

**OF CIRCUIT SPLITS,  
DICTIONARIES & LEGAL ESSENCES:  
The Right of Publicity as “Intellectual Property”**

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The Reuters lede was grim. “If the doomsday predictions are right,” Alison Frankel reported on September 23, 2021, “a Philadelphia morning news anchor and two federal appellate judges just broke the internet.”<sup>1</sup> That morning, the U.S. Court of Appeals for the Third Circuit had handed down a divided ruling in *Hepp v. Facebook*,<sup>2</sup> with the majority holding that the morning news anchor, Karen Hepp, could sue the social media giant for violating her right of publicity because “Section 230 [of the Communications Decency Act] does not preclude claims based on state intellectual property laws.”<sup>3</sup>

In doing so, the *Hepp* court gave its answer to two questions left open by Section 230(e)(2),<sup>4</sup> which carves out an “intellectual property” exception to the legal immunity Congress granted websites and platforms hosting third-party

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1. Alison Frankel, *3rd Circuit Splits with 9th, Says Celeb Can Sue Facebook for Unauthorized Photo*, REUTERS (Sept. 23, 2021, 2:23 PM), <https://www.reuters.com/legal/transactional/3rd-circuit-splits-with-9th-says-celeb-can-sue-facebook-unauthorized-photo-2021-09-23> [https://perma.cc/CZ3Q-GFRS].

2. 14 F.4th 205 (3d Cir. 2021).

3. *Id.* at 215.

4. 47 U.S.C. § 230(e)(2).

content. These companies, under the § 230(e)(2) provision, are still liable for user content that violates “any law pertaining to intellectual property.”<sup>5</sup> However, without further explication in the statute, courts have been forced to guess at (1) whether “intellectual property” (I.P.) is limited to core I.P. rights in copyright, trademark and patent, and (2) whether “any law” is limited to federal (as opposed to state and federal) laws.<sup>6</sup> In 2007, the Ninth Circuit had construed the provision narrowly, ruling that § 230(e)(2) only exempted federal copyright, patent and trademark laws.<sup>7</sup> The Third Circuit now rejected that reading, finding that state laws were included, and that “intellectual property,” in this case, encompassed the right of publicity, thus creating a noteworthy split between the two appellate courts.

Section 230 is one of two laws that has profoundly shaped the modern Internet. Its “Good Samaritan” rule freed sites with third-party content from nearly all liability by guaranteeing that courts would not treat them as “the publisher or speaker” of user content<sup>8</sup> while its intellectual-property exclusion ensured that copyright would remain, mostly, protected.<sup>9</sup> As noted scholar Mark Lemley put it:

Because of Section 230 immunity, Internet companies do not have to vet and preapprove content posted by others. It is that freedom that has allowed the Internet to scale. It is impossible to imagine Facebook or YouTube processing the incredible amount of data they do if they had to get lawyers to check and approve the content in advance.<sup>10</sup>

The Digital Millennium Copyright Act’s Section 512, passed two years later, gave online service providers a way to address the mountains of copyrighted material posted by users with a notice-and-takedown mechanism—a safe harbor provision—that left the ‘policing’ of user content to the copyright holders, and let web companies retain their immunity by simply removing allegedly infringing content when alerted to it.<sup>11</sup> For nearly 25 years, these two laws have helped social media sites avoid a staggering burden. In the case of

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5. *Id.*

6. *See, e.g., Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008) (holding no Section 230 immunity for a state right of publicity claim).

7. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007). The Ninth Circuit reiterated its *Perfect 10* holding in 2019: “We therefore hold that the intellectual property exception contained in § 230(e)(2) encompasses claims pertaining to an established intellectual property right under federal law, like those inherent in a patent, copyright, or trademark.” *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1053 (9th Cir. 2019).

8. “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.” 47 U.S.C. § 230(c)(1).

9. *Id.* at § 230(e)(2).

10. Mark A. Lemley, *The Contradictions of Platform Regulation*, 1 J. FREE SPEECH L. 303, 306 (2021).

11. 17 U.S.C. § 512.

copyright, the DMCA shifts the burden to the copyright holder to notify platforms of infringing content. In the case of defamation, privacy, and related torts—or even, more recently, incitement or negligence claims—Section 230 has provided immunity to online intermediaries for the speech of their users. Until *Hepp*.

By embracing the idea that state right of publicity laws fall within the category of “intellectual property” under § 230(e)(2), the *Hepp* court has potentially opened the floodgates of litigation based on 50 vastly different, and often uncertain, state interpretations of the amorphous right of publicity, which in fact derives from privacy law. Indeed, the specter of *Hepp*’s “broken Internet” presents legal thinkers with an opportunity to reexamine this development and ask if the publicity right really belongs in the I.P. pantheon alongside copyright, trademark, and patent law, at least for purposes of Section 230.

This Article first provides a basic outline of both the right of publicity and the mechanism of Section 230. Next, it analyzes the existing case law interpreting Section 230’s intellectual property exclusion. The Article then explores three dimensions that suggest the right of publicity should not be treated as intellectual property for 230 purposes. Finally, it offers concluding perspectives on this difficult and vitally important area of the law.

## I. THE RIGHT OF PUBLICITY

The right of publicity, which gives plaintiffs the ability to control certain commercial uses of their identity, was born of privacy law. Standard legal historiography traces its provenance to the “right of privacy” proposed by Samuel Warren and Louis Brandeis in their enormously influential 1890 article, “The Right of Privacy.”<sup>12</sup> Tort law giant William L. Prosser subsequently divided the right of privacy into a taxonomy of four distinct claims, including the appropriation of a person’s name or likeness (alternatively dubbed “misappropriation”).<sup>13</sup>

It was not until 1953 that the privacy-based appropriation tort morphed into a “right of publicity” in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*<sup>14</sup> Here, a dispute between two baseball card companies pointed up the limits of appropriation to allow individuals to *manage* commercial uses of their persona, rather than simply preventing them. The *Haelan* majority formulated a means for “prominent persons” to make grants of permission to use their “countenances” so they could make money off their fame.<sup>15</sup> “This right,” wrote Judge Jerome Frank, “might be called a ‘right of publicity.’”<sup>16</sup> Having thus constructed a seemingly workable remedy to avoid celebrities feeling “sorely

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12. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

13. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

14. 202 F.2d 866 (2d Cir. 1953).

15. *Id.* at 868.

16. *Id.*

deprived”<sup>17</sup> by the inability to cash in on their fame, Judge Frank showed little interest in either developing the concept further or specifying its proper legal classification. “Whether it be labelled a ‘property’ right is immaterial,” he wrote, “for here, as often elsewhere, the tag ‘property’ simply symbolizes the fact that courts enforce a claim which has pecuniary worth.”<sup>18</sup>

Within the year, however, Professor Melville Nimmer insisted that the *Haelan* court “clearly held that the right of publicity, unlike the right of privacy, is a property right,”<sup>19</sup> and enthusiastically touted the importance of recognizing it as a new tort altogether, independent of appropriation. Nimmer’s seminal article expounded upon the shape this new tort could take, urging jurists and lawmakers to give it life, in order to “meet[] the needs of Broadway and Hollywood.”<sup>20</sup> The key to this market-friendly spinoff of appropriation was that it gave celebrities—whose fame had precluded them from pursuing appropriation claims—the power to both protect and license their personae. His article, however, went far beyond just celebrity applications.<sup>21</sup> Nimmer, a former lawyer for Paramount Pictures, saw “publicity” as a broad concept that could apply to animals, brands, and locales as well.<sup>22</sup>

In addition to outlining justifications for a right of publicity, Nimmer examined lawsuits in which justice ostensibly suffered for lack of the right. There was a football player whose picture, in uniform, was featured on a calendar; an actress whose photo was placed outside a burlesque theater that had no association with her; a prize fighter who could not stop a TV station from broadcasting his boxing match; and some Hollywood actors, employed by Paramount Pictures, who had no redress when the movie studio sold posters of them *sans* consent or remuneration.<sup>23</sup> But there was also a cookie company that manufactured “Vassar Chocolates,” using a seal similar to that of Vassar College;<sup>24</sup> a radio station owner whose exclusive right to broadcast an auto race was frustrated by a listener who retransmitted his own account of the event;<sup>25</sup> and a North Pole expedition that had a news service film their adventure to

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17. *Id.*

18. *Id.*

19. Melville B. Nimmer, *The Right of Publicity*, 19 *LAW & CONTEMP. PROBS.* 203, 222 (1954).

20. *Id.* at 203.

21. *Id.* at 204–05.

22. Nimmer found appropriation to be lacking for several reasons, including that fact that it was “Limited to Human Beings.” *Id.* at 210. For example, he states: “[i]t is common knowledge that animals often develop important publicity values. Thus, it is obvious that the use of the name and portrait of the motion picture dog Lassie in connection with dog food would constitute a valuable asset.” *Id.*

23. *Id.* at 205–06. In these cases, the fact that a defendant was famous precluded recovery under the privacy theory.

24. *Vassar Coll. v. Loose-Wiles Biscuit Co.*, 197 F. 982 (W.D. Mo. 1912).

25. *Loeb v. Turner*, 257 S.W.2d 800 (Tex. Civ. App. 1953).

defray their costs,<sup>26</sup> only to find that another news service photographed the trip and sold those photos before the expedition could.<sup>27</sup> “[W]ere the plaintiff regarded as having been granted an exclusive property right,” Nimmer wrote of one of these hapless individuals, “a result more consonant with the economic realities and the demands of justice would have been achieved.”<sup>28</sup> The problem with this account, of course, is that (acknowledging the evolution of the law since the time Nimmer wrote) at least two of these cases are more appropriately dealt with, if at all, using forms of core intellectual property. Vassar’s claim is, if anything, closer to a modern trademark dilution claim. The radio station’s claim, as the court in that case acknowledged, is simply a copyright claim that is unwinnable for the plaintiff given the fact/expression dichotomy.<sup>29</sup> Nimmer’s suggestion that the law treat these scenarios under a right of publicity conflates the right with core I.P. rights.

Where Nimmer hoped to establish a new tort, which likely fueled his attempt to sweep a host of claims under the publicity right, William Prosser’s ambitions were pinned on bringing clarity to the various incarnations of common law privacy. Prosser’s influential 1960 article, *Privacy*, argued that four distinct torts had surfaced, “which are tied together by the common name, but otherwise have almost nothing in common” besides their plaintiffs’ wish “to be let alone.”<sup>30</sup> Having defined the tort as “the appropriation, for the defendant’s benefit or advantage, of the plaintiff’s name or likeness,”<sup>31</sup> Prosser noted that this tort was “quite a different matter” from the other three, as “[t]he interest protected is not so much a mental as a proprietary one.”<sup>32</sup> Then, alluding to the *Haelan* decision, he noted that appropriation was “a right of value upon which the plaintiff can capitalize by selling licenses,” and that it “has been called ‘a right of publicity.’”<sup>33</sup> And, echoing Judge Frank, he also claimed that it “seems quite pointless to dispute over whether such a right is to be classified as ‘property.’ If it is not, it is at least, once it is protected by the law, a right of value upon which the plaintiff can capitalize by selling licenses.”<sup>34</sup> Prosser thus incorporated the transferrable license from *Haelan* into the appropriation tort, and determined that ‘the right of publicity’ was simply another name for appropriation.<sup>35</sup>

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26. *Smith v. Surratt*, 7 Alaska 416 (D. Alaska 1926).

27. Nimmer, *supra* note 19, at 210–11.

28. *Id.* at 211.

29. *Loeb*, 257 S.W.2d at 802–03. *See also* *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.* 499 U.S. 340, 347 (1991) (“‘No one may claim originality as to facts.’ This is because facts do not owe their origin to an act of authorship.”) (citations omitted).

30. William L. Prosser, *supra* note 13, at 389.

31. *Id.* at 401.

32. *Id.* at 406.

33. *Id.* at 406–07.

34. *Id.* at 406.

35. *Id.* at 406–07. In 1977, this designation was adopted in the Restatement (Second) of Torts

Fifteen years later, Ohio's Eighth District Court of Appeals considered the summary judgment dismissal of an appropriation claim by Hugo Zacchini, whose 15-second human cannonball act had been aired on a local TV news broadcast.<sup>36</sup> Judge William Day began his analysis by laying out Prosser's four privacy torts,<sup>37</sup> then announcing that "we think none of Professor Prosser's categories provide a logically adequate embrace for the wrong the plaintiff claims has been done."<sup>38</sup> The "property" that had been usurped by the TV station was, after all, not Zacchini's likeness, Judge Day wrote, but rather his act itself, which "falls within the category of dramatic production."<sup>39</sup> Then, suggesting that Zacchini's common-law *copyright* had almost certainly been violated,<sup>40</sup> the Ohio court reversed and remanded.

But alas, this astute analysis by a state appellate judge would not be replicated in either Ohio's Supreme Court or the U.S. Supreme Court. The Supreme Court took up *Zacchini v. Scripps-Howard Broadcasting*<sup>41</sup> because of the First Amendment issue raised when a news station broadcast the act. However, that aspect of the ruling has been less enduring than the chaos Justice Byron White wrought upon a state tort that was still in its nascent days. Writing for the majority of a divided court, Justice White noted that: "Ohio has recognized what may be the strongest case for a 'right of publicity' involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of *the very activity* by which the entertainer acquired his reputation in the first place."<sup>42</sup>

The Supreme Court's enthusiastic support for publicity rights as a form of I.P. was precisely the kind of expansionist move Nimmer promoted in his 1954 piece, and which Prosser had sought to limit. The Court's opinion embraced it fully, with Justice White proceeding to explain economic justifications for the 'right of publicity' that, he acknowledged, looked strikingly like those underlying copyright: "[T]he State's interest is closely analogous to the goals of patent and copyright law," Justice White wrote, "focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting

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§ 652, of which Prosser was the Reporter. In 1995, the right of publicity was relocated into Restatement (Third) of Unfair Competition, § 46–49.

36. *Zacchini v. Scripps-Howard Broad. Co.*, No. 33713, 1975 WL 182619, at \*2 (Ohio Ct. App. July 10, 1975), *rev'd*, 47 Ohio St.2d 224, *rev'd and remanded*, 433 U.S. 562 (1977).

37. *Id.*

38. *Id.*

39. *Id.* at \*5.

40. *Id.* at \*4. Judge Day suggested that common law copyright could offer relief even though Zacchini's act was a live performance: "Common law copyright is a designation for a concept protecting property rights in intellectual productions conferred by the common law. It is sometimes called 'copyright before publication.'" *Id.* at \*4.

41. 433 U.S. 562 (1977).

42. *Id.* at 576 (emphasis added).

feelings or reputation.”<sup>43</sup> Thus did the Court manage to assist in the conflation of the right of publicity with intellectual property—by analyzing copyright while calling it ‘right of publicity.’

In the ensuing years, many scholars have regarded the inclusion of publicity rights in the intellectual property canon as suspect. As legal scholars Stacy L. Dogan and Mark A. Lemley have pointed out, “no one seems to be able to explain exactly why individuals should have this right.”<sup>44</sup> Important I.P. rights like copyright and patent are justified by their contribution to the social good. Publicity rights, on the other hand, promise no such contribution. Professor Michael Madow has argued that the theoretical underpinnings of the right of publicity as a property right “are not nearly as compelling as is commonly supposed.”<sup>45</sup> Its proponents, indeed, “still have work to do to persuade us why these images should not be treated as part of our cultural commons, freely available for use in the creation of new cultural meanings and social identities, as well as new economic values.”<sup>46</sup> The very creation of the right of publicity seems to beg important questions. Wee Jim Yeo has critiqued the circular reasoning involved in granting “a full property right in a celebrity persona solely because it has commercial value.”<sup>47</sup> Because “the commercial value of personality rights ‘depends on the extent to which it is legally protected,’ the extent of legal protection determines the right’s value.”<sup>48</sup> Courts, however, seem to have approached publicity rights largely by assuming that where there is potential value, the law must therefore offer protection, rather than engage in a deep analysis of whether there is a need for the right as presently configured.

## II. IS THE RIGHT OF PUBLICITY EXCLUDED FROM SECTION 230 IMMUNITY?

Section 230 of the Communications Decency Act was enacted by Congress in 1996 to encourage the development of the Internet and promote free speech online by, among other things, limiting the liability of online intermediaries.<sup>49</sup> The language of Section 230(c)(1) 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.”<sup>50</sup>

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43. *Id.* at 573.

44. Stacy L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1163 (2006).

45. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 179 (1993).

46. *Id.* at 239.

47. Wee Jin Yeo, *Disciplining the Right of Publicity’s Nebulous First Amendment Defense with Teachings from Trademark Law*, 34 CARDOZO ARTS & ENT. L.J. 401, 413 (2016).

48. *Id.*

49. 47 U.S.C. § 230.

50. *Id.* at § (c)(1).

As scholar Eric Goldman wrote, “Section 230(c)(1) says Internet services categorically are not liable for third-party content, subject to a few statutory exceptions including intellectual property claims and federal criminal prosecutions.”<sup>51</sup> Although limiting defamation actions was the statute’s primary function, courts have held that it also applies to an impressive array of claims, including “negligence; deceptive trade practices, unfair competition, and false advertising; the common-law privacy torts; tortious interference with contract or business relations; intentional infliction of emotional distress; and dozens of other legal doctrines.”<sup>52</sup> Thus, Section 230 immunizes online sites from liability for most user-generated content, and expressly preempts state law that is contrary to the statute.<sup>53</sup> As Goldman notes, Section 230 reinforces First Amendment values by providing online services with, among other things, both early dismissals and greater legal certainty than the First Amendment could guarantee with its standard defenses alone.<sup>54</sup>

In recent years, lawmakers from both parties have proposed revisiting Section 230, hoping to narrow or reverse its immunity, but the right of publicity has managed to threaten internet platforms without any legislative alterations to Section 230 in its current iteration. The *Hepp* decision creates a significant federal circuit split on the question of whether the right of publicity should be treated as “intellectual property” and thereby excluded from Section 230’s protection, essentially removing its shield in the case of publicity claims. This question is, of course, a matter of tremendous concern for online platforms, which would face wildly varying state law regimes if publicity rights were held to fall under the statute’s intellectual property rubric. The issue also raises serious concerns for free expression online. Because the right of publicity is such an amorphous entity, holding online platforms responsible for violations would almost inevitably lead to platforms placing significant limitations on users.

### III. SECTION 230 & THE RIGHT OF PUBLICITY IN THE COURTS

In 2007’s *Perfect 10, Inc. v. CCBill LLC*,<sup>55</sup> the U.S. Court of Appeals for the Ninth Circuit rejected the notion that publicity rights should be considered intellectual property and thus excluded from Section 230’s coverage. The lawsuit arose when Perfect 10, owner of an adult entertainment magazine and website, sued two defendants who provided billing services to companies hosting pirated nude images owned by Perfect 10.<sup>56</sup> The magazine’s copyright claim was, of course, uncontroverted. Its secondary claim was not. A number of

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51. Eric Goldman, *Why Section 230 Is Better than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 33 (2019).

52. *Id.* at 37.

53. 47 U.S.C. § 230(e)(3).

54. Goldman, *supra* note 51, at 39–43.

55. 488 F.3d 1102 (9th Cir. 2007).

56. *Id.* at 1108.

models had signed over their publicity rights to Perfect 10 and, as the assignee of those rights, Perfect 10 argued that the defendants had infringed those rights as well.<sup>57</sup>

The defendants sought the refuge of Section 230 to ward off the publicity claims. The Ninth Circuit noted that intellectual property rights were excluded from Section 230’s protective umbrella, but reasoned, in a terse paragraph, that the right of publicity did not fit within the statute’s “intellectual property” exclusion.<sup>58</sup> The court pointed out that “while the scope of federal intellectual property law is relatively well-established, state laws protecting ‘intellectual property,’ however defined are by no means uniform. Such laws may bear various names, provide for varying causes of action and remedies, and have varying purposes and policy goals.”<sup>59</sup> Since one of the big-picture goals of Section 230 was to protect the development of the Internet from the vagaries of state law, the court reasoned, construing the statutory language to include the right of publicity would contravene that policy goal. For that reason, and “in the absence of a definition from Congress, we construe the term ‘intellectual property’ to mean ‘federal intellectual property.’”<sup>60</sup> As a result, Section 230 precluded the plaintiff’s right of publicity claims.

A year before the *Perfect 10* decision, the Eleventh Circuit, in *Almeida v. Amazon.Com, Inc.*,<sup>61</sup> addressed the issue in dicta, but ultimately concluded that its resolution was unnecessary to the disposition of the case. The *Almeida* court noted that the right of publicity is a “widely recognized intellectual property right,”<sup>62</sup> citing a variety of cases and scholarly works asserting that proposition. Interestingly, however, the court also noted in a footnote that Florida’s statutory right of publicity claim and its common-law misappropriation claim “are substantially identical.”<sup>63</sup> Since the misappropriation claim, “identical” to the publicity claim, is commonly understood to be a species of invasion of privacy, not intellectual property, there appear to be some conflicting notions operating in the opinion. In any event, as noted, the court properly declined to settle definitively the right of publicity issue as it pertained to Section 230 immunity.

A number of federal district courts outside of the Ninth Circuit have disagreed with *Perfect 10* and concluded that Section 230 does not preempt state publicity claims. In *Doe v. Friendfinder Network, Inc.*,<sup>64</sup> a New Hampshire

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57. *Id.*

58. *Id.* at 1118–19.

59. *Id.* at 1118.

60. *Id.* at 1119.

61. 456 F.3d 1316 (11th Cir. 2006). *See also* Universal Comm’n Sys., Inc. v. Lycos, 478 F.3d 413 (1st Cir. 2007) (dismissing a state trademark dilution claim on the merits after ruling that Section 230 did not preempt that claim).

62. *Almeida*, 456 F.3d at 1322.

63. *Id.* at 1328 n.1.

64. 540 F. Supp. 2d 288 (D.N.H. 2008). *See also* Atlantic Recording Corp. v. Project Playlist, Inc., 603 F. Supp. 2d 690 (S.D.N.Y. 2009); Gucci Am., Inc. v. Hall & Assocs., 135 F. Supp.

federal district court criticized the *Perfect 10* court's reasoning, while itself illustrating how troublingly nebulous the "right of publicity" can be. The case concerned a sexually explicit, and fake, dating profile created on AdultFriendFinder.com that included photos of the plaintiff.<sup>65</sup> The profile was active on the site, and showed up in promotional "teasers" appearing in Internet search results and other websites.<sup>66</sup> Although Doe's grievances sounded primarily in private facts and false light—indeed, she did not actually make a right of publicity claim<sup>67</sup>—Judge Joseph N. LaPlante ruled that the profile "teasers" triggered New Hampshire's common-law appropriation tort, which he treated as a "right of publicity" and duly labeled "intellectual property" for purposes of Section 230.<sup>68</sup>

First, the court pointed out, statutory interpretation should begin with the plain language of the statute, so Section 230(e)(2) exempts from immunity "any law relating to intellectual property."<sup>69</sup> Moreover, other parts of Section 230 made clear that Congress was perfectly capable of distinguishing federal and state law when it chose to do so.<sup>70</sup> The *Friendfinder* court also criticized how *Perfect 10*'s framed one of Section 230's goals as protecting the Internet from the divergences of state law. The *Friendfinder* court pointed out the actual language of Section 230 refers to protecting the Internet from "government regulation,"<sup>71</sup> with no particular emphasis on state law.<sup>72</sup> The *Friendfinder* court was particularly skeptical of the *Perfect 10* court's claim that state intellectual property laws are so diverse that they would pose a significant burden on online platforms attempting to comply with them.<sup>73</sup> The court pointed out that federal and state trademark and unfair competition laws coexist quite comfortably.<sup>74</sup> "This court has no reason to believe that reading § 230(e)(2) to exempt state intellectual property law would place any materially greater burden on service providers than they face by having to comply with federal intellectual property law,"<sup>75</sup> the court wrote.

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2d 409 (S.D.N.Y. 2001).

65. *Friendfinder Network, Inc.*, 540 F. Supp. 2d at 291–92.

66. *Id.*

67. *Id.* at 303.

68. *Id.* at 302–04. *See also* Jennifer E. Rothman, *New Hampshire*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, <https://www.rightofpublicityroadmap.com/law/new-hampshire> [<https://perma.cc/R778-UEZV>] (noting that federal courts "have treated New Hampshire's appropriation tort as a 'right of publicity'" and citing *Friendfinder*).

69. 47 U.S.C. § 230(e)(2) (emphasis added).

70. *Friendfinder Network, Inc.*, 540 F. Supp. 2d at 299–300.

71. 47 U.S.C. § 230(a)(4).

72. *Friendfinder Network, Inc.*, 540 F. Supp. 2d at 300.

73. *Id.* at 301.

74. *Id.*

75. *Id.*

In September of 2021, the right of publicity/Section 230 issue became a full-blown circuit split when the U.S. Court of Appeals for the Third Circuit published its opinion in *Hepp v. Facebook*.<sup>76</sup> In *Hepp*, an unconsented photograph of Karen Hepp, a television news personality, appeared on various online platforms.<sup>77</sup> The photo was used in Facebook ads and Reddit posts (linked to Imgur, an online photo-sharing app) that garnered indecent comments.<sup>78</sup> Hepp then sued the platforms for violating her publicity rights, including claims under both Pennsylvania’s statutory and common-law rights of publicity.<sup>79</sup> A federal district court dismissed the claims against the platforms, holding that they were immune under Section 230, which the court concluded excluded federal I.P. law, but not state I.P. law.<sup>80</sup>

The Third Circuit reversed, ruling that Section 230 did not protect Facebook, the only remaining defendant on appeal after Reddit and Imgur were dismissed from the case on jurisdictional grounds.<sup>81</sup> Facebook presented three arguments that the Section 230 I.P. exclusion should be read as not including state laws, all of which the Third Circuit rejected.

First, Facebook maintained that the statute’s structure suggested its preferred construction. Facebook argued that Section 230(e)’s exclusions referred only to federal law except where analogous state laws were coextensive with federal law.<sup>82</sup> The Third Circuit rejected this argument by pointing out that Section 230(e) made clear that when Congress wished to exempt state law, it did so explicitly.<sup>83</sup> Since the reference to intellectual property in the section did not mention state law at all (“any law pertaining to intellectual property”), “the text and structure [told the court] that § 230(e)(2) can apply to federal and state laws that pertain to intellectual property.”<sup>84</sup>

Next, Facebook argued that the motivation behind Section 230 was Congress’s desire to protect internet platforms from inconsistent state law regimes and thus broadly promote free-market values.<sup>85</sup> While the court agreed with the free-market characterization, that did not necessarily support Facebook’s position, the court reasoned.<sup>86</sup> On the contrary, various forms of property (including intellectual property) enable markets to function efficiently. As the Third Circuit put it: “Because state property rights can facilitate market

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76. 14 F.4th 204 (3d Cir. 2021).

77. *Id.* at 206–07.

78. *Id.*

79. *Id.* at 207.

80. *Id.*

81. *Id.* at 208, 212.

82. *Id.* at 210.

83. *Id.* at 211.

84. *Id.*

85. *Id.*

86. *Id.*

exchange, interpreting the § 230(e)(2) limitation to include intellectual property laws tracks Congress' pro-free-market goal."<sup>87</sup>

Facebook also argued that policy considerations—including the uncertainty about Section 230 protection if state law claims were excluded—should lead to its preferred interpretation of the statute.<sup>88</sup> The Third Circuit, however, rejected that approach, stating that “policy considerations cannot displace the text.”<sup>89</sup> Thus, the court held that Section 230's I.P. exclusion could not be read as referring only to federal intellectual property claims.

Given that interpretation, the Third Circuit next turned to whether Hepp's particular state statutory right of publicity claim was appropriately categorized as intellectual property. Following a strict textualist approach, the court embarked upon a survey of dictionaries to determine whether the right of publicity was mentioned as part of the definition of intellectual property. Although average dictionary definitions did not agree, the court found that critical legal dictionaries generally supported the notion that publicity rights pertained to intellectual property.<sup>90</sup> The court also pointed out that at least one dictionary that did not explicitly mention the right of publicity did refer to trademark law, which the court found to be analogous to the right of publicity.<sup>91</sup> The Third Circuit also cited the Supreme Court's opinion in *Zacchini v. Scripps-Howard Broadcasting Co.*,<sup>92</sup> in which the Court first wrestled with the publicity right and found that it was “‘closely analogous to . . . patent and copy-right’ because it focuses ‘on the right of the individual to reap the reward of his endeavors and [has] little to do with protecting feelings or reputation.’”<sup>93</sup> Thus, the right of publicity was appropriately categorized within Section 230's exclusion for intellectual property.<sup>94</sup>

The Third Circuit emphasized that the holding in *Hepp* was narrow. The court emphasized that the case at bar involved only commercial speech, thus obviating the threat to fully protected expression.<sup>95</sup> It also noted that Pennsylvania's statutory right of publicity—the subject of its holding—provides a right only for those plaintiffs who have worked to develop a “valuable image in their likeness.”<sup>96</sup> Moreover, the court stated that “we express no opinion as

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87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 213.

91. *Id.*

92. 433 U.S. 562 (1977).

93. *Hepp*, 14 F.4th at 213 (quoting *Zacchini*, 433 U.S. at 573).

94. *Id.* at 214. The court further held that the statutory language (“any law pertaining to intellectual property”), which included the language “any” and “pertaining to,” suggested that not just core intellectual property rights should be included, but rights that might be regarded as being at the periphery of that category. *Id.*

95. *Id.*

96. *Id.*

to whether other states’ right of publicity qualify as intellectual property as a matter of federal law.”<sup>97</sup>

#### IV. THE PROBLEMS WITH PUBLICITY RIGHTS AS INTELLECTUAL PROPERTY

The Third Circuit in *Hepp* determined that the right of publicity was appropriately categorized as intellectual property using the standard textualist playbook, including what has been called “the battle of the dictionaries.”<sup>98</sup> The Third Circuit spent an almost comedic portion of its opinion analyzing whether various dictionaries included publicity rights in their definitions of I.P., whether legal dictionaries differed from nonspecialized dictionaries, which dictionaries should be granted precedence, and the like.<sup>99</sup> Yet a deeper look at how the theoretical justifications for the publicity right diverge from other I.P. rights, the disarray and contradictions in state publicity law, and the practical administrative difficulties in carrying out a Section 230 regime in which publicity rights were treated as I.P., suggests a different and more thoughtful way of interpreting the statute. The following subsections explore those issues.

##### A. *Theoretical Justifications for the Right of Publicity are Weak*

Intellectual property rights are monopolies, which are typically granted only for very sound reasons. The core intellectual property rights granted under federal law, patent and copyright, have strong theoretical justifications that prioritize how they contribute to the public good, not the private well-being or wealth of the creator. The Copyright and Patent Clause of the U.S. Constitution emphasizes that connection when it grants Congress the 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.”<sup>100</sup> The I.P. system creates a federal monopoly that acts as an incentive to creation for the public good in both the case of copyright and patent—because of the monopoly, creators are incentivized to create valuable inventions (patent) and literary and artistic works (copyright) that will redound to the benefit of the entire society. That public benefit occurs both in the short term, as valuable inventions and works become available at a price set by the creator, and in the long term, as patented inventions and copyrighted works fall into the public domain and are available for free to all.<sup>101</sup> Unlike those of

97. *Id.*

98. Shirley S. Abrahamson & Michael E. Ahrens, *The Legacy of Hans Linde in the Statutory and Administrative Age*, 43 WILLAMETTE L. REV. 175, 187 (2007). For a critique of dictionary use in legal interpretation, see Jason Weinstein, *Against Dictionaries: Using Analogical Reasoning to Achieve a More Restrained Textualism*, 38 U. MICH. J.L. REFORM 649 (2005). For a general view of textualism, see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

99. *Hepp*, 14 F.4th at 212–13.

100. U.S. CONST. art. I, § 8, cl. 8.

101. For an excellent overview of the public domain, see Tyler T. Ochoa, *Origins and*

patent and copyright, the theoretical justifications for the right of publicity are weak. It is beyond the scope of this work to explore all of these justifications and their critiques, so this article will focus primarily on the incentive rationale.

The right of publicity arguably confers no similar public benefits, nor does the law need to incentivize the creation of celebrity personae. As one thoughtful analysis noted, “[s]ociety doesn’t need to encourage more celebrities or more marketing of celebrity image.”<sup>102</sup> The commodification of celebrity image contributes very little, if any, value to society.<sup>103</sup> In the age of TikTok, YouTube, and what has been called “a constant, rapid-fire turnover of those enjoying the Warholian fifteen minutes of fame,”<sup>104</sup> the last thing the law needs to do is encourage the creation of marketable celebrity personae, particularly when doing so limits the expressive possibilities of a rich public domain. The argument here is not that celebrity images never have value. For just one example among many, legal scholar Roberta Rosenthal Kwall has pointed out “the urban gay community’s adoption of Judy Garland’s image as a powerful means of self-expression in the 1950s.”<sup>105</sup> Instead, the argument suggests that exclusive legal rights to such images have little or no public benefit. Moreover, such legal incentives would seem to have virtually no marginal effect even if it were presumed that expansive rights in celebrity image were a valuable commodity. As one commentator put it:

Not a shred of empirical data exists to show that anyone would change her behavior with regard to her primary activity—that is, that a person would invest less energy and talent in becoming a sports star or entertainer or great civic figure—if she knew in advance that, after achieving fame, she would be unable to capture licensing fees from putting her face on sweatshirts or coffee mugs.<sup>106</sup>

Since most celebrities achieve enviable incomes through their main professional activity, the right of publicity as “incentive to creation” (as in copyright and patent) seems inapt, even assuming that the production of celebrity image is a desirable social good (a dubious assumption indeed). As one federal court, surveying publicity rights in the context of baseball cards, stated, “it is unlikely

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*Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215 (2003).

102. Dogan & Lemley, *supra* note 44, at 1164.

103. For a theoretical approach that argues for an autonomy-based justification for the right of publicity, see Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383 (1999).

104. Matthew D. Bunker, *Free Speech Meets the Publicity Tort: Transformative Use Analysis in Right of Publicity Law*, 13 COMM. L. & POL’Y 301, 312 (2008).

105. Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 3 (1997).

106. Diane Leenheer Zimmerman, *Fitting Publicity Rights Into Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long!*, 10 DEPAUL-LCA J. ART & ENT. L. 283, 306 (2000).

that little leaguers will stop dreaming of the big leagues or major leaguers will start ‘dogging it’ to first base” if publicity rights were limited.<sup>107</sup>

It thus appears that the right of publicity lacks the fundamental theoretical justification that undergirds other core intellectual property rights—a government-granted monopoly as an incentive for creators to provide a significant public benefit. Trademark law, which also lacks the incentive rationale since there is no need to incentivize the creation of new trademarks, is still supported by the justification that 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.<sup>108</sup> Trademark “allows consumers to become repeat customers and inform other consumers of their good experience; conversely, it allows consumers to *not* repeat their business and to inform others of a bad experience. Trademarks therefore reduce transaction costs and incentivize quality goods.”<sup>109</sup> The publicity right produces no such benefits. As the Restatement of Unfair Competition explains: “The rationales underlying recognition of a right of publicity are generally less compelling than those that justify rights in trademarks or trade secrets.”<sup>110</sup>

Beyond the incentive theory, which utterly fails as a justification for treating the right of publicity as on par with copyright or patent, other theoretical justifications for the publicity right have serious difficulties.<sup>111</sup> A version of Lockean labor theory<sup>112</sup> claims that because celebrities exert efforts to build their personae, they should therefore be rewarded with any monetary proceeds that result. The Lockean approach has endured withering scholarly criticism, particularly focusing on the idea that most celebrities do not in fact craft their public personae at all; public images most frequently arise due to the joint efforts of the media and the public to create images of celebrities. A significant amount of fame and celebrity is the result of mere fortuity rather than painstaking effort.<sup>113</sup> The uncontrollable and capricious nature of fame strongly suggests that the right of publicity, as one thoughtful analysis put it, does not

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107. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 974 (10th Cir. 1996).

108. See MARY LAFRANCE, *UNDERSTANDING TRADEMARK LAW* 1 (2d ed. 2009).

109. Daniel Gervais & Martin L. Holmes, *Fame, Property, and Identity: The Scope and Purpose of the Right of Publicity*, 25 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 181, 201–02 (2014).

110. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c. (AM. L. INST. 1995).

111. For cogent critiques of the standard justifications, see Dogan & Lemley, *supra* note 44, at 1180–90; David Westfall & David Landau, *Publicity Rights as Property Rights*, 23 *CARDOZO ARTS & ENT. L.J.* 71, 117–23 (2005).

112. See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 18–30 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690).

113. JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 107–08 (2018). See also Madow, *supra* note 45, at 182–96 (arguing that the idea “that a star’s public image is nothing else than congealed star labor is the folklore of celebrity, the bedtime story the celebrity industry prefers to tell us, and perhaps, itself.”).

involve “intellectual or creative works of the human intellect,” as trademark, copyright, and patent law do.<sup>114</sup>

In any event, the Lockean approach is out of step with our understandings of core I.P rights in U.S. law. In copyright, as the Supreme Court put it in its influential 1991 decision in *Feist Publications, Inc. v. Rural Telephone Services Co.*, “[t]he primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’”<sup>115</sup> What the Court has called the “sweat of the brow” theory in copyright is not tenable.<sup>116</sup> With its promise of public benefit from the creation of original works, the incentive theory is the constitutional paradigm. Thus, any attempt to justify the right of publicity in Lockean terms is problematic in multiple ways.

Even assuming the notion that celebrities are the purposeful and sole creators of their personae, legal analogies can cut both ways. At some level of abstraction, crafting a persona—a public representation of oneself that creates good will and a desirable public image—is not that different than building a good reputation, the subject of defamation law.<sup>117</sup> And defamation law is the absolute paradigm case of Section 230 immunity for online platforms. Aside from the commercial aspects of publicity rights, such as transferability and descendibility, there are certainly some interesting parallels with the law of defamation, which is why the two claims are not infrequently brought together in the same lawsuit based on the same conduct.<sup>118</sup> The close connection between the two causes of action was recognized in a 2015 amicus brief dealing with the right of publicity and Section 230. There, the Electronic Frontier Foundation argued that if right of publicity claims “[were] allowed to evade Section 230 it would gut the central purpose of the law. Every defamation plaintiff could replead his or her case as a right of publicity action and force service providers to endure expensive litigation.”<sup>119</sup> Strikingly, the district court in the *Hepp* case noted that Ms. Hepp’s *own complaint* alleged that “Defendants’ actions with respect to [her] image have caused serious, permanent, and irreparable harm” to “Plaintiff’s *reputation*, brand, and image.”<sup>120</sup> Harm to reputation is the essence of defamation law. Publicity rights, which are close conceptually to the

114. Brief for Electronic Frontier Foundation et al. as Amici Curiae Supporting Appellant at 18, *Cross v. Facebook, Inc.*, 222 Cal. Rptr. 3d 250 (2017) (No. A148623).

115. *Feist Publ’ns, Inc. v. Rural Tele. Serv. Co., Inc.*, 499 U.S. 340, 349 (1991) (QUOTING U.S. CONST. art. I, § 8, cl. 8.).

116. *Id.* at 353.

117. Courts sometimes even use terminology reminiscent of defamation in referring to appropriation and publicity rights, as when the *Doe v. Friendfinder Network, Inc.* court wrote about the defendant taking advantage of the plaintiff’s “reputation and prestige” in appropriating her identity. 540 F. Supp. 2d 288, 303 n.17 (D.N.H. 2008) (quoting *Rensburg v. Docusearch, Inc.*, 816 A.2d 1001 (N.H. 2003)).

118. *See, e.g., Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003).

119. Brief for Electronic Frontier Foundation et al., *supra* note 114, at 16.

120. *Hepp v. Facebook, Inc.*, 476 F. Supp. 3d 81, 84 (E.D. Pa. 2020) (emphasis added).

law of defamation, therefore look even less like copyright or patent, the kind of rights legitimately exempted from Section 230.

B. *The Right of Publicity’s History and Current Disarray Make it an Unlikely Candidate for the Designation “Intellectual Property”*

As noted earlier, the right of publicity emerged from privacy law. However, that “emergence” is a bit illusory, since the privacy-based appropriation tort and the right of publicity are frequently all but identical in state law.<sup>121</sup> For example, in the *Almeida* case, discussed earlier, the Eleventh Circuit both identified publicity rights as a form of intellectual property and simultaneously acknowledged that publicity rights and the common-law appropriation tort are “substantially identical.”<sup>122</sup> One would think there would need to be a significant break with its privacy-based cousin to justify the assertion that the right of publicity belongs to an entirely different legal genus.

Similarly, in a widely discussed Missouri case, *Doe v. TCI Cablevision*,<sup>123</sup> the Missouri Supreme Court in 2003 cataloged the relatively minuscule differences between the two actions in that state.<sup>124</sup> In *TCI Cablevision*, Tony Twist, a professional hockey player, sued the creator of the comic book *Spawn* for naming an evil Mafia don in the series “Tony Twist.”<sup>125</sup> The real-life Twist filed suit in Missouri state court, claiming both defamation and a violation of the privacy-based appropriation tort (in Missouri, referred to as “misappropriation”).<sup>126</sup> After a state appellate court overturned a jury verdict of \$24,500,000, the Missouri Supreme Court reversed.<sup>127</sup>

Because Twist’s original claim at trial sounded in privacy law, the Missouri high court explained that while misappropriation allowed damages for

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121. Joshua L. Simmons & Miranda D. Means, *Split Personality: Constructing a Coherent Right of Publicity Statute*, A.B.A.: LANDSLIDE, [https://www.americanbar.org/groups/intellectual\\_property\\_law/publications/landslide/2017-18/may-june/split-personality](https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2017-18/may-june/split-personality) [<https://perma.cc/RVN7-T452>]. As Simmons and Means put it, “many states struggled to adopt a strong, consistent theory of why the [publicity] right exists and what it should be designed to protect.” *Id.* They note that “[t]his failure has resulted in a kind of cognitive dissonance, such as when the right of publicity is called both a ‘privacy right’ (neither descendible nor transferable) and ‘property right’ (both descendible and transferable), often interchangeably.” *Id.*

122. *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1328 n.1 (11th Cir. 2006).

123. 110 S.W.3d 363 (Mo. 2003).

124. *See also* *Rosa & Raymond Parks Inst. for Self Dev. v. Target Corp.*, 812 F.3d 824, 829–30 (11th Cir. 2016) (characterizing Michigan’s right of publicity as part of common-law privacy right of appropriation).

125. *TCI Cablevision*, 110 S.W.3d at 365.

126. *Id.* at 365. The defamation claim was dismissed for the intriguing reason that the comic book character did not identify the real-life Twist. *Id.* For more on this odd twist, see Matthew D. Bunker & Emily Erickson, *Plaintiff Identification in the “Persona Torts”: What Defamation Law Can Offer the Right of Publicity and Related Claims*, 23 COMM’N. L. & POL’Y 301, 313–14 (2018).

127. *TCI Cablevision*, 110 S.W.3d at 365, 376.

dignitary harms to the individual, the “*separate yet similar* tort termed the ‘right of publicity’ . . . is said to ‘protect a person from losing the benefit of their [*sic*] work in creating a publicly recognizable persona.’”<sup>128</sup> As a result, the court explained, the damages obtainable under each tort were slightly different: Misappropriation was intended to protect the plaintiff’s feelings, and thus allowed for damages for mental distress, as well as pecuniary damages.<sup>129</sup> The right of publicity similarly allowed for the plaintiff’s pecuniary damages, but also allowed for damages based on the defendant’s unjust pecuniary gain.<sup>130</sup> Because of these relatively small differences in the measure of damages, and because Twist had sought only pecuniary damages at trial, “Twist’s case, though brought as a misappropriation of name action, is more precisely labeled a right of publicity action.”<sup>131</sup>

The Missouri Supreme Court went on to note that “[d]espite the differences in the type[] of damages that may be recovered, *the elements of the two torts are essentially the same.*”<sup>132</sup> Strikingly, the court held that, barring a few minor technical differences, the torts were equivalent. Thus, the court could analyze Twist’s claim—brought in the trial court as misappropriation and presented to the jury in that manner—under the rubric “right of publicity” on appeal without losing a step. The high court noted that it could even apply prior misappropriation precedents to the right of publicity claim.<sup>133</sup> The analysis in *Almeida* and *TCI Cablevision* suggests several questions: If the right of publicity has evolved so little from its privacy roots, how does it suddenly transmogrify into an entirely different legal category for purposes of Section 230? Is it enough that it is an intangible right or that some judges and legal dictionaries call publicity rights a form of I.P.? How can what is fundamentally the same action fall into two entirely distinct legal categories, one of which is encompassed by Section 230, the other of which is exempted? Far from being a distant cousin of appropriation, the right of publicity is, at least in some states, appropriation’s virtual twin. Further illustrating this bizarre duality, an empirical study of Section 230 immunity in 2010 found that courts have used Section 230 to shield online platforms from misappropriation claims.<sup>134</sup> And there

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128. *TCI Cablevision*, 110 S.W.3d at 368 (emphasis added) (quoting *Bear Foot, Inc. v. Chandler*, 965 S.W.2d 386, 389 (Mo. Ct. App. 1998)).

129. *TCI Cablevision*, 110 S.W.3d at 368.

130. *Id.*

131. *Id.* at 368.

132. *Id.* at 368. (emphasis added). The court went to say: “To establish the misappropriation tort, the plaintiff must prove that the defendant used the plaintiff’s name without consent to obtain some advantage. In a right of publicity action, the plaintiff must prove the same elements . . . with the minor exception that the plaintiff must prove that the defendant used the name to obtain a *commercial* advantage.” *Id.* at 368–69 (citations omitted).

133. *Id.* at 369.

134. David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of*

would be absolutely no reason that courts would not continue that practice, since the privacy torts are not regarded as “intellectual property.”

Ironically, in the landmark *Zacchini* case that constituted the Supreme Court’s first recognition of the right of publicity, the Court mischaracterized the state law claim involved. The Court was empowered to decide whether the First Amendment protected the news station from liability to the Human Cannonball, but it was not empowered to alter the state law claim on which his suit was based. As Professor Jennifer E. Rothman has pointed out in an astute analysis, the Ohio Supreme Court characterized *Zacchini*’s action as a form of the appropriation tort under privacy law, noting that *Zacchini*’s version of the appropriation tort was referred to as the right of publicity.<sup>135</sup> On appeal, although the Court was legally bound to respect the state law characterization of the action:

[T]he U.S. Supreme Court described the right as a distinct species of IP that protected quite different interests than privacy law did. This view by the Supreme Court had no binding effect on how Ohio courts understood the right, but it had a dramatic effect nationwide by shoring up and reifying a distinction between the right of publicity and the right of privacy . . . .<sup>136</sup>

The right of publicity cannot simultaneously be both a form of intellectual property and a tortious invasion of privacy. Legal categories cannot be that porous, particularly where crucial free expression rights are implicated through the application of Section 230. That should be the case regardless of what Black’s Law Dictionary might say.

### C. *A Lack of Section 230 Protection Creates Serious Practical Policy Issues*

The Third Circuit dismissed the “parade of horrors” offered by an amicus brief in *Hepp*, which suggested that platform liability for publicity rights could cause major harm to free expression online.<sup>137</sup> Nonetheless, subjecting online platforms to liability for publicity rights violations creates enormous practical problems. One such problem is the almost insurmountable difficulty of identifying publicity violations across the range of state law iterations of the right, which exists in wildly varying forms in state law. Scholar Jennifer E. Rothman, in an excellent book-length study of publicity rights, notes that:

Some states limit their right of publicity to uses in advertising or in connection with products or services, or on merchandising, while other states allow claims arising out of virtually any use of a person’s identity, including uses in news, movies, books, video games, and political campaigns. Some states allow only those who are residents (domiciled) in the state (or were at the time of

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*Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 *Lox. L.A. L. REV.* 373, 452 (2010).

135. *Zacchini v. Scripps-Howard Broadcasting, Inc.*, 47 Ohio St. 2d 224, 229–30 (1976).

136. ROTHMAN, *supra* note 113, at 78.

137. *Hepp v. Facebook, Inc.*, 14 F.4th 205, 211 (3d. Cir. 2021).

death) to bring claims. Others allow anyone to sue. Some states limit claims to those with commercially valuable identities, while others do not . . . . Some states limit right of publicity actions to the living, while others allow heirs to bring claims on the basis of uses of a deceased person's identity.<sup>138</sup>

From the perspective of an online platform, such as a social media site, the Babelian nature of publicity rights would seem to make monitoring third-party content for violations an enormously daunting task. Moreover, platform liability for publicity violations under Section 230 would encourage forum shopping by plaintiffs seeking the most favorable state legal regime—thus subjecting platforms to the most restrictive version of the publicity right.<sup>139</sup> The level of legal uncertainty, as Judge Robert Cowen explained in a concurrence and dissent in *Hepp*, is such that even after the *Hepp* majority decision:

Facebook does not even know whether Hepp's common law right of publicity claim falls under [the Section 230 I.P. exception]. Such uncertainty as well as the probability of additional litigation in the future together with the real possibility of being held liable under disparate and often very expansive state law 'intellectual property' regimes would encourage internet service providers to censor more content . . . .<sup>140</sup>

Uncertain legal rights have the potential to encourage platforms to place more rigorous limits on user content.

Comparing the publicity right with the two core I.P. rights most likely to generate litigation against online intermediaries—copyright and trademark—also reveals a disturbing discrepancy. As to copyright, online platforms do in fact face copyright infringement claims with no protection from Section 230. On the other hand, as noted earlier, such platforms receive significant protection via the “safe harbor” of the Digital Millennium Copyright Act (DMCA), which protects platforms from copyright liability unless they have knowledge of the potentially infringing content and fail to take it down in an expeditious manner.<sup>141</sup> As one court put it, under the DMCA: “Congress has determined that the burden of identifying what must be taken down is to be on the *copyright owner*, a determination which has proven predictable in practice.”<sup>142</sup>

Likewise, in trademark law, courts have provided similar protection for platforms through the use of trademark liability doctrines. In the landmark case of *Tiffany (NJ) Inc. v. eBay Inc.*,<sup>143</sup> the Second Circuit in 2010 protected eBay, which had undertaken substantial anti-counterfeiting measures, from both direct and contributory liability for trademark infringement on its site

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138. ROTHMAN, *supra* note 113 at 3.

139. Barrett v. Rosenthal, 146 P.3d 510, 525–26 (Cal. 2006).

140. *Hepp*, 14 F.4th at 225 (3d Cir. 2021) (Cowen, J., concurring and dissenting).

141. 17 U.S.C. § 512(c).

142. Viacom Int'l Inc. v. YouTube, Inc., 940 F. Supp. 2d 110, 115 (S.D.N.Y. 2013) (emphasis added).

143. 600 F.3d 93 (2d Cir. 2010).

in connection with counterfeit Tiffany goods. The Second Circuit held that, as to direct liability, eBay’s use of Tiffany’s trademarks was protected by the nominative fair use doctrine, which permits third parties to use a producer’s trademark in order to identify that producer’s goods or services, as long as it is done without creating a “likelihood of confusion about the source of [the] defendant’s product or the mark-holder’s sponsorship or affiliation.”<sup>144</sup> On the contributory infringement claim, the Second Circuit held that since eBay routinely removed listings when notified that the goods offered were counterfeit, Tiffany would have to prove eBay’s specific knowledge of infringing listing beyond those that it had been notified about, rather than just its “generalized” knowledge of infringing activities on its site.<sup>145</sup> The upshot of the *eBay* case, as one analysis put it, is that platforms have quite similar protections in trademark as that provided by the DMCA in copyright: “While the DMCA does not apply to trademark infringement, similar principles have been applied in the United States based on contributory and vicarious liability so that the legal framework applying to the liability of e-commerce platforms for copyright and trademark infringement can be considered to be globally the same.”<sup>146</sup>

Thus, paradoxically, platforms receive at least some degree of protection from claims based on the best theoretically justified and most socially valuable forms of I.P. (copyright and trademark), as long as the platform is not provided with specific notice of the alleged violation, while receiving no such protection against the most suspect form of I.P. (the right of publicity). There is no notice-and-takedown procedure for publicity claims. While there is certainly no legal principle that requires all such claims to be treated similarly, this profound discrepancy should at least suggest that publicity claims are a less viable candidate for inclusion in the I.P. rubric of Section 230.

Beyond these issues, the base level of complexity in identifying specific infringements of publicity rights is enormous. Publicity rights used to encompass such relatively simple attributes as the name or likeness of a celebrity. For top-tier celebrities, whose names and visages are universally known, an online platform—say, a social media site—could perhaps reasonably hope to identify many infringements of this sort contained in user-generated content. However, in recent decades, as the “evocation” approach to celebrity personae has been ascendant, the relative simplicity of name and likeness has vanished in a number of states, including in California with its outsized celebrity

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144. *Id.* at 102 (quoting *Merck & Co. v. Megiplan Health Consulting, Inc.*, 425 F. Supp. 2d 402, 413 (S.D.N.Y. 2006)).

145. *Id.* at 107.

146. Béatrice Martinet & Reinhard J. Oertli, *Liability of E-Commerce Platforms for Copyright and Trademark Infringement: A World Tour*, A.B.A.: LANDSLIDE (2015), [https://www.americanbar.org/groups/intellectual\\_property\\_law/publications/landslide/2014-15/may-june/liability-e-commerce-platforms-copyright-trademark-infringement-world-tour/](https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2014-15/may-june/liability-e-commerce-platforms-copyright-trademark-infringement-world-tour/) [https://perma.cc/PF4D-DUFG].

industry. Now the publicity right, as legal scholar David Tan has pointed out, often “extends to a person’s nickname, signature, physical pose, characterization, singing style, vocal characteristics, body parts, frequently used phrases, car, performance style, mannerisms, and gestures, provided that these are distinctive and publicly identified with the person claiming the right.”<sup>147</sup> Moreover, in some states, plaintiffs who have no fame or notoriety at all can bring publicity claims.<sup>148</sup> The incredible complexity of even spotting a potential infringement from amongst a blizzard of third-party content seems formidable.

Unlike copyright, in which there is a “work” that is capable of being identified (a song, a book, a film, a video game), or trademark, which consists of a specific “word, name, symbol, or device,”<sup>149</sup> with the super-sized right of publicity, there is simply no *there* there. Instead, there is a vast web of possible allusions and associations that may or may not sufficiently evoke a potential plaintiff, who may or may not be widely known. For example, in one of the most thoroughly criticized applications of the “evocation” approach, the Ninth Circuit held in *White v. Samsung Electronics America, Inc.*,<sup>150</sup> that a robot, arrayed in gown, blonde wig, and jewels, sufficiently evoked celebrity presenter Vanna White since the robot was posed next to a replica of the *Wheel of Fortune* game board. Since the ad was set in the (then-distant) future, the most reasonable interpretation was that the robot was being presented in the ad as White’s successor on the game show, not White herself. The majority’s finding that the robot identified White led to a strong dissent in a later proceeding denying *en banc* review by Judge Alex Kozinski, who was deeply concerned about this broad conception of the publicity right: “[T]he panel majority erects a property right of remarkable and dangerous breadth: Under the majority’s opinion, it’s now a tort for advertisers to *remind* the public of a celebrity.”<sup>151</sup>

The upshot of these conflicts in state law, as well as the extravagantly broad reach of some states’ publicity regimes, is that, as a practical matter,

147. David Tan, *Much Ado About Evocation: A Cultural Analysis of “Well-Knownness” and the Right of Publicity*, 28 CARDOZO ARTS & ENT. L.J. 317, 322 (2010).

148. ROTHMAN, *supra* note 113 at 3.

149. 15 U.S.C. § 1127. On the more limited nature of trademark vis-à-vis the right of publicity, see *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915 (6th Cir. 2003). In this case, the 6th Circuit held in a trademark claim by golfer Tiger Woods against sports artist who painted images of Woods that trademark requires a specific image that functions as a trademark by distinguishing one person’s goods from those of others, as opposed to *all* images of the person. *Id.* at 922. As the court describes it, “ETW claims protection under the Lanham Act for any and all images of Tiger Woods. This is an untenable claim. ETW asks us, in effect, to constitute Woods himself as a walking, talking trademark. Images and likenesses of Woods are not protectable as a trademark because they do not perform the trademark function of designation . . . They cannot function as a trademark because there are undoubtedly thousands of images and likenesses of Woods . . . *Id.*”

150. 971 F.2d 1395 (9th Cir. 1992).

151. *White v. Samsung Electronics of America*, 989 F.2d 1512, 1514 (9th Cir. 1993) (Kozinski, J., dissenting).

online platforms will be faced with the Sisyphean task of attempting to even identify *potential* infringements. The *Hepp* majority’s facile rejection of this problem notwithstanding, it is a reality that must be considered, particularly given Section 230’s underlying mandate to protect online intermediaries from excessive legal entanglements as a way to encourage the free exchange of ideas.

### CONCLUSION

The protections of Section 230, although under some political threat at the time of this writing, continue to be an extremely valuable adjunct to the First Amendment in protecting free expression online. Without these protections, it is quite likely that online platforms would have to place much more stringent limits on user-generated content. And that, of course, would reduce the degree to which users could engage in the important debates of the day online.

Although *Hepp* may not have “broken the Internet,” the threat to free expression, particularly if that precedent is expanded nationally, is very real. This article has attempted to demonstrate that there are significant objections to treating the right of publicity, an amorphous right with no clear public benefit, as an intellectual property right and thus excluded from the immunity offered by Section 230. The strictly textualist approach of the *Hepp* court in 2021, with its battle of the dictionaries approach, seems to miss important nuances. “Intellectual property” is a modern umbrella term found nowhere in the Constitution and only rarely in federal court opinions until quite recently.<sup>152</sup> Thus, there is at least some ambiguity associated with the term. Moreover, even strict textualists are willing to consider factors outside the statutory text under the right circumstances. For example, Justice Antonin Scalia, by far the most important figure in the textualist movement in the federal courts,<sup>153</sup> freely admitted that interpretation of a statute may be influenced by the statutory purpose and that textual ambiguities may be properly resolved based upon that purpose.<sup>154</sup> Since the purpose of Section 230 includes advancing the development of the internet to provide opportunities for “political discourse,” “cultural development,” “myriad avenues for intellectual activity”<sup>155</sup> by extricating online intermediaries from many speech-related tort claims against their users, and since the publicity right looks less like copyright or patent and more

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152. For an interesting analysis of the rise of the term (and the problems associated with it), see Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 *Tex. L. Rev.* 1031, 1033–40 (2005). On a light note, Lemley quips that the term I.P. “is sexy: practitioners in the field will tell you that their stock at cocktail parties went up immeasurably when they began to tell people they ‘did intellectual property’ rather than that they were ‘patent lawyers.’” *Id.* at 1034.

153. See, e.g., Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 *Geo. Wash. L. Rev.* 857 (2017).

154. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012).

155. 47 U.S.C. § 230 (a)(3).

like the privacy tort of appropriation, it could be a perfectly acceptable textualist move to decline to include the right of publicity within I.P. for purposes of the statute. Of course, applying a more purposive approach to statutory interpretation,<sup>156</sup> that conclusion could be reached even more easily given the serious issues discussed in this work.

Although this article has been primarily critical of *Hepp*, it should be noted that the *Hepp* majority's decision was at least a narrow one that explicitly only included publicity rights invaded by commercial speech as part of the Section 230 exclusion. This is a helpful limitation on the breadth of the court's holding, since the right of publicity is at its most dangerous when it moves beyond simple false endorsement claims and enters the realm of expressive works such as books, songs, films, video games, and the like. It is in these scenarios in particular that, as one thoughtful analysis put it recently, the publicity right's "jagged and unpredictable reach chills speech in extensive and immeasurable ways."<sup>157</sup> The court also expressly noted that it was not holding that all state laws bearing the name "right of publicity" were necessarily excluded from Section 230's coverage, which leaves some room for more nuanced treatment of the tort depending on its precise contours in a particular state. Of course, as noted earlier, these caveats also create considerably more legal uncertainty for online intermediaries.

At the end of the day, it makes little sense to regard publicity rights as a form of intellectual property for purposes of Section 230. Despite the expansionist rhetoric surrounding the term, courts should carefully examine the theoretical bankruptcy of the right of publicity, the disarray in state versions of the right, and the practical problems associated with making platforms responsible for policing third-party appropriations. These issues suggest that the publicity right is a poor fit for the Section 230 intellectual property exclusion.

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156. See, e.g., Tara Leigh Grove, *Which Textualism?*, 134 Harv. L. Rev. 265, 267–68 (2020) ("Purposivists contend that, given the complexity of the legislative process, Congress cannot be expected to put everything in the text, and judges should interpret a statute so as to fulfill its overall aims and goals.").

157. Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 Yale L.J. 86, 91 (2020).