefore, while causes of action under a state’s right of publicity can be brought concurrently with a cause of action for copyright infringement, copyright law does not necessarily preempt right of publicity claims. Though an argument that the state-based right of publicity is preempted by federal copyright law exists, most judicial decisions have rejected it. The Sixth and Ninth Circuits, as well as some district courts, have concluded that section 301, the Copyright Act’s explicit preemption clause, never preempts the right of publicity because the right of publicity is generally not equivalent to the rights protected by the Copyright Act. While there is no categorical preemption of right of publicity claims, there have been individual cases in which the right was preempted; for example, in Fleet v. CBS, Inc., an actor in a movie attempted to use his right of publicity to thwart a copyright owner from exploiting its property. In Fleet, because the individuals only sought to block CBS from reproducing and distributing their performances in a film, their claims were preempted by federal copyright law since the film came within the subject matter of copyright protection and their claim was equivalent to an exclusive right within the general scope of copyright.

Many rights of publicity cases also involve causes of action for copyright infringement under the DMCA, which is analogous to the CDA

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83. Id. at 205.
84. 17 U.S.C. § 301(a).
85. McCarthy, supra note 19, § 11:50 (noting the majority rule is that federal copyright law does not preempt state-based right of publicity); see also Rothman, supra note 81, at 225–26 (noting that few courts have found right of publicity preempted by copyright law).
86. Rothman, supra note 81, at 225–29; see, e.g., Downing v. Abercrombie & Fitch, 265 F.3d 994, 1003–05 (9th Cir. 2001); Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619, 623–24 (6th Cir. 2000); Wendt v. Host Int’l, 125 F.3d 806, 809 (9th Cir. 1997); Bi-Rite Enters., Inc. v. Button Master, 555 F. Supp. 1188, 1201 (S.D.N.Y. 1983); see also 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 1.13[B] (2021) (stating that courts should primarily focus on a 301 analysis of preemption).
88. Fleet, 58 Cal. Rptr. 2d at 646, 650–51.
in that the DMCA immunizes providers from some lawsuits involving third-party content. In passing the DMCA, Congress “sought to provide a safe harbor against copyright liability for the normal operations of online service providers.”\(^90\) The DMCA established certain safe harbors to “provide protection from liability for: (1) transitory digital network communications; (2) system caching; (3) information residing on systems or networks at the direction of users; and (4) information location tools.”\(^91\) The DMCA provides “safe havens” to covered providers who remove content after being notified that the content may violate federal copyright law.\(^92\) To be protected from lawsuits premised on hosting potentially infringing content, the DMCA requires the person notifying a service provider of copyright infringement to submit a statement “under penalty of perjury identifying the allegedly infringing material and providing a good-faith assertion that the use of the material is unlawful.”\(^93\) Then, the provider hosting the allegedly infringing content must decide whether to accept the notice and remove the material or ignore the notice and risk liability.\(^94\) The DMCA both incentivizes the provider to take down the material by granting immunity to providers that do so, which creates a risk that providers will take down lawful material in order to avoid liability, as well as provides a process for the user who posted the allegedly infringing content to challenge the initial notice, in which case the provider may be able to replace the initial post and retain immunity if there is sufficient “counter notification.”\(^95\)

The most significant difference between the CDA and the DMCA is the DMCA’s requirement that the provider lack knowledge of the infringing material to be protected. Section 230 of the CDA immunizes providers for hosting both lawful and unlawful third-party content regardless of whether...

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\(^90\) Ryan Gerdes, Scaling Back Section 230 Immunity: Why the Communications Decency Act Should Take a Page from the Digital Millennium Copyright Act’s Service Provider Immunity Playbook, 60 Drake L. Rev. 653, 668 (2012).

\(^91\) Ellison v. Robertson, 357 F.3d 1072, 1076–77 (9th Cir. 2004) (citing 17 U.S.C. § 512(a)–(d)).


\(^94\) Brannon & Holmes, supra note 93, at 32–33.

\(^95\) Id. at 33; 17 U.S.C. § 512(g)(1)–(4); see also, e.g., Wendy Seltzer, Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment, 24 Harv. J. L. & Tech. 171, 175 (2010) (discussing the incentive structure and arguing that the DMCA results in removal of constitutionally protected speech).
the provider has notice of allegedly unlawful user-generated content. For example, Perfect 10, Inc. v. CCBill LLC, in which the owner of a subscription website for adult entertainment alleged interactive service providers violated copyright and right of publicity laws among others by providing services to websites that posted stolen images, involved both the safe harbors from DMCA and the question of whether a claim under the right of publicity was barred by section 230 of the CDA. Because the DMCA sets a significantly higher threshold for providers to qualify for immunity, the Ninth Circuit first analyzed whether the providers met the threshold conditions set out in section 512(i) and then determined whether the providers could qualify for any of the safe harbors established in subsections (a) through (d). Ultimately, the provider was not eligible for immunity because it was not enforcing its DMCA policy. The district court stated that “the DMCA’s protection of an innocent service provider disappears at the moment the service provider loses its innocence, i.e., at the moment it becomes aware that a third party is using its system to infringe.”

In contrast to the complex and thorough examination of the requirements set forth by the DMCA to be shielded from liability, the question of whether the right of publicity claim was barred by section 230 of the CDA was quickly and succinctly handled on its face as the Ninth Circuit held the claim did not fit within the intellectual property carve-out. Perfect 10 clearly illustrates some of the significant differences in the liability shields granted through the DMCA and the CDA. Though the statutes are entirely distinct from one another, scholars have advocated for CDA reform, in part because as it is, section 230 allows interactive service providers to avoid liability even if they are aware of and profit from illegal content, so long as the provider itself is not the author of the material.

96. Brannon & Holmes, supra note 93, at 33 (citing Barrett v. Rosenthal, 146 P.3d 510, 520 (Cal. 2006) (comparing the DMCA’s “limited liability” scheme to section 230 and concluding “that Congress did not intend to permit notice liability under the CDA”). Nonetheless, section 230 immunity contains exceptions allowing liability for hosting certain types of unlawful content, including if a site violates federal criminal law.

97. Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1108 (9th Cir. 2007).
98. Id. at 1109–18.
99. Id. at 1120–21.
101. Perfect 10, 488 F.3d at 1118–19; see infra Section II.B.
II. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

A. LEGISLATIVE HISTORY AND INTENT

Before Congress enacted section 230 of the Communications Decency Act, it enacted a subsection of the Telecommunications Act of 1996 in order to protect internet platforms from liability for third-party content. Common law had created a much different legal standard. In Stratton Oakmont v. Prodigy Services, a defamation case involving the “Wolf of Wall Street,” Jordan Belfort, in which an anonymous user wrote on Prodigy’s online message board that Belfort’s brokerage had engaged in criminal and fraudulent acts, the New York Supreme Court held that the message board was a “publisher” and moderating some posts and establishing guidelines for impermissible content meant that the message board was liable. Thus, an internet platform would bear no liability for illegal context created by its users, but this protection did not extend to a platform that moderated user-created content. This created a policy-poor incentive in that platforms could adopt an “anything goes” model for user-created content to avoid open-ended liability. In response, then-Representatives Ron Wyden, a Democrat from Oregon, and Christopher Cox, a Republican from California, were concerned that this precedent would disincentivize websites to block obscene content.

Representatives Wyden and Cox were also concerned about another extreme: then-Senator James Exon (Democrat from Nebraska) proposed a bill in the summer of 1996 to ban “anything unsuitable for minors from the internet.” Senator Exon’s bill, which passed in the Senate with eighty-four votes in favor and sixteen votes opposed, cast an extremely wide net as “anyone who posted any ‘indecent’ communication, including any ‘comment, request, suggestion, proposal [or] image’ that was viewable by ‘any person under 18 years of age,’ would become criminally liable, facing

107. Id.
108. Wakabayashi, supra note 105.
109. Cox, supra note 106.
both jail and fines.”110 Moreover, the bill went so far as to criminalize the mere transmission of such content.111 Representatives Wyden and Cox responded and proposed their own bill that was intended to protect speech and privacy on the internet from government regulation and “incentivize blocking and filtering technologies that individuals could use to become their own censors in their own households.”112 Representative Wyden emphasized that “parents and families are better suited to guard the portals of cyberspace and protect our children than our Government bureaucrats,” and argued against federal censorship of the internet.113 This way, content creators would be liable for compliance with all civil and criminal laws relating to their content, but this responsibility would not shift to internet platforms, “for whom the burden of screening billions of digital messages, documents, images, and sounds would be unreasonable—not to mention a potential invasion of privacy.” Instead, platforms are permitted to review and moderate some content in the course of enforcing rules against obscene content while still maintaining a broad liability shield.114 This measure received 420 yea and four nays in the House of Representatives, and Congress ultimately passed its version of the Telecommunications Act—with both the contradicting Cox-Wyden amendment and Exon amendment.115 However, within a year of the statute’s enactment, the Exon amendment was struck down by the Supreme Court, which unanimously held that the Exon amendment created an unacceptable burden on adult speech because “[i]n order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.”116 Ironically, because Exon’s legislation and Cox-Wyden’s legislation were merged into the same legislative title, after Exon was declared unconstitutional, the Cox-Wyden amendment became section 230 of the Communications Decency Act, the exact name of the legislation that it was designed to rebuke.117 When section 230 was enacted in 1996, less than half of Senators and only a quarter of House Representatives even had email addresses.118 Though people likely generally understood the burgeoning significance of the internet, it was probably hard to foresee exactly how important user-generated content would become to everyday lives and

110. Id.
111. Id.
112. Id.
114. Cox, supra note 106.
115. Id.
117. Cox, supra note 106.
118. Id.
activities or even the sheer volume of internet traffic.\textsuperscript{119}

Overall, section 230 serves three core purposes. First, it “maintain[s] the robust nature of internet communication and, accordingly . . . keep[s] government interference in the medium to a minimum.”\textsuperscript{120} Second, the immunity provided by section 230 “protects against the ‘heckler’s veto’ that would chill free speech,” as without section 230, individuals could threaten litigation against interactive computer service providers, which would be forced to choose to either remove the content or face litigation costs and potential liability.\textsuperscript{121} Third, section 230 encourages interactive computer service providers to self-regulate “offensive” material as a response to the holding in \textit{Stratton Oakmont}, in which the provider of an electronic message-board service was “potentially liable for its user’s defamatory message because it had engaged in voluntary self-policing of the third-party content.”\textsuperscript{122} However, the broad immunity shield granted to providers has arguably led to disincentivize providers from self-regulating.\textsuperscript{123}

Judicial interpretation of section 230 is crucial to determine whether platforms such as Facebook, Reddit, Imgur, and others could be liable for the infringing actions of third-party users. Section 230 unambiguously provides immunity to providers and users of interactive computer services from liability for subject matter generated by third parties as (c)(1) states, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”\textsuperscript{124} Though “immunity” or a synonym is not explicitly included in section 230(c)(1), reviewing courts have recognized the provision to protect interactive service providers for the display of content created by someone else.\textsuperscript{125} The main purpose of section 230 is to bar...

\textsuperscript{119} Id. As of 2020, more than 85% of American businesses with websites rely on user-generated content, making section 230 essential to ordinary commerce. Id. User-generated content has saved lives by allowing people to locate loved ones during deadly tornados, user-generated content is vital to law enforcement and social services, and during the COVID-19 crisis, online access to user-created educational resources was crucial to countless families. Id.

\textsuperscript{120} Jones v. Dirty World Ent. Recordings LLC, 755 F.3d 398, 407 (6th Cir. 2014) (quoting Zeran v. AOL, 129 F.3d 327, 330 (4th Cir. 1997)).

\textsuperscript{121} Id. at 407–08.

\textsuperscript{122} Id. at 408.

\textsuperscript{123} See Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003) (discussing the inconsistency between section 230’s caption and its judicial interpretation); see also Andrew J. Crossett, \textit{Unfair Housing on the Internet: The Effect of the Communications Decency Act on the Fair Housing Act}, 73 Mo. L. REV. 195, 202 (2008) (“The title makes little sense when the effect of the section is ‘to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services.’” (quoting \textit{GTE}, 347 F.3d at 660)).

\textsuperscript{124} 47 U.S.C. § 230(c)(1).

\textsuperscript{125} Seaton v. TripAdvisor LLC, 728 F.3d 592, 599 n.8 (6th Cir. 2013) (recognizing that section 230(c)(1) provides immunity); see also Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321 (11th Cir. 2006) (“The majority of federal circuits have interpreted the CDA to establish broad federal immunity to
“lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content.”\textsuperscript{126} In \textit{Zeran v. AOL}, which was decided shortly after the CDA was enacted, the Fourth Circuit heard a defamation claim against America Online (“AOL”) alleging “that AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter,” but held that the CDA squarely barred the claim.\textsuperscript{127}

Section 230 defines an “interactive computer service” as “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.”\textsuperscript{128} This broad definition covers many entities operating online, including broadband internet access providers (such as Verizon FIOS and Comcast Xfinity), internet hosting companies (such as DreamHost and GoDaddy), search engines (such as Google and Yahoo!), online messaging boards, and many varieties of online platforms.\textsuperscript{129} An “information content provider” is “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.”\textsuperscript{130} Thus, section 230 distinguishes those who create content from those who provide access to that content, providing a broad liability shield to the latter group.\textsuperscript{131}

It is undisputed that section 230(c)(1) of the CDA is limited by section 230(e)(2), which requires courts to “construe Section 230(c)(1) in a manner that would neither ‘limit or expand any law pertaining to intellectual property.’”\textsuperscript{132} However, there are conflicting interpretations of section 230(e)(2) of the CDA. This discrepancy is the focus in many rights of publicity cases and other cases rooted in state causes of action, such as \textit{Hepp v. Facebook}. In determining whether section 230(e)(2) applies, courts have

\begin{quote}
any cause of action that would make service providers liable for information originating with a third-party user of the service.” (citations and quotations omitted)).
\end{quote}

\begin{enumerate}
\item \textsuperscript{126} Zeran v. AOL, 129 F.3d 327, 330 (4th Cir. 1997).
\item \textsuperscript{127} Id. at 328; see id. at 330–35.
\item \textsuperscript{128} 47 U.S.C. § 230(f)(2).
\item \textsuperscript{130} 47 U.S.C. § 230(f)(3).
\item \textsuperscript{131} BRANNON & HOLMES, supra note 93, at 3.
\item \textsuperscript{132} Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1118 (9th Cir. 2007) (quoting Gucci Am., Inc. v. Hall & Assocs., 135 F. Supp. 2d 409, 413 (S.D.N.Y. 2001) and 47 U.S.C. § 230(e)(2)).
\end{enumerate}
sometimes looked not only to whether the plaintiff is suing under a law that generally involves intellectual property issues, but more specifically, whether the plaintiff’s claim actually involves an intellectual property right. It is significant to note that protection of intellectual property rights on internet platforms is limited by federal protections, such as the safe harbor provisions of section 512 of the DMCA. These safe harbors give providers a broad liability shield from indirect liability for copyright infringement by third-party users, which is relevant here as these safe harbors could potentially be interpreted to indicate congressional intent to protect platforms against liability for intellectual property infringement by third-parties. Because both statutes were enacted in the late 1990s, there has been debate over whether they should still exist in their current form, as the internet is nearly unrecognizable as compared to the late 1990s.

B. ARGUMENTS THAT SUBSECTION (E)(2) SHOULD BE INTERPRETED TO BE LIMITED TO FEDERAL INTELLECTUAL PROPERTY LAWS

In three relatively short paragraphs, the Ninth Circuit directly addressed in 2009 whether the intellectual property carve-out in section 230(e)(2) should open up interactive computer service providers to liability for claims under state right of publicity statutes in Perfect 10, Inc. v. CCBill LLC and ultimately held that it should not. The Ninth Circuit revisited the issue in 2019 in Enigma Software Group USA, LLC v. Malwarebytes, Inc., and affirmed its prior conclusion.

Section 230 states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,” and expressly preempts any state law to the contrary, so the majority of federal circuits have interpreted section 230 to establish “broad ‘federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.’” There is no express definition of


135. Perfect 10, 488 F.3d at 1118.

136. Enigma Software, Grp. USA, LLC v. Malwarebytes, Inc., 946 F.3d 1040, 1053 (9th Cir. 2019) (“We have observed before that because Congress did not define the term ‘intellectual property law,’ it should be construed narrowly to advance the CDA’s express policy of providing broad immunity.”).

137. 47 U.S.C. § 230(c)(1), (c)(3).

“intellectual property” in the CDA, and there are many types of laws that could arguably be characterized as intellectual property claims.\textsuperscript{139} The Ninth Circuit reasoned that while the scope of federal intellectual property laws is “relatively well-established,” state laws governing intellectual property claims significantly differ and do not provide analogous uniformity. Therefore, construing “any law pertaining to intellectual property” in subsection (e)(2) to literally mean any intellectual property law, including state laws, would open up interactive computer service providers to a massive amount of liability with extremely unpredictable litigation.\textsuperscript{140} To avoid this, the Ninth Circuit held that the term “intellectual property” should instead mean “federal intellectual property” in order to protect Congress’s “expressed goal of insulating the development of the Internet from the various state-law regimes.”\textsuperscript{141} Furthermore, regarding the right of publicity specifically, there is an argument that the publicity rights do not constitute intellectual property rights for the purposes of the liability carve-out, in which case subsection (e)(2) would be irrelevant and right of publicity suits would be barred by section 230(c)(1).

This concern is certainly valid with respect to right of publicity claims; as noted above, of the twenty-five states that have actually granted statutory protection to an individual’s right of publicity, there are vast discrepancies between state statutes, including the scope of the right, who may assert a claim, and the duration of the right.\textsuperscript{142} However, websites and their respective contents are accessible in all fifty states at any given time. Thus, if section 230 does not immunize interactive computer service providers from causes of action stemming from right of publicity statutes, each state with relevant legislation could potentially have a different outcome. For example, if potentially infringing content used only an individual’s voice for a commercial purpose without the individual’s consent, it would be actionable only in Alabama, California, Hawaii, Indiana, Illinois, Nevada, New York, Ohio, Oklahoma, South Dakota, Texas, and Washington, but likely not in Florida, Kentucky, Massachusetts, Nebraska, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, or Wisconsin.\textsuperscript{143} Even states that

\textsuperscript{139} Perfect 10, 448 F.3d at 1118.
\textsuperscript{140} Id.
\textsuperscript{141} Id.; see 47 U.S.C. § 230(a)-(b); see also Batzel v. Smith, 333 F.3d 1018, 1027 (9th Cir. 2003) (noting that “courts construing § 230 have recognized as critical in applying the statute the concern that lawsuits could threaten the freedom of speech in the new and burgeoning Internet medium” (citations omitted)).
\textsuperscript{142} See supra Part I.
would allow this claim to proceed have different required elements regarding who may bring the claim and the duration of the right, among others, and even if an individual were able to successfully assert their right and win their case, these statutes grant different remedies. Overall, allowing section 230(e)(2) to include the state right of publicity laws within the intellectual property exception could open up interactive computer service providers to a massive amount of unpredictable liability. Again, because the internet is accessible throughout the country, these providers would be required to comply with the most restrictive state’s standards to avoid liability.

Additionally, states also have different choices of law and jurisdictional reaches that could lead to forum-shopping. For instance, the broad choice of law and jurisdictional reach of the Indiana statute, collectively with the statute’s “expansive scope of protection and purported applicability to nondomiciliaries and deceased individuals, opens up Indiana courts for suits brought by many individuals who might not have a cause of action in their home states.” Though forum-shopping would likely not pose a significant risk if the relevant statute requires that an individual seeking to assert a claim be domiciled in that state as an individual can only be domiciled in one state, it is still a possibility, particularly if the statute does not limit who may assert a claim in the state or if the allegedly infringing content in question involves multiple individuals. For example, because the Indiana right of publicity statute specifies that it “applies to an act or event that occurs within Indiana, regardless of a personality’s domicile, residence, or citizenship,” an individual who may not meet the required elements of another state’s statute could be incentivized to assert their right in Indiana instead. This possibility could force entities that utilize others’ personality rights to comply with Indiana’s statute over others.

Alternatively, individuals who split their time between different states may raise a question of domicile. For example, in a series of cases involving who could control the commercial use of the iconic photograph of Marilyn Monroe standing over a subway grate with her white skirt blowing up around

§§ 32-36-1.02 to 32-36-1-20 (2022); NEV. REV. STAT. ANN. §§ 597.770–597.810 (2022); N.Y. CIV. RIGHTS LAW § 51 (McKinney 2022); OHIO REV. CODE §§ 2741.01–2741.99 (West 2022); OKLA. STAT. tit. 12 §§ 1448–1449 (2022); S.D. CODIFIED LAWS §§ 21-62-1 to 21-64-12 (2022); TEX. PROP. CODE ANN. §§ 26.001–26.015 (West 2021); WASH. REV. CODE ANN. § 63.60.080 et seq. (2022). But see FLA. STAT. ANN. § 540.08 (2022); KY. REV. STAT. ANN. § 391.170 (West 2022); MASS. ANNO. LAWS ch. 214, § 3A (2022); NEB. REV. STAT. ANN. §§ 20-201 to 20-211 (2022); 42 PA. CONS. STAT. § 8316 (2022); 9 R.I. GEN. LAWS § 9-1-28 (2022); TENN. CODE ANN. §§ 47-25-1101 to 47-25-1108 (2022); UTAH CODE ANN. §§ 45-3-1 to 45-3-6 (LexisNexis 2022); VA. CODE ANN. §§ 8.01-40, 18.2-216.1 (2022); WIS. STAT. § 995.50 (2022).

144. See supra note 143.
145. Adkins, supra note 60, at 524; see IND. CODE ANN. § 32-36-1-1.02 to 32-36-1-20 (2022).
146. IND. CODE ANN. § 32-36-1-1(a) (2022) (emphasis added).
her from the film *The Seven Year Itch*, because Monroe split her time, work, and property ownership between New York and California, the significant differences in the state law made the question of domicile critical.\textsuperscript{147} Eventually, the Monroe estate lost its rights in Monroe’s identity because the court determined that Monroe’s domicile resulted in the application of New York law.\textsuperscript{148}

In *Perfect 10*, the Ninth Circuit most likely implicitly categorized the right of publicity as intellectual property because it considered whether the California statute protecting the right of publicity should be included in the Section(e)(2) exception and concluded it should not.\textsuperscript{149} The Ninth Circuit stated that “[s]tates have any number of laws that could be characterized as intellectual property laws: trademark, unfair competition, dilution, right of publicity and trade defamation.”\textsuperscript{150} Due to the nature of the inconsistency of state laws, “no litigant will know if he is entitled to immunity for a state claim until a court decides the legal issue.”\textsuperscript{151}

The California right of publicity statute is distinct from the right of privacy and stresses the economic value of an individual’s persona as property,\textsuperscript{152} which aligns with the general consensus that the right of publicity is a property right rather than a personal one. However, this is not true for all states. Because the right of publicity originally stemmed from a privacy theory, some states have retained this classification. In New York, for instance, the current statute is titled the “Right of Privacy,” and as such, is concerned with protecting an individual’s identity rather than unfair competition.\textsuperscript{153} Despite the fact that *Haelan* was the first to recognize that a right of publicity existed separately from the right of privacy under New York law in 1953, the current New York statute is relatively limited compared to other states.\textsuperscript{154} If the right of publicity is not rooted in a theory of property, “then the right clearly may be made the subject of license or waiver, but cannot have independent, exclusive, alienable, or divisible characteristics.”\textsuperscript{155} However, if the right of publicity is defined as a property

\textsuperscript{147} Adkins, supra note 60, at 499, 526; see e.g., Shaw Family Archives Ltd. v. CMG Worldwide, Inc., No. 05 Civ. 3939 (CM), 2008 WL U.S. Dist. LEXIS, at *1 (S.D.N.Y. Sept. 2, 2008).


\textsuperscript{149} Perfect 10, Inc. v. CCBill LLC, 448 F.3d 1102, 1118, 1121 n.5 (9th Cir. 2007).

\textsuperscript{150} Id.

\textsuperscript{151} Id.

\textsuperscript{152} Adkins, supra note 60, at 508–12; see CAL. CIV. CODE § 3344 (West 2022).

\textsuperscript{153} See N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2022).

\textsuperscript{154} Adkins, supra note 60, at 505–06; Haelan Labs, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

right, then the right may be “assignable, survivable, descendible, and even taxable.” This difference was another significant issue in the series of Marilyn Monroe cases described above; because New York law applied, issues of assignability resulted in the Monroe estate losing its rights in Monroe's identity.156 Somewhat similarly, a New Hampshire trial court held that three right-of-privacy torts, including “intrusion upon seclusion, publication of private facts, and casting in a false light,” involved rights that could not be considered property rights.157 Thus, the claims did not fit within the intellectual property carve-out and section 230 barred the claims.158

Theoretically, if the right of publicity is not actually classified as intellectual property, section 230(e)(2) would not apply and right of publicity claims brought in those states would unquestionably be barred. Despite considering the intellectual property carve-out of section 230, the Ninth Circuit declined to explicitly define what constitutes “intellectual property” or reference a definition of the term in Perfect 10 and instead construed the term narrowly to advance the CDA’s express policy of providing broad immunity.159 Conversely, the Third Circuit applied multiple definitions of intellectual property, including one from Black’s Law Dictionary that defines the term as a “category of intangible rights protecting commercially valuable products of the human intellect. The category comprises primarily trademark, copyright, and patent rights, but also includes . . . publicity rights.”160 The intellectual property system aims to strike a good balance between the interests of innovators and the wider public in order to “foster an environment in which creativity and innovation can flourish.”161

Interestingly, this is very similar to Congress’s stated purpose behind section 230 of the CDA. Even in 1996, the internet was already a valuable tool for society that offered significant opportunities for people to both create and express content, as well as learn from the massive amount of information available, so Representatives Cox and Wyden wanted to strike an analogous balance to the intellectual property system. By shielding interactive computer service users and providers from liability and allowing them to moderate user-generated content so long as they do not participate in the generation of allegedly infringing content in any way, section 230 was

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158. Id. at 303.
159. See Perfect 10, Inc. v. CCBill LLC, 448 F.3d 1102, 1118–19 (9th Cir. 2007).
designed to balance innovation and public interest of free speech online. The precarious balance of these significant competing interests could be greatly threatened if section 230(e)(2) were interpreted to include state right of publicity laws because internet platforms would be subject to liability in an ever-evolving and incredibly inconsistent doctrine of law.

Right of publicity actions involve both confusion-based and association-based relationships. Confusion-based relationships include situations “where a person’s name or likeness is used in commercial advertising, creating a likelihood that consumers will believe the person endorses or approves of the advertised product.” Association-based relationships, on the other hand, are “mere references that conjure associations with a person [but] do not automatically create a likelihood that consumers will be confused as to whether the person endorses or approves of the product.” Because confusion-based relationships are already protected by the broad scope of trademark and unfair competition law, these types of claims do not necessarily need to be brought under state right of publicity law in order to fit within the subsection (e)(2) intellectual property exemption. For example, celebrities and public figures can register their names as a trademark or service mark under federal trademark law. As described above in White, Vanna White brought a likelihood of confusion claim under the Lanham Act and the Ninth Circuit found that the provided evidence was sufficient to present a genuine issue of material fact. Similarly, unfair competition acts can be brought under federal trademark law even without a registered trademark. Thus, analogous cases involving confusion-based relationships can be brought under the Lanham Act as it


163. Beckerman-Rodau, supra note 41, at 164–65; see e.g., Carson v. Here’s Johnny Portable Toilets, Inc., 698 F.2d 831, 837 (6th Cir. 1983).

164. Beckerman-Rodau, supra note 41, at 165. See generally ETW Corp. v. Jireh Publ’g, Inc., 332 F.3d 915 (6th Cir. 2003) (noting that the Sixth Circuit has created an eight-factor test to determine the likelihood of confusion).

165. Beckerman-Rodau, supra note 41, at 167.

166. See 15 U.S.C. § 1052(e)(4), (O) (allowing surname to be registered as trademark provided it has acquired distinctiveness); see also Russell W. Jacobs, Recapturing Rareness: The Significance of Surname Rareness in Trademark Registration Determinations, 50 IDEA 395, 395 (2010).


provides nationwide coverage, a clear remedy, and a wide scope of damages. Such claims would not be barred by section 230 because under either interpretation of subsection (e)(2), the Lanham Act would clearly fit within the statutory exemption for intellectual property. Therefore, plaintiffs such as White may have some recourse available to them even if the circuit split on the interpretation of subsection (e)(2) is resolved to bar state right of publicity laws. However, this case was decided in 1992, so the CDA had not yet been enacted. The next relevant question would be to determine whether interactive service providers might still be entitled to immunity for violations of specific provisions of the Lanham Act. In a more recent case, the Ninth Circuit held that despite the fact that the Lanham Act generally deals with intellectual property—for example, trademarks—the intellectual property carve-out in section 230(e)(2) “does not apply to false advertising claims brought under [section] 1125(a) of the Lanham Act, unless the claim itself involves intellectual property.”

Overall, the Ninth Circuit declined to include rights of publicity protected by state law within the “intellectual property” exemption because doing so would “fatally undermine the broad grant of immunity provided by the CDA.” Despite the isolated language in section 230(e)(2), reading section 230 holistically leads to the conclusion that courts should defer to the legislative intent and purpose of creating a “vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by . . . State regulation.” Thus, to interpret section 230(e)(2) to include diverse state intellectual property laws, particularly those regarding the right of publicity, would mean that entities otherwise entitled to CDA immunity would be forced to endure litigation costs for extremely unpredictable state laws, defeating the purpose and policy goals of section 230.

C. ARGUMENTS THAT SUBSECTION (E)(2) SHOULD BE INTERPRETED TO INCLUDE STATE INTELLECTUAL PROPERTY LAWS

In contrast, the Third Circuit recently addressed whether state right of publicity laws should be included in the intellectual property exemption in Karen Hepp’s appeal and concluded that “a state law can be a law pertaining

169. Enigma Software Grp. USA, LLC v. Malwarebytes, Inc., 946 F.3d 1040, 1053 (9th Cir. 2019),
cert. denied, 141 S. Ct. 13 (2020) (statement of Thomas, J., respecting the judgment). The Supreme Court
denied certiorari for this case, but Justice Thomas stated that the Court should consider whether the text
of section 230 of the CDA aligns with the current state of immunity enjoyed by internet platforms in a
more appropriate case. His statement did not address the intellectual property exception to liability under
section 230.

170. Perfect 10, Inc. v. CCBill LLC, 448 F.3d 1102, 1119 n.5 (9th Cir. 2007).

171. 47 U.S.C. § 230(a)–(b); see Perfect 10, 448 F.3d at 1118–19.
to intellectual property, too.”

Despite the Ninth Circuit’s holding in 

Perfect 10, the Third Circuit reasoned that the plain language of section 230(e)(2) is clear. If Congress had actually intended for the intellectual property exemption to be limited to federal law, “it knew how to make that clear, but chose not to.”

The Third Circuit’s holding builds off 

Universal Communication Systems, Inc. v. Lycos, Inc., the first case to address whether section 230 precludes intellectual property laws. First Circuit case was decided shortly before Perfect 10 in which there were alleged violations of federal law as well as trade name dilution in violation of Florida law. In 

Universal Communication, the First Circuit held “[c]laims based on intellectual property laws are not subject to section 230 immunity,” so it addressed the dilution claim separately.

The Third Circuit also considered district court cases that interpreted section 230(e)(2), including 

Atlantic Recording Corp. v. Project Playlist, Inc. 

In 

Atlantic Recording, record companies asserted copyright claims under both state and federal law, and the court reasoned that because Congress specified whether local, state, or federal law applied four times in subsection (e), Congress did not intend to limit the intellectual property exemption to only federal law. Therefore, in Hepp, the Third Circuit found that because Congress knew how to cabin the interpretation about state law and did so explicitly, “the structure does not change the natural meaning.”

Atlantic Recording did not involve any DMCA safe harbors, but other such cases that involve allegedly infringing third-party user content could consider the interaction between the CDA intellectual property exception and the DMCA safe harbors to determine whether interactive service providers might still be immune from liability.

While it is true that section 230 generally created a pro-free-market

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173. Id. at 210 (citations omitted) (quoting Atl. Recording Corp. v. Project Playlist, Inc., 603 F. Supp. 2d 690, 703 (S.D.N.Y. 2009)).
174. Universal Commc’n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 417 (1st Cir. 2007).
175. Id. at 422–23 (citing 47 U.S.C. § 230(e)(2)).
176. Hepp, 14 F.4th at 204, 209–10 (3d Cir. 2021); see Atl. Recording Corp. v. Project Playlist, Inc., 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009) (“Section 230(e)(1) does not provide immunity for either federal or state intellectual property claims.”).
177. Atl. Recording, 603 F. Supp. 2d at 703. Within section 230(e), the statutory language specifies whether local, state, or federal law applies in four places: once to federal criminal law in subsection (e)(1), twice in the general state law provision in subsection (e)(3), and again in the communications law context in subsection (e)(4). Therefore, Congress expressly chose not to limit subsection (e)(2) only to federal intellectual property law.
178. Hepp, 14 F.4th at 211.
179. See Atl. Recording, 603 F. Supp. 2d at 694; see also supra Section I.E.
policy, the statute’s policy goals do not necessarily swallow state intellectual property rights because state property rights can also facilitate market exchange. The Third Circuit noted that because the natural reading of section 230(e)(2) would include state law, “policy considerations cannot displace the text.” Even so, the Third Circuit stated that policy could cut the other way even outside section 230’s text: “if likeness interests are disregarded on the internet, the incentives to build an excellent commercial reputation for endorsements may diminish.”

The Third Circuit also considered whether Hepp’s claims actually arose from a law pertaining to intellectual property, and concluded that they do. Black’s Law Dictionary defines “intellectual property” to include publicity rights, and both legal and lay dictionaries treat “intellectual property” as a compound term. The court also applied a test from another legal dictionary, Bouvier’s, which the Pennsylvania right of publicity statute satisfies. Overall, there is substantial evidence to support the conclusion that at least Pennsylvania’s statutory right of publicity falls within the definition of intellectual property.

Moreover, the Third Circuit considered the only Supreme Court case to address the right of publicity, Zacchini v. Scripps-Howard Broadcasting Co., which analogized the right of publicity to patent and copyright law because the right of publicity focuses “on the right of the individual to reap the reward of his endeavors and [has] little to do with protecting feelings or reputation.” As analyzed above, the right of publicity and trademarks are relatively analogous for confusion-based relationships. The Florida Supreme Court articulated the harm caused by a right of publicity violation by “associat[ing] the individual’s name or . . . personality with something else.” Thus, the legal definition including trademark also supports the conclusion that the right of publicity is intellectual property.

However, Judge Cowen dissented in Hepp and stated that he “believe[s] that the ‘intellectual property’ exception or exclusion to immunity under

180. Hepp, 14 F.4th at 211.
183. Id. at 212–13, apps. a–b; see Intellectual Property, BLACK’S LAW DICTIONARY (11th ed. 2019).
185. Id.; The Wolters Kluwer Bouvier Law Dictionary proposes a test that the Pennsylvania statute satisfies because it grants individuals monopolies in their likenesses. See id. Further, the statute provides for “property-like relief, including the ability to obtain damages and injunctions against trespassers.” Id. at 213; see 42 PA. CONS. STAT. § 8316(a) (2022).
186. Id. at 213; Zacchini, 433 U.S. at 573.
§ 230(e)(2) . . . is limited to federal intellectual property laws (i.e., federal patent, copyright, and trademark laws) and—at most—state laws only where they are co-extensive with such federal laws.” Judge Cowen argued that despite the fact that the majority implied there was an existing circuit split between the First and Ninth Circuits due to Universal Communication and Perfect 10, Hepp actually created the circuit split because in Universal Communication neither party actually raised the issue of whether state law counts as intellectual property under section 230 and the First Circuit seemingly assumed it did. Ultimately, Judge Cowen supported the Ninth Circuit’s approach for the reasons analyzed in Section II.B and stated that “the more expansive interpretation would gut the immunity system established by Congress and undermine the policies and findings that Congress chose to codify in the statute itself.”" Furthermore, on October 21, 2021, Facebook requested that the Third Circuit re-hear the Hepp appeal en banc, arguing that the “‘majority’s decision misread the intellectual property exception to the immunity established by section 230 of the Communications Decency Act (CDA) creating a conflict with’ the Ninth Circuit, and ‘ignores a key textual feature and downplays the contextual and structural features of the statute.’”

D. ARGUMENTS FOR SECTION 230 REFORM AND PROPOSED CHANGES

The above arguments and analyses of section 230 of the CDA are applicable in its current state, but section 230 as a whole has recently come under fire from both sides of the political aisle. There have been calls to amend or even repeal the statute. Many on the left have criticized section 230 because they believe it has “enabled tech platforms to host harmful content with impunity,” while many on the right argue that it has allowed tech platforms to disproportionately suppress conservative speech and perspectives. The law arguably allows bad actors to hide behind the law’s liability shield and prevents harmed users, such as Karen Hepp, from holding internet platforms accountable. In the 116th congressional session, twenty-six bills were introduced that would have amended the scope of section 230 immunity, and the bills had an extremely wide range of proposed changes, such as reducing the scope of immunity in certain types of cases, placing

188. Hepp, 14 F.4th at 216 (Cowen, J., dissenting).
189. Id. at 217; Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1119 n.5 (9th Cir. 2007).
190. Hepp, 14 F.4th at 220 (Cowen, J., dissenting).
192. Anand et al., supra note 18.
193. Id.
conditions on immunity, or repealing the statute entirely.\textsuperscript{194} Currently, there are fourteen bills that have been introduced for the 117th congressional session related to section 230, but none of the proposals are related to the judicial interpretation or scope of the intellectual property exception to immunity within subsection (e)(2).\textsuperscript{195}

There is also a question of executive authority in whether the Federal Communications Commission (“FCC”) has regulatory authority to implement section 230. Congress passed the CDA as part of the Telecommunications Act of 1996, which in turn amended the Communications Act of 1934, a statute administered by the FCC.\textsuperscript{196} The National Telecommunications and Information Administration (“NTIA”) filed a petition in 2020 that provides the FCC with an opportunity to consider its rulemaking authority.\textsuperscript{197} To clarify the FCC’s role in administering section 230, Congress could grant an express delegation or disavowal of authority.\textsuperscript{198} A delegation would give the FCC a statutory basis for promulgating regulations while a disavowal would prohibit the FCC from attempting to regulate under section 230.\textsuperscript{199}

Legislative action on section 230 in any shape or form could have significant and unintended consequences. Since section 230 was passed in 1996, it has been considered to be the “cornerstone of online expression” and has been referred to as the “[twenty-six] words that created the internet” and the internet’s “Magna Carta.”\textsuperscript{200} The internet has grown exponentially and has influenced daily public life considerably since the statute was enacted in 1996, so a fundamental change to section 230 could change the internet as we know it, and even a small change to section 230 could have a substantial ripple effect. For example, social media operators could potentially adjust their content moderation practices to comply with reforms, ranging from aggressively screening content to not moderating any content, including content that may be considered objectionable or obscene to most users. On the other hand, if section 230 were to remove immunity for certain types of content, it does not necessarily mean that providers or users will actually be liable for such content; it simply means that section 230 would not bar liability. Thus, providers could continue to host potentially obscene or objectionable content if they believe the benefits of hosting such content

\textsuperscript{194} BRANNON & HOLMES, CONG. RSCH. SERV., supra note 93, at 30.
\textsuperscript{195} Anand et al., supra note 18.
\textsuperscript{196} BRANNON & HOLMES, CONG. RSCH. SERV., supra note 93, at 36.
\textsuperscript{197} Id. at 37.
\textsuperscript{198} Id. at 42.
\textsuperscript{199} Id.
\textsuperscript{200} Anand et al., supra note 18.
would outweigh potential litigation costs, particularly if lawsuits are unlikely or providers believe they have a strong likelihood of prevailing in a suit. This could be a move to bring the reality of section 230 closer to its original congressional intention of creating a free-market system.

Overall, despite the heated debate over section 230, there have not been any proposed changes that have been close to being implemented. The extremely wide range of proposed changes also means that their implications on section 230 generally, as well as the right of publicity specifically, are ironically very unpredictable. Therefore, the circuit split on the interpretation of subsection (e)(2) and whether state right of publicity claims should be barred will continue to be a noteworthy issue until Congress acts, whether through amendments, repealing the statute entirely, or more directly providing guidance on the relatively narrow subject of the right of publicity.

CONCLUSION

The explicit statutory language of section 230 of the CDA supports the Third Circuit’s interpretation of subsection (e)(2), the intellectual property exception to immunity. Within subsection (e), Congress specified whether federal, state, or local law applied in four instances, so we must defer to the express language and assume that Congress chose not to limit subsection (e)(2) to only federal intellectual property laws. The general consensus among the legal community is that the right of publicity falls under the umbrella of intellectual property, so the literal interpretation of section 230 should not bar right of publicity claims brought under state statutes. Unless or until Congress clarifies what should be included within this exception to the broad liability shield protecting interactive service providers or takes some other action, the Third Circuit’s interpretation will likely be upheld.

Overall, however, it would make the most sense to interpret section 230(e)(2) in the way that aligns most closely with the legislative intent and history of the statute as a whole to avoid fundamentally crippling the statute by exposing interactive service providers to liability from extremely varied state statutes relating to the right of publicity. The Third Circuit’s interpretation could very likely create an exception that swallows the whole statute. Assuming the right of publicity constitutes intellectual property, under the Ninth Circuit’s interpretation to protect the integrity of section 230,
right of publicity claims should be barred so long as providers do not participate in the creation of the allegedly infringing content. This would maintain uniformity and predictability throughout the court system. The Ninth Circuit’s interpretation is thus most beneficial to interactive service providers such as Facebook and most frustrating to individuals who feel they have been harmed by allegedly infringing content on internet platforms, such as Karen Hepp. Such individuals could potentially attempt to redress this harm through other types of claims, such as copyright or trademark. These two examples would undoubtedly constitute intellectual property laws, and claims under federal law would be doubly effective against section 230’s broad shield, but alleged infringements of the right of publicity do not always meet the required elements for such claims. Furthermore, providers could be immune from liability through other statutes, such as the safe harbors from the DMCA, so individuals may be left without a remedy. There is no clear balance or solution to these concerns in the current form of section 230 of the CDA.

The severe implications of the Third Circuit’s seemingly “correct” interpretation could strongly incentivize Congress to clarify either the scope of subsection (e)(2) or separately protect the right of publicity in order to avoid the purpose and intent behind section 230 of the CDA. Many scholars have advocated for a federal statute or a uniform act to protect the right of publicity. Federal codification of the right of publicity would create uniform and equal protections to individuals across the entire country, as opposed to the current state statutes that have created extremely varied interests in the right. A federal statute or uniform act would also drastically reduce the economic costs created by uncertainty in litigation. Finally, unauthorized uses of individuals’ “personas,” including name and likeness, are becoming increasingly more common due to improvements in technology and the expansion of social media. This type of action would balance the interests of wanting to protect both the public’s right of publicity and interactive service providers from liability for user-generated content. Ultimately, due to the complex and time-intensive nature of Congressional processes, any proposed change, if any, to section 230 may not be established for some time, so there is likely going to be substantial consequences and potentially a wave of lawsuits for alleged violations of the right of publicity in the wake of the Third Circuit’s holding in *Hepp*. 