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STRANGERS WITH OUR FACES: HOW THE COMMUNICATIONS DECENCY ACT CAN PREVENT RIGHT OF PUBLICITY STUNTS

*Ericka H. Spears**

I. INTRODUCTION

Ha Ha Ha!¹ Walking into your office, you are greeted by snickering co-workers. Worried that you have something stuck in your teeth, you quickly rush to the restroom where you are greeted by your best friend who says, “Wow, I really thought you told me everything, I didn’t know you were into swinging!” Thoroughly confused at this point, you ask, “What are you talking about?” She responds, “Everyone has seen you on AdultFriendFinder.com.” You have never heard of this website, let alone registered on it. After several minutes of awkward silence, your friend notices your utter confusion, and says, “Why don’t I show you what everyone is talking about.”

Ten minutes later, you are horrified to discover a profile featuring a digitally altered image of yourself, which you have never seen. The profile features your actual hometown, hair color, eye color, and height—enough information to lead anyone who knew you to believe that the profile was yours. However, this is where the similarities stop. The profile is filled with details about what you are looking for in a partner as well as your sexual habits and proclivities, none of which are true. If this was not enough, suddenly your office phone rings and your boss asks to speak with you. A sinking feeling settles in the pit of your stomach as you walk to his office.

“Fired!” Your world has suddenly been turned upside down. This morning you were an average employee, but now your reputation and career are ruined because a stranger used your image on an adult website. You try to recover from the damage this posting caused your commercial value by bringing a claim for misappropriation of the right of publicity, but the judge tells you that your claim is barred by a statute

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1. This hypothetical is based on the situations faced by the Plaintiffs in *Doe v. Friendfinder Network*, 540 F. Supp. 2d 288 (D.N.H. 2008) and *Carafano v. Metrosplash*, 339 F.3d 1119 (9th Cir. 2003). The Plaintiffs in both cases were women who had total strangers use their identity on websites and were then left to face the repercussions.

that protects the interests of operators and users of interactive computer services.²

Real plaintiffs have suffered this injustice, by being precluded from bringing right of publicity claims under Section 230 (§ 230) of the Communications Decency Act (CDA).³

This Comment examines the various approaches applied by federal circuits regarding whether the immunity from tort liability granted by § 230 to operators and users of interactive computer services⁴ that publish information provided by a third party applies to Internet content providers, such as Internet dating sites, facing liability for the tort of misappropriation of the right of publicity. Part II of this Comment discusses the history of both the Communications Decency Act and the state law of the right of publicity. Part III explores the current split among the federal circuits regarding whether § 230 permits state law claims for misappropriation of the right of publicity. Part IV argues right of publicity claims should be exempt from § 230 immunity based on the right of publicity's traditional characterization as an intellectual property claim, the strict statutory interpretation of § 230(e)(2), and the public policy interests of state law makers in developing right of publicity law and Congress in passing § 230. Finally, in Part V, this Comment joins the First Circuit in classifying the right of publicity as an intellectual property right exempt from CDA immunity.

II. HISTORICAL BACKGROUND

An overview of the CDA and an introduction to the right of publicity provide the background information necessary to fully understand the context in which courts interpret § 230. Subpart A of this Part discusses the policy considerations taken into account by Congress when passing § 230 of the CDA. Subpart B discusses the history and policy behind the right of publicity and how to bring a cause of action for the

2. 47 U.S.C. § 230(f)(2) (2006) (“The term ‘interactive computer service’ means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”). “Most courts have held that through these provisions, Congress granted interactive services of all types, including blogs, forums, and listservs, immunity from tort liability so long as the information is provided by a third party.” Citizen Media Law Project, *Immunity for Online Publishers Under the Communications Decency Act*, <http://www.citmedialaw.org/legal-guide/immunity-online-publishers-under-communications-decency-act> (last visited June 5, 2010).

3. 47 U.S.C. § 230(c)(1) (2006). “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.” *Id.*

4. *See id.*

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misappropriation of the right of publicity.

A. Legislative History of § 230 of the Communications Decency Act

The CDA was originally passed to regulate obscenity and indecency on the Internet.⁵ Section 230, which protects users and operators of interactive computer services from liability for content posted by third parties, was not part of the original Senate legislation, but was added in a conference with the House of Representatives.⁶ This provision was passed in part as a reaction to *Stratton Oakmont, Inc. v. Prodigy Services Co.*, a controversial New York Supreme Court decision which held that online service providers could be held liable for the speech of their users.⁷

An unidentified user of Prodigy's Money Talk bulletin board created a post which claimed that Stratton Oakmont, Inc., a securities investment banking firm and its president, committed fraudulent and criminal acts in connection with an initial public offering of stock.⁸ Stratton Oakmont sued Prodigy, arguing that Prodigy should be liable as the publisher of the defamatory material.⁹ Despite Prodigy's reliance on the district court's prior decision in *Cubby, Inc. v. CompuServe Inc.*,¹⁰ which found that an Internet service provider was not liable as a publisher for user-generated content, the court held that Prodigy was liable as the publisher of the content created by its users because it exercised editorial control over the messages on its bulletin boards.¹¹

5. Communications Decency Act, 47 U.S.C. §§ 560–61 (1996).

6. Tara E. Lynch, *Good Samaritan or Defamation Defender? Amending the Communications Decency Act to Correct the Misnomer of Section 230 . . . Without Expanding ISP Liability*, 19 SYRACUSE SCI. & TECH. L. REP. 1, 8 (2008). "The original Senate version of the CDA included only the prohibitions against and penalties for distributing obscene material over the Internet to minors, and did not include section 230, which was added by conference amendment in the House of Representatives." *Id.*

7. *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 509, § 230(c)(1), 110 Stat. 56 (codified as amended at 47 U.S.C. § 230 (c)(1) (2006)). "The amendment [Section 230], proposed by Representatives Chris Cox (R-CA) and Ron Wyden (D-CA), came as a direct response to the New York decisions *Cubby, Inc. v. CompuServe, Inc.* and *Stratton Oakmont, Inc. v. Prodigy Services*. Specifically, the amendment statutorily overruled the then-recent Stratton Oakmont decision, which had held an ISP could be held liable for defamatory material posted by its users." Lynch, *supra* note 6, at 8–9.

8. *Stratton Oakmont*, 1995 WL 323710, at *1.

9. *Id.*

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

11. *Stratton Oakmont*, 1995 WL 323710, at *4. The New York court found that Prodigy exercised editorial control over the messages on its bulletin boards in three ways: 1) posting Content Guidelines for users, 2) enforcing those guidelines through "Board Leaders" and 3) utilizing screening software designed to remove offensive language. *Id.* at *4–5.

The decision in *Stratton Oakmont* had a potential chilling effect, leaving “providers of interactive computer services with the choice of either monitoring and editing posts by third parties and therefore accepting some liability for the content of the postings, or not monitoring any posts by third parties no matter how objectionable the content, thereby avoiding liability.”¹² Congress acknowledged this dilemma motivated the creation of § 230,¹³ which states that “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.”¹⁴ Through this provision Congress granted most internet service providers immunity from liability for publishing false or defamatory material so long as it was provided by another party.¹⁵

Congress enacted § 230 for two basic policy reasons: to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material.¹⁶ The Fourth Circuit Court of Appeals addressed these policy concerns in *Zeran v. America Online, Inc.*, a case concerning the posting of offensive messages regarding the Oklahoma City Bombing on an America Online (AOL) bulletin board, and holding that AOL, as an internet service provider, was immune from liability under § 230.¹⁷ The Fourth Circuit addressed the chilling effect on speech that may result from holding internet service providers liable as publishers and expresses a fear that internet service providers “might choose to severely restrict the number and type of messages posted” in order to avoid being faced with potential liability for each message republished by their services.¹⁸ The court addressed the encouragement of voluntary monitoring for offensive material, noting that Congress enacted § 230’s broad immunity “to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online

12. Matthew Minora, Comment, *Rumor Has It That Non-Celebrity Gossip Website Operators are Overestimating Their Immunity Under the Communications Decency Act*, 17 COMMLAW CONSPLECTUS 821, 831 (2009).

13. Cybertelecom: Good Samaritan Reference 47 U.S.C. § 230, <http://www.cybertelecom.org/cda/samaritanref.htm> (last visited May 21, 2010).

14. 47 U.S.C. § 230(c)(1) (2006). “The term ‘information content provider’ means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” *Id.* § 230(f)(3).

15. See *Batzel v. Smith*, 333 F.3d 1018, 1026–27 (9th Cir. 2003). An “internet service provider” is “[a] business that offers Internet access through a subscriber’s phone line, usually charging the user for the time spent connected to the business’s server.” BLACK’S LAW DICTIONARY (8th ed. 2004).

16. See *Batzel*, 333 F.3d at 1026–30.

17. *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

18. *Id.* at 331.

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material.”¹⁹

Congress even codified its policy reasons for passing § 230 within the language of the statute itself. Section 230(b) states that:

It is the policy of the United States – (1) to promote the continued development of the Internet and other interactive computer services and other interactive media; (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation; (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.²⁰

In summary, in order to counteract the negative implications of the *Stratton Oakmont* decision, which held that online service providers could be held liable for the speech of their users, Congress enacted § 230 of the CDA. Congress had two goals in mind when immunizing users and operators of interactive computer services from liability for content posted by third parties: to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive material.

B. The Right of Publicity: Where Intellectual Property Law Meets Torts

The right of publicity is “a right inherent to everyone to control the commercial use of identity and persona and recover in court damages and the commercial value of an unpermitted taking.”²¹ The right of publicity shares aspects of property law and of tort law. From the plaintiff’s perspective, the right of publicity is intellectual property capable of being “licensed” and “trespassed upon.”²² However, from the defendant’s perspective, infringement on the right of publicity is a tort of unfair competition developed from the tort of privacy.²³

In order to understand how the right of publicity became a “mixture of personal rights, property rights, and rights under the law of unfair

19. *Id.*

20. 47 U.S.C. § 230(b) (2006).

21. 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2009).

22. *Id.* § 1:7.

23. *Id.*

competition,”²⁴ an exploration of its history and policy is necessary. This Subpart first discusses the historical development of the right of publicity from its origins in the right of privacy to its recognition as an independent doctrine. Second, this Subpart explores the public policy reasons for having a right of publicity in state law. Finally, this Subpart discusses the development of the cause of action for the misappropriation of the right of publicity.

1. Historical Development of Right of Publicity Law

The right of publicity, a state-created intellectual property right, is defined as “the inherent right of every human being to control the commercial use of his or her identity.”²⁵ This right developed within the domain of privacy law, specifically the right “to be let alone.”²⁶ However, the right “to be let alone” only applied in cases where anonymous persons saw their identities used without permission in widely circulated advertisements.²⁷ The right “to be let alone” did not directly address the issue of how celebrities could prevent the unauthorized commercial use of their image.²⁸ Therefore, the boundaries of the law of privacy were stretched when “famous plaintiffs” began to appear in court, arguing not that they wanted no one to commercialize their identity, but that they wanted the right to control when, where, and how their identity was used.²⁹

Finally, in 1953, Judge Jerome Frank recognized that the law needed an alternative view of the right to control the commercial use of one’s identity, and the new label, the “right of publicity,” was born in the case *Haelan Laboratories, Inc. v. Topps Chewing Gum*.³⁰ In *Haelan*, the plaintiff, a chewing gum distributor, who signed a contract with baseball players for an exclusive right to use their pictures on advertising, sued the defendant, claiming that the defendant invaded plaintiff’s exclusive

24. *Id.*

25. *Id.* § 1:3.

26. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

27. MCCARTHY, *supra* note 21, § 1:7.

28. *Id.* § 1:38. “Well known personalities . . . do not seek the ‘solitude and privacy’ which Brandeis and Warren sought to protect.” Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 203–04 (1954) (quoting Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890)). “Indeed, privacy is the one thing they do ‘not want, or need.’” *Id.* at 204 (quoting *Gautier v. Pro-Football*, 304 N.Y. 354, 361 (1952)). “[T]he well known personality does not wish to hide his light under a bushel of privacy, neither does he wish to have his name, photograph, and likeness reproduced and publicized without his consent or without remuneration to him.” *Id.*

29. See MCCARTHY, *supra* note 21, §§ 5:63 to 5:67.

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

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right to use the photographs by inducing the players to allow their image to be used on defendant's competing chewing gum.³¹ Judge Frank recognized that in addition to the right of privacy, persons have a "right of publicity" in their photographs, which in this case meant each baseball player's right to grant the exclusive privilege of publishing his picture.³²

The Supreme Court first addressed the right of publicity in *Zacchini v. Scripps-Howard Broadcasting Co.*, a case in which a performer brought an action against a television broadcasting company to recover damages allegedly suffered when the broadcasting company videotaped his entire performance and played the videotape on a television news program without his consent.³³ The Court held that "the First and Fourteenth Amendments do not immunize the [news] media [from civil liability] when they broadcast a performer's entire act without his consent," and that the Constitution does not prevent a state from requiring broadcasters to compensate performers.³⁴ The Court found that "the broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance," because "if the public can see the act free on television it will be less willing to pay to see it at the fair," and the broadcast "goes to the heart of petitioner's ability to earn a living as an entertainer."³⁵ Furthermore, the Court stated that protecting the petitioner's right of publicity "provides an economic incentive for him to make the investment required to produce a performance of interest to the public."³⁶ Though "entertainment, as well as news, enjoys First Amendment protection," and "entertainment itself can be important news," "neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized."³⁷ Therefore the court in *Zacchini* not only

31. *Id.* at 867.

32. *Id.* at 869.

33. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977). The plaintiff "perform[ed] a 15-second 'human cannonball' act in which he [was] shot from cannon into a net some 200 feet away." *Id.* at 562. The plaintiff asked a freelance reporter who attended the fair where he performed not to film the performance. The freelance reporter "returned the following day and filmed the entire act." *Id.* The resulting film clip was approximately 15 seconds long (the length of the performer's entire act) and was shown on the 11 o'clock news program that night. *Id.* The plaintiff then sued the broadcasting company in state court, alleging an "unlawful appropriation" of his "professional property." *Id.* This case is the only right of publicity case taken by the Supreme Court. Fred M. Weiler, *The Right of Publicity Gone Wrong: A Case for Privileged Appropriation of Identity*, 13 CARDOZO ARTS & ENT. L.J. 223, 232 (1994).

34. *Zacchini*, 433 U.S. at 575.

35. *Id.* at 575-76.

36. *Id.* at 576.

37. *Id.* at 578.

recognized the existence of the right of publicity, but also carved out the “newsworthy” exception to the right.³⁸

Currently, nineteen states recognize the right of publicity via statute,³⁹ and the right exists by common law in many states that have not legislatively defined the right.⁴⁰ The variations between state right of publicity laws have generated scholarly debate over whether a federal right of publicity statute would be beneficial.⁴¹ The Patent, Trademark and Copyright Section of the American Bar Association has occasionally explored federalization of the right of publicity. Due to parallels with trademark law, some have proposed that the proper place to create a federal right of publicity is within the federal trademark statute, commonly known as the Lanham Act.⁴² Nevertheless, efforts to federalize the right of publicity have broken down under the strains of competing interests.⁴³

2. Policy Justifications for the Right of Publicity

There are several policy justifications for having a right of publicity. First, there is a natural rights argument that “[e]ach and every human should be given control over the use of his or her identity” simply because it is his or her identity.⁴⁴ This view “posits that a right of publicity should be protected the same as any other property right,” meaning that “the identifiable aspects of a person’s identity or ‘persona’ should be legally recognized as the person’s ‘property,’ protectable against unpermitted commercial use.”⁴⁵ Closely related to the natural rights argument is the right of “autonomous self-definition,” which argues that “the right of publicity prevents unauthorized commercial

38. *Id.* at 574–75, 578 (stating that the right of publicity does not prevent the media from reporting “newsworthy facts” about the plaintiff’s act, but clarifying that the First and Fourteenth Amendments to the Constitution do not immunize the media when broadcasting a “performer’s entire act without his consent”).

39. MCCARTHY, *supra* note 21, § 6:8. The states that have recognized the right of publicity via statute are: CA, FL, IN, IL, KY, MA, NY, NE, NV, OH, OK, PA, RI, TN, TX, UT, VA, WA, and WI.

40. *Id.* The states in which the courts have recognized a common law right of publicity are: AZ, AL, CA, CT, FL, GA, HI, IL, KY, MI, MN, MO, NH, NJ, OH, PA, TX, UT, WV, and WI.

41. See Symposium, *Rights of Publicity: An In-Depth Analysis of the New Legislative Proposals to Congress*, 16 CARDOZO ARTS & ENT. L.J. 209 (1998).

42. *Id.* at 209–10. However, the Lanham Act may not be the optimal place for a federal right of publicity for the simple reason that causes of action under the Act are limited to some form of falsity, while infringement of the right of publicity involves no element of falsity. 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:14 (4th ed. 2010).

43. See Symposium, *supra* note 41, at 209–10.

44. MCCARTHY, *supra* note 21, § 2:1.

45. *Id.* § 2:2.

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uses of a person's identity that interfere with meanings and values that the public associates with that person."⁴⁶ In other words, people should have the right to control their identity because it's theirs, and because it belongs to them, they should have the right to control the way it is perceived by others.

There are also several economic policy reasons for having a right of publicity. The incentive justification suggests that certain persons should be given an economic incentive to engage in the socially beneficial activity of entering the public eye. Since a person must sacrifice some amount of privacy to be in the public eye, in return they should have the opportunity to gain from the marketable value of their identity.⁴⁷ There is also a micro-economic-based justification for a right of publicity, which recognizes the principle that "granting individuals exclusive rights to property is an effective way of allocating scarce resources."⁴⁸ Thus "granting a property right in a person's identity will result in the best and most efficient use of a person's name and likeness."⁴⁹ Lastly, there is the argument that the right of publicity can be justified by the need to prevent fraudulent business practices—namely falsity in business promotions such as product endorsements and product tie-ins.⁵⁰ This theory is based on the assumption that many commercial uses of a person's identity contain false representations regarding a person's endorsement of the product. Such misrepresentations injure the person featured in the endorsement by associating him or her with a product or service he or she does not actually support and injures the consuming public by misleading claims of endorsement.⁵¹

Because the right of publicity is based on a person's commercial value and many of the policy reasons behind the right focus on economic considerations, many right of publicity cases deal with

46. *Id.* § 2.9 (citing M.P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225 (2005)).

47. *Id.* § 2:6.

48. *Id.* § 2:7; Richard A. Posner, *John A. Sibley Lecture: The Right of Privacy*, 12 GA. L. REV. 393, 411 (1978) [hereinafter Posner, *Right of Privacy*]; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.3 (4th ed. 1992) [hereinafter POSNER, *ECONOMIC ANALYSIS*].

49. MCCARTHY, *supra* note 21, § 2:7. See also Posner, *Right of Privacy*, *supra* note 48, at 411; POSNER, *ECONOMIC ANALYSIS*, *supra* note 48, § 3.3.

50. MCCARTHY, *supra* note 21, § 2:8; Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1600 (1979).

51. MCCARTHY, *supra* note 21, § 2:8. The right of publicity is often invoked in the context of commercial speech when the appropriation of a celebrity likeness creates a false and misleading impression that the celebrity is endorsing a product. See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir.1992); see also *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

celebrities.⁵² In fact, while the majority view is that the right of publicity is an inherent right for everyone, including non-celebrities, a minority view concludes only “celebrities” have a right of publicity.⁵³ It has been argued that the right should only attach to those who “consciously seek pecuniary reward from the exploitation of the publicity value of their names and likenesses.”⁵⁴ Conversely, those who believe “everyone has a right of publicity” believe that “[w]hile a celebrity’s right of publicity will usually have a greater economic value than that of a non-celebrity, this governs only the amount of damages, not the very existence of the right.”⁵⁵ Many “courts use the commonsense rule that if a defendant uses [the] plaintiff’s personal identity for commercial purposes, then it will be presumed that plaintiff’s identity had commercial value.”⁵⁶

3. Bringing a Cause of Action for Misappropriation of the Right of Publicity

When the commercial interest in a person’s identity is infringed upon, the resulting claim for restitution is misappropriation of the right of publicity, a commercial tort of unfair competition.⁵⁷ In order to establish this cause of action, plaintiffs must prove (1) the validity of their right of publicity; and (2) that this right has been infringed upon by the defendant.⁵⁸

There are currently two tests used to establish this cause of action. Under common law, the plaintiff must prove the following elements: “(1) the defendant used plaintiff’s identity or persona; (2) the appropriation of the persona was for the defendant’s commercial advantage; (3) the plaintiff did not consent to the use [of his or her identity]; and (4) the use is likely to cause an injury to [the] plaintiff.”⁵⁹ Currently, however, more courts follow a two-pronged test, which requires the plaintiff to prove that: (1) the “[d]efendant, without permission, has used some aspect of identity or persona in such a way that plaintiff is identifiable from defendant’s use;” and (2)

52. MCCARTHY, *supra* note 21, § 4:2.

53. *Id.* §§ 4:15, 4:16.

54. *Id.* § 4:15.

55. *Id.* § 4:14.

56. *Id.* § 4:17.

57. *Id.* § 3:1.

58. *Id.* § 3:2 (citing *Prima v. Darden Rest., Inc.*, 78 F. Supp. 2d 337 (D.N.J. 2000)).

59. Thomas Phillip Boggess V, *Cause of Action for an Infringement on the Right of Publicity*, in 31 CAUSES OF ACTION 121, §§ 6–13 (2d ed. 2006). *See also* *Eastwood v. Super. Ct.*, 198 Cal. Rptr. 342 (Cal. Ct. App. 1983).

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“[d]efendant’s use is likely to cause damage to the commercial value of that persona.”⁶⁰

The first prong of the two-prong test has three sub-elements; the plaintiff must be able to prove that the defendant (1) without consent (2) used a characteristic of the plaintiff’s identity in a manner from which (3) plaintiff was identifiable.⁶¹ The first sub-element, whether the plaintiff consented to the defendant’s use of his or her image, is usually a straightforward issue easily determined by the courts.⁶² After lack of consent is established, a plaintiff must prove that some aspect of his or her identity was used.⁶³ Most right of publicity cases involve the use of a plaintiff’s distinguishable name, photograph, or likeness.⁶⁴ With respect to the third sub-element, the law has not yet developed a clear-cut definition of “identifiability”; although it is clear, the use of the plaintiff’s name, image, or likeness must be more than an incidental or coincidental similarity.⁶⁵

Plaintiffs must show that a defendant, without permission, used some aspect of their identity or persona in such a way that they are identifiable. Once this showing is made, plaintiffs must still demonstrate that the defendant used their persona for commercial or trade purposes in a manner that would likely cause damage to their commercial value.⁶⁶ A classic example of the use of an individual’s identity or persona for trade purposes is the use of the individual’s likeness to advertise the defendant’s goods or services.⁶⁷ Determining the commercial status of the defendant’s use often involves balancing the right of publicity against the broader right of free speech provided by

60. MCCARTHY, *supra* note 21, § 3:2.

61. *Id.*

62. Minora, *supra* note 12, at 855–56 (“On the whole, whether the plaintiff consented to the defendant’s use of his or her image is a clear-cut issue and easily determined by the trier of fact.”); Boggess, *supra* note 59, § 12 (“Typically, the issue as to whether there was consent is obvious.”).

63. MCCARTHY, *supra* note 21, § 4:46.

64. *See Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 292, 304 (D.N.H. 2008) (Image); *see also Ali v. Playgirl, Inc.* 447 F. Supp. 723 (S.D.N.Y. 1978) (Portrait); *Beverly v. Choices Women’s Med. Ctr. Inc.*, 587 N.E.2d 275, 278 (N.Y. 1981) (Image); *Henley v. Dillard Dep’t Stores*, 46 F. Supp. 2d 587, 594–95 (N.D. Tex. 1999) (Name).

65. *See Henley*, 46 F. Supp. 2d at 594–95 (“there are many ways a plaintiff can be identified in a defendant’s use” and plaintiff’s identifiability “will probably not be a disputable issue in the majority of meritorious [r]ight of [p]ublicity cases.” (citing 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 3:2 (1998))). *See also, e.g., Hooker v. Columbia Pictures Indus., Inc.*, 551 F. Supp. 1060, 1062 (N.D. Ill. 1982) (finding plaintiff not identified by the similarity in name between the plaintiff, a famous sculptor, and the defendant’s creation of the same name, a television character in a fictional police drama).

66. RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46, 49 (1995).

67. *Id.* § 47.

the First Amendment.⁶⁸ For instance, “the use of a person’s identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses” is not ordinarily an infringement of the right of publicity,⁶⁹ precluding a finding of commercial damage. Therefore, an individual’s right of publicity is often found to be more valuable than commercial speech and less valuable than informative or political speech.⁷⁰

The right of publicity blossomed as a separate legal theory when the right of privacy failed to protect celebrity plaintiffs. Today, the right of publicity is generally recognized as an intellectual property right belonging to everyone. The majority of states and the Supreme Court have recognized the right of publicity as a legitimate legal theory. There are several key public policy reasons for recognizing a person’s right of publicity. Everyone should have the right to protect their commercial identity and the way their identity is perceived by the public. Furthermore, those who sacrifice their privacy to be in the public eye should have the opportunity to gain from the marketable value of their identity and to allocate the use of their identity in the public to maintain its value. Allowing persons to protect and manage their commercial identity also limits the amount of fraudulent business practices in advertising and related fields. Today, if potential plaintiffs can prove that some aspect of their identity has been used without their permission in a way that is likely to cause damage to their commercial value, they

68. See Boggess, *supra* note 59, § 19. “The First Amendment of the U.S. Constitution protects certain types of speech. Of all the different areas of speech, ‘commercial speech’ has the lowest level of protection under the First Amendment.” *Id.* (citing *Pallas v. Crowley, Milner & Co.*, 33 N.W.2d 911 (Mich. 1948); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001)). “Any speech that has as its focus imploring the audience to buy a product or service is labeled commercial speech for First Amendment purposes.” *Id.* (citing *MCCARTHY*, *supra* note 21, §§ 7:3, 8:16, 8:18). “In cases where the speech is purely commercial, the right of publicity will often trump any free speech claim the defendant may make.” *Id.* (citing *Comedy III Prod., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001); *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)).

69. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995).

70. *Comedy III Prod., Inc. v. Saderup, Inc.*, 21 P.3d 797, 807 (Cal. 2001).

[T]he right of publicity cannot, consistent with the First Amendment, be a right to control the celebrity’s image by censoring disagreeable portrayals. Once the celebrity thrusts himself or herself forward into the limelight, the First Amendment dictates that the right to comment on, parody, lampoon, and make other expressive uses of the celebrity image must be given broad scope. The necessary implication of this observation is that the right of publicity is essentially an economic right. What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity’s fame through the merchandising of the ‘name, voice, signature, photograph, or likeness’ of the celebrity.

Id.

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will have a valid cause of action. The existence of the right of publicity cause of action gives potential plaintiffs a chance to manage their identity in the eyes of the public and to protect themselves from any use of their name, image, or likeness that serves to erode the commercial value of that identity.

III. CIRCUIT COURT APPROACHES TO ANALYZING RIGHT OF PUBLICITY CLAIMS UNDER § 230 OF THE COMMUNICATIONS DECENCY ACT

Currently, federal circuits have taken differing approaches regarding the scope of immunity provided by § 230 of the CDA in relation to misappropriation of the right of publicity claims. The Ninth Circuit has held that a claim for the misappropriation of the right of publicity is barred by § 230 based on policy reasons. In contrast, within the First Circuit, the District Court of New Hampshire, accepted the characterization of the misappropriation of the right of publicity tort as an invasion of an intellectual property right and has held that a right of publicity claim is exempt from CDA immunity. Meanwhile, the Eleventh Circuit avoided making a concrete ruling on whether right of publicity claims are exempt under § 230. Because the Supreme Court has yet to rule on the exact scope of what constitutes intellectual property under § 230, it is unlikely that the circuits will reach a consensus on how the right of publicity should be treated under the statute.

A. Public Policy Counts: The Ninth Circuit in Carafano v. MetroSplash and Perfect 10, Inc. v. CC Bill, LLC

The Ninth Circuit Court of Appeals has taken an expansive view of the immunization given by § 230, adopting the viewpoint that only federal intellectual property claims such as copyright and trademark infringement are exempt from CDA immunity. In *Carafano v. MetroSplash*, a case involving “cruel and sadistic identity theft,” the Ninth Circuit held that a computer match-making service was statutorily immune under § 230 from claims stemming from the posting of false content in a dating profile provided by someone posing as another person.⁷¹ Carafano was a popular actress, who appeared in numerous films and television shows under the stage name Chase Masterson.⁷² An unknown person using a computer in Berlin posted a trial personal

71. *Carafano v. MetroSplash*, 339 F.3d 1119, 1120–21 (9th Cir. 2003).

72. *Id.* at 1121. Carafano has appeared on “Star Trek: Deep Space Nine” and “General Hospital.”

profile of Carafano on Matchmaker.com under the identifier “Chase529.”⁷³ The profile featured her picture, listed the movies she appeared in, and provided her home address.⁷⁴ As a result of the improper posting, Carafano began to receive threatening and sexually explicit messages.⁷⁵ She filed a complaint in California state court against Matchmaker.com and its corporate successors, alleging misappropriation of the right of publicity.⁷⁶

The Ninth Circuit focused on the policy reasons for enacting the CDA, which gave most Internet service providers immunity from publishing false or defamatory material so long as the information was provided by another party.⁷⁷ The court felt that allowing tort liability would have a chilling effect on the large amount of information communicated via interactive computer services.⁷⁸ Therefore, in order to uphold the speech-protective policy interests behind § 230, the Ninth Circuit affirmed the lower court’s decision that all of Carafano’s claims were barred by the CDA.⁷⁹

In reaching that decision, the court focused on Congress’s reasons for enacting the CDA, promoting the free exchange of information and ideas over the Internet and encouraging voluntary monitoring for offensive material, and noted that reviewing courts have treated CDA immunity as “quite robust.”⁸⁰ Under the “robust” view, courts have “adopt[ed] a relatively expansive definition of ‘interactive computer

73. *Id.* The profile stated that “Chase529” was “looking for a one-night stand” and sought a “hard and dominant” man with “a strong sexual appetite” and that she “liked sort of be[ing] controlled by a man, in and out of bed.” *Id.*

74. *Id.*

75. *Id.* at 1121–22. Shortly after the posting, Carafano began received sexually explicit messages in her voicemail and a highly threatening and sexually explicit fax that also threatened her son. Feeling unsafe in her home, she and her son stayed in hotels away from her home in Los Angeles for a few months. *Id.*

76. *Id.* at 1122. “The district court granted the defendant’s motion for summary judgment in a published opinion.” *Id.*

77. *Id.* at 1122–23. The court notes that the text of § 230 itself notes that “interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation,” and that “[i]ncreasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.” *Id.* (citing 47 U.S.C. § 230(a)(4), (5) (2006)). “Congress declared it the ‘policy of the United States’ to ‘promote the continued development of the Internet and other interactive computer services,’ ‘to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services,’ and to ‘remove disincentives for the development and utilization of blocking and filtering technologies.’” *Id.* (citing 47 U.S.C. § 230(b)(1), (2) (4)).

78. *Id.* at 1124. “Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted.” *Id.*

79. *Id.* at 1125.

80. *Id.* at 1122–23.

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service’ and a relatively restrictive definition of ‘information content provider,’” which allows an “interactive computer service” to “qualif[y] for immunity so long as it does not also function as an ‘information content provider’ for the portion of the statement or publication at issue.”⁸¹ Under this type of analysis, the court found that “Matchmaker[.com] [could not] be considered an ‘information content provider,’” despite the fact that some of the content was formulated in response to Matchmaker.com’s questionnaire, “because no profile has any content until a user actively creates it.”⁸² Likewise, the court held that the fact that Matchmaker.com classifies characteristics into categories and collects answers to essay questions does not transform Matchmaker.com into the developer of the information.⁸³ The Ninth Circuit went on to say that even if Matchmaker could be considered an “information content provider,” § 230(c)(1) precludes treatment as a publisher or speaker for “*any* information provided by *another* information content provider.”⁸⁴ Therefore, the statute would still bar Carafano’s claims unless Matchmaker.com created or developed the particular content at issue; because the court found that Matchmaker.com did not play a significant role in creating, developing or “transforming” the content in question, they could not be found liable.⁸⁵

In *Perfect 10, Inc. v. CC Bill LLC*, the Ninth Circuit explicitly defined the scope of immunization provided by the CDA, holding that the CDA immunized interactive computer service providers from state intellectual property claims, including the misappropriation of the right of publicity, on policy grounds.⁸⁶ The court said that state laws protecting intellectual property lacked uniformity and “may bear various names, provide for varying causes of action and remedies, and have varying purposes and policy goals.”⁸⁷ Because material on a website may be viewed in more than one state at a time, the court believed that allowing any particular state’s definition of intellectual property to dictate the boundaries of federal immunity would be contrary to Congress’s

81. *Id.* at 1123.

82. *Id.* at 1124.

83. *Id.*

84. *Id.* at 1125 (quoting 47 U.S.C. § 230(c)(1) (2006)) (emphasis added).

85. *Id.*

86. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118–19 (9th Cir. 2007). Perfect 10, the publisher of an adult entertainment magazine and the owner of the subscription website perfect10.com, alleges CCBill violated various intellectual property laws, including, *inter alia*, right of publicity laws, by providing services to websites that posted images stolen from Perfect 10’s magazines and websites. *Id.* at 1108.

87. *Id.* at 1118.

expressed goal of protecting the development of the internet from different state-law systems⁸⁸ The Ninth Circuit construed the term “intellectual property” to mean “federal intellectual property.”⁸⁹

The Ninth Circuit has generally taken an expansive view of the scope of § 230’s immunity, finding a plaintiff’s claim for the misappropriation of the right of publicity barred in two cases. *Perfect 10, Inc.* clarified the Ninth Circuit’s reasoning in *Carafano* by expressly holding that all state intellectual property claims, including the misappropriation of the right of publicity, are not subject to the § 230(e)(2) exception.

B. Literal Statutory Interpretation: The First Circuit in Doe v. Friendfinder Network

In *Doe v. Friendfinder Network*, the District Court of New Hampshire reached the opposite conclusion than the Ninth Circuit. In *Friendfinder Network*, an unknown person created a female profile with the screen name “petra03755” on “AdultFriendFinder.com,” which described itself as the “the World’s Largest SEX and SWINGER Personal Community.”⁹⁰ The profile identified the plaintiff as a recently separated 40-year old woman living in New Hampshire.⁹¹ The plaintiff claimed that the biographic information and photograph on the website identified her as “petra03755.”⁹² The plaintiff requested the website operator to remove the profile, which it did.⁹³ However, “the profile allegedly continued to appear, with slight modifications, on other similar websites operated by the defendants,” and “as ‘teasers’ on Internet search engines and advertisements on other third-party websites, including ‘sexually related’ ones.”⁹⁴ The plaintiff ultimately sued the website operator for a variety of claims including “[i]nvasion of [p]roperty/[i]ntellectual [p]roperty [r]ights” equivalent to the misappropriation of the right of publicity.⁹⁵

88. *Id.* (citing 47 U.S.C. §§ 230(a), (b) (2006)).

89. *Id.* at 1119. The court in *Perfect 10* is interpreting the § 230(e)(2) of the CDA, which requires the court to construe § 230(c)(1) in a manner that would neither “limit [n]or expand any law pertaining to intellectual property.” 47 U.S.C. § 230(e)(2).

90. *Doe v. Friendfinder Network*, 540 F.Supp.2d 288, 291–92 (D.N.H. 2008).

91. *Id.* at 292.

92. *Id.* The profile included information on her sexual proclivities, birth date, height, build, hair and eye color, and an apparently digitally altered nude photograph. *Id.* The plaintiff learned of the profile more than a year after it was posted from an acquaintance who had been discussing it with other members of the plaintiff’s circle who believed the profile to be the plaintiff’s. *Id.*

93. *Id.*

94. *Id.* The plaintiff claimed that “these teasers and advertisements served to direct Internet traffic to the defendants’ own websites, allegedly increasing their profitability.” *Id.* at 293.

95. *Id.*

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The district court accepted the plaintiff's characterization of the misappropriation of the right of publicity tort as an invasion of an intellectual property right, meaning that the tort was exempt from CDA immunity.⁹⁶ In reaching this decision, the court relied on dicta from the First Circuit Court of Appeals. The First Circuit stated, in a case regarding Florida's trademark dilution statute, that "[c]laims based on intellectual property laws are not subject to Section 230 immunity."⁹⁷ The court rejected the Ninth Circuit's limitation on the definition of intellectual property to only include "federal intellectual property," noting that other courts have joined the First Circuit in assuming that § 230(e)(2) excepts state as well as federal intellectual property laws.⁹⁸

The District Court of New Hampshire's finding that intellectual property law includes both state and federal intellectual property law is based on a strict interpretation of the language of § 230(e)(2). Citing First Circuit precedent, the court noted that "[s]tatutory interpretation begins with the language of the statute" and where the language of the statute is clear and unambiguous there is no need for further inquiry.⁹⁹ Because the language of § 230(e)(2) simply states that "[n]othing in this section shall be construed to limit or expand *any* law relating to intellectual property," and because the Supreme Court has noted that "the modifier 'any' amounts to 'expansive language [that] offers no indication whatsoever that Congress intended [a] limiting construction,'" the district court rejected the Ninth Circuit's argument that intellectual property under § 230 was limited to federal intellectual property.¹⁰⁰ The court also rejected the *Perfect 10* court's argument regarding the effect of state law on the manageability of the CDA, stating that they had no reason to believe that a reading of the statute "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."¹⁰¹

96. *Id.* at 303.

97. *Id.* at 298 (citing *Universal Comm'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 422–23 (1st Cir. 2007)). *Universal Comm'n Sys.* was decided on an appeal from the Massachusetts district court. Defendant Lycos is a Massachusetts corporation with its principal place of business in Massachusetts. Plaintiff Universal Communications Systems is a Nevada Corporation with its principal place of business in Florida. *Universal Comm'n Sys.*, 478 F.3d at 414.

98. *Friendfinder Network*, 540 F. Supp. 2d at 299. See *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1324 (11th Cir. 2006); *Gucci Am., Inc., v. Hall & Assocs.*, 135 F.Supp.2d 409, 413 (S.D.N.Y. 2001).

99. *Friendfinder Network*, 540 F. Supp. 2d at 299 (citing *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 8 (1st Cir. 2007) (citing *United States v. Ron Pair Enters.*, 489 U.S. 235 (1989))).

100. *Id.* (citing *Harrison v. PPG Indus.*, 446 U.S. 578, 589 (1980)).

101. *Id.* at 301. The court stated that "neither the Ninth Circuit nor the defendants offered a single example of how 'any particular states definition of intellectual property,' meaningfully enlarges its

Relying on First Circuit precedent interpreting § 230(e)(2) to exempt state as well as federal intellectual property claims from the scope of the Act's immunity provision and Supreme Court statutory interpretation precedent interpreting "any" to have an expansive meaning, the District Court of New Hampshire, in *Doe v. Friendfinder Network*, accepted the plaintiff's characterization of the misappropriation of the right of publicity claim as an invasion of an intellectual property right and exempted the claim from § 230's immunity provision.

C. Dodging the Issue: The Eleventh Circuit in Almeida v. Amazon.com

In *Almeida v. Amazon.com*, a woman who, as a minor, was photographed for an artistic exhibit with her mother's consent brought an action against Amazon.com, Inc. for displaying her image on its websites in furtherance of its sale of the book *Anjos Proibidos* ("Forbidden Angels"), asserting right of publicity claims under Florida's commercial misappropriation statute.¹⁰² The plaintiff did not consent to the use of her picture and did not receive compensation for the use of her image.¹⁰³

When faced with the issue of whether the CDA preempts right of publicity claims, the Eleventh Circuit stated that "there appears to be no dispute that the right of publicity is a type of intellectual property right."¹⁰⁴ The court seemed to agree with the plaintiff's argument that the right of publicity is a widely recognized intellectual property right.¹⁰⁵ However, even though the court agreed with the plaintiff that the district court should have addressed § 230(e)(2) before invoking the CDA's grant of immunity, the court also failed to address the issue,

protections beyond those conferred by federal law, or how intellectual property regimes 'vary widely from state to state' in substance." *Id.*

102. *Almeida*, 456 F.3d at 1318–19. *Anjos Proibidos* is a photographic book displaying black and white photographs of girls between the ages of ten and seventeen. *Id.* The photographer and the book's publisher were prosecuted for creating a work of child pornography and were acquitted. *Id.* Originally the Plaintiff Almeida was featured inside of the First Edition of the book that was approved by her mother. *Id.* However, in 2000, a second edition was published where her picture was featured on the book's cover. *Id.* It was the Second Edition that was offered for sale on Amazon's website. *Id.*

103. *Id.* at 1318.

104. *Id.* at 1323.

105. *Id.* at 1322. The court cited several sources that recognize the right of publicity as an intellectual property right: *ETW Corp v. Jireh Publ'g, Inc.*, 332 F.3d 915, 928 (6th Cir. 2003) ("the right of publicity is an intellectual property right of recent origin which has been defined as the inherent right of every human being to control the commercial use of his or her identity"); *Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1448 (the common law right of publicity is an intellectual property right for purposes of the first-sale doctrine); and J. Thomas McCarthy, *Melville B. Nimmer & the Rights of Publicity: A Tribute*, 34 UCLA L. REV. 1703, 1712 (1987) (the right of publicity has "matured into a distinctive legal category occupying an important place in the law of intellectual property").

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stating that regardless of the answer, “the district court did not need to address the difficult issues of application of the CDA under the facts of this case.”¹⁰⁶ The court held that since the plaintiff’s right of publicity claim would not withstand a motion to dismiss under the law, it was unnecessary for the district court to determine whether the CDA preempts a state law right of publicity claim.¹⁰⁷ Despite the Eleventh Circuit’s recognition of the right of publicity as an intellectual property right, the court refused to infer that as an intellectual property right, right of publicity claims should be exempted from § 230 immunity. Therefore, a split among federal circuits interpreting § 230(e)(2) still exists. The Ninth Circuit held that the term intellectual property only encompasses federal intellectual property for purposes of the statute, whereas the District Court of New Hampshire, relying on First Circuit precedent, concluded that § 230(e)(2) encompasses both state and federal intellectual property claims resulting in an exemption from § 230 immunity for right of publicity claims.

The circuit courts have been unable to reach a consensus regarding the treatment of the misappropriation of the right of publicity tort under § 230. The CDA has been broadly interpreted to provide immunity for operators and users of interactive computer services, who publish information provided by a third party, from even the most egregious of torts against individuals.¹⁰⁸ However, § 230(e)(2) requires courts to construe the CDA in a manner that would neither limit nor expand any law pertaining to intellectual property.¹⁰⁹ As a result, federal courts appear to be split on exactly how to characterize misappropriation of the right of publicity. The Ninth Circuit, viewing misappropriation of the right of publicity from the tort perspective, found that the claim was barred under the CDA.¹¹⁰ Conversely, the District Court of New Hampshire viewed the plaintiff’s misappropriation of the right of publicity claim as an intellectual property claim that was exempt from CDA immunity.¹¹¹ The Eleventh Circuit chose to decide the issue on other grounds.¹¹² Therefore, clarification in the law is necessary to ensure that all plaintiffs with right of publicity claims receive his or her day in court.

106. *Almeida*, 456 F.3d at 1324.

107. *Id.*

108. *See* 47 U.S.C. § 230 (2006).

109. 47 U.S.C. § 230(e)(2).

110. *Carafano v. Metrosplash*, 339 F.3d 1119 (9th Cir. 2003).

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

112. *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1324 (11th Cir. 2006).

IV. ANALYSIS AND RECOMMENDATIONS

In resolving the question as to whether the § 230(e)(2) intellectual property exemption applies to right of publicity claims, this Part addresses the right of publicity's traditional characterization as an intellectual property right and why its status as a state law doctrine should have no effect on this classification. This Part then addresses why the strict statutory interpretation of § 230(e)(2) favors the exclusion of right of publicity claims from § 230's statutory immunity and how the language of § 230(e)(2) could be further clarified. Finally, this Part illustrates how allowing right of publicity claims despite § 230 immunity furthers the policy reasons behind right of publicity law and does not harm the policy interests promoted by Congress in enacting § 230.

A. The Right of Publicity as a Traditional Intellectual Property Right

The right of publicity is traditionally a state law claim, and is traditionally considered an intellectual property issue. Black's Law Dictionary explicitly lists publicity rights as a recognized category of intellectual property as well as other traditional state law doctrines such as trade-secret rights and rights against unfair competition.¹¹³ Furthermore, publicity rights serve a purpose similar to traditional intellectual property rights. The state's interest in providing a right of publicity is "closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors."¹¹⁴ While patent and copyright law protects the endeavors of authors and inventors in creating valuable writings and inventions,¹¹⁵ the right of publicity similarly protects the endeavors of those who develop the marketable value of their identity.

Despite its traditional characterization as a member of the intellectual property law family, there has been some argument that since it is traditionally a state-law claim it should be treated differently. However, right of publicity case law is relatively similar throughout the states, and

113. BLACK'S LAW DICTIONARY 813 (7th ed. 1999) (defining intellectual property 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 trade-secret rights, publicity rights, moral rights, and rights against unfair competition").

114. *Almeida*, 456 F.3d at 1323 (citing *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977)).

115. U.S. CONST. art. I, § 8, cl. 8 (granting Congress power "[t]o 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").

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attempts to federalize the doctrine illustrate that the right of publicity is a doctrine of enough significance to be codified along with its more famous cousins copyright, trademark and patent.¹¹⁶

B. Strict Literal Interpretation of § 230(e)(2)

The strict literal statutory interpretation of § 230(e)(2) supports the argument that right of publicity claims should be allowed despite the § 230 immunity provided to other tort claims not related to intellectual property. The language of § 230(e)(2) itself does not suggest a limitation to federal intellectual property, but simply states that “nothing in this section shall be construed to limit or expand *any* law pertaining to intellectual property.”¹¹⁷ The word “any” is interpreted broadly, indicating that Congress did not intend a narrow construction of the statutory language.¹¹⁸ Furthermore, Congress has expressly used the words “federal” and “state” elsewhere in the statute when its intent was to limit the scope of the statutory provision.¹¹⁹ Section 230(e)(1) states that “[n]othing in this section shall be construed to impair the enforcement of [named federal criminal statutes] or any other Federal criminal statute” and § 230(e)(3) states that “[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with the section.”¹²⁰ The content of § 230(e)(1) and § 230(e)(3) illustrates that “where Congress wished to distinguish between state and federal law in § 230, it knew how to do so.”¹²¹ It follows that the use of “any” in § 230(e)(2) in contrast to the use of “federal” elsewhere in the statute suggests that Congress did not intend for “any” to be interpreted as interchangeable with “federal.” “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress . . . intentionally” makes such decisions.¹²²

Plaintiffs should be allowed to recover damages for the misappropriation of the right of publicity because Congress did not intend any sort of limiting construction and because the right of

116. See Symposium, *supra* note 41.

117. 47 U.S.C. § 230(e)(2) (2006).

118. *Doe v. Friendfinder Network*, 540 F. Supp. 2d 288, 299 (D.N.H. 2008) (quoting *Harrison v. PPG Indus.*, 446 U.S. 578 (1980)).

119. *Id.* at 299–300.

120. 47 U.S.C. § 230(e)(1), (3).

121. *Friendfinder Network*, 540 F. Supp. 2d at 300 (citing *Voicenet Comm’n’s, Inc. v. Corbett*, No. 04-1318, 2006 WL 2506318, at *4 (E.D. Pa. Aug. 30, 2006)).

122. *Duncan v. Walker*, 533 U.S. 167, 173 (2001) (quoting *Bates v. United States*, 522 U.S. 23, 29–30 (1997)).

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publicity is a widely accepted intellectual property right. A state law/federal law distinction cannot be discerned from the face of the statute, and therefore, should not cause right of publicity claims to be treated differently from their more well-known intellectual property cousins.

C. The Need for Statutory Clarification of § 230(e)(2)

Despite § 230(e)(2)'s clear language, some courts, citing public policy concerns, still believe that a distinction should be made based on the right of publicity's status as a state law claim. In order to encourage the strict literal interpretation of the statute in circuits that are proponents of enforcing the public policy reasons for the passage of § 230, a possible solution may be for the legislature to amend the statute to include an express definition of "intellectual property," and to make clear that the right of publicity falls within that definition.

To further emphasize Congress' intent to exempt all forms of intellectual property, both state and federal, from the scope of CDA immunity, Congress could amend § 230(e)(2) to include an express definition of intellectual property. The new statutory definition of intellectual property could possibly be based on the Black's Law Dictionary definition, defining "intellectual property" as "a category of intangible rights protecting commercially valuable products of the human intellect, including both state and federally created rights."¹²³

Expressly defining intellectual property to include both state and federal law should eliminate any split among the circuits regarding whether the right of publicity is intellectual property. However, to ensure the right of publicity's protection under § 230(e)(2), an express listing of all categories of intellectual property exempted from CDA immunity under the statute should be added to the statutory definition of intellectual property. For example, the statute could read, "intellectual property includes, but is not limited to: trademarks, copyrights, patents, trade-secrets, publicity rights, moral rights, and rights against unfair competition."¹²⁴ If the right of publicity is expressly listed as an included category, courts will have to follow the explicit, plain language of the statute.

123. BLACK'S LAW DICTIONARY 813 (7th ed. 1999).

124. *See id.*

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D. The Public Policy Benefits of Exempting Right of Publicity Claims from § 230 Immunity

Despite the fact that the clear language of the statute supports exempting the right of publicity from CDA immunity, there are competing policy concerns regarding the protection of internet content providers from the floodgates of tort litigation, the prevention of the chilling of valuable free speech over the Internet and the maintenance of voluntary monitoring of offensive material. However, the policy reasons for having a right of publicity are equally compelling, and arguably, the natural right of every human being to control their image and likeness, self-definition, and their personal economic interests should be balanced against the natural right of a person's free speech. Allowing right of publicity claims does not necessarily hinder Congress's policy interests in passing § 230 and can further the goals of having a right of publicity.

1. Exempting Misappropriation of the Right of Publicity Claims from § 230 Immunity Promotes the Policy Goals of the State Right of Publicity Policy

Allowing claims for the misappropriation of the right of publicity to be exempt from § 230 immunity furthers the public policy goals of allowing persons to possess a right of publicity. First, exempting right of publicity claims from CDA immunity supports the natural rights and autonomous self-determination justifications for a right of publicity. Following the Ninth Circuit's precedent in barring such claims, deprives potential plaintiffs of the right to control what is rightfully theirs—namely their identity and public perception of that identity. Conversely, allowing right of publicity claims gives potential plaintiffs a way to protect their identity and others' perception of it by creating a cause of action against those owners and operators of interactive computer services that allowed false information about the victim to be posted on their websites.

Furthermore, following Ninth Circuit precedent would deprive potential plaintiffs of possible opportunities to benefit from their identity's marketable value and would erode the potential marketable value of their identity. For example, having one's identity associated with suggestive dialogue and questionable sexual activities could ruin an individual's reputation, resulting in loss of employment or hindrance in finding new job opportunities. Allowing a potential plaintiff to bring claims for the misappropriation of the right of publicity against operators and users of interactive computer services provides an extra level of

protection against unfair damage to an individual's commercial value.

Another justification for the right of publicity is that it helps protect against fraudulent business practices. However, barring right of publicity claims under the CDA would only serve to encourage unfair business practices on the part of internet service providers. For example, in *Doe v. Friendfinder Network Inc.*, one of the plaintiff's complaints centered around the fact that AdultFriendFinder.com caused portions of the "petra03755" profile to appear as "teasers" on internet search engines and as advertisements on other third party websites, including "sexually related ones."¹²⁵ If the District Court of New Hampshire had followed the Ninth Circuit's lead, the plaintiff would have no redress against this unfair use of the commercial value of her identity. In order to protect plaintiffs from being associated with products or services they do not support and prevent consumers from being misled, claims for misappropriation of the right of publicity should be allowed in order to prevent deceptive practices.

2. Exempting Misappropriation of the Right of Publicity Claims from § 230 Immunity Preserves the Policy Goals of Congress's Legislative Intent

In addition to furthering the policy goals of the right of publicity, allowing misappropriation of the right of publicity claims under § 230 will preserve Congress's policy goals. The free exchange of information over the internet will not be curtailed by preventing internet service providers from allowing third party content providers to post false and defamatory material about persons whose identity they have usurped. If anything, protecting the commercial identity of such persons should increase the amount of truthful speech available on the internet, which is arguably more beneficial to the public than having large amounts of false material on the internet. Even though free speech is a natural right recognized by the Founders as being constitutionally protectable, courts have found that certain types of speech, such as defamation, obscenity, and subversive speech, are less deserving of First Amendment protection because they are of little social benefit and harm the individual rights of others.¹²⁶ Arguably, allowing third parties to take others' identities and

125. *Friendfinder Network*, 540 F. Supp. 2d at 293.

126. *Dun & Bradstreet, Inc. v. Greenmoss Builders Inc.*, 472 U.S. 749, 759 n.5 (1985). The Supreme Court recognized that all speech is not of equal First Amendment importance and offered several examples of speech which has historically been accorded no protection at all, including obscene speech, fighting words, speech advocating the violent overthrow of the government, and certain kinds of commercial speech. *See id.* *See also* *R.A.V. v. City of St. Paul Minn.*, 505 U.S. 377 (1992) (recognizing defamation as a historically regulated category).

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publish false statements about such persons has little social benefit and can be very damaging to the commercial value of people's identity. Commercial speech is another area of limited First Amendment protection.¹²⁷ Since right of publicity claims often involve the unfair commercial use of one's identity, it seems to do no harm to goals of free speech to limit harmful speech in the commercial context. Just as false information in advertising is not protected, false information about a person, who has a valuable commercial identity, should not be protected.

Allowing right of publicity claims under § 230 will encourage voluntary monitoring of offensive material by providers and users of interactive computers services. Such parties, knowing that they may still face liability for right of publicity claims under the statute, will have a greater incentive to continually monitor their sites for false postings. Many cases involving right of publicity claims involve plaintiffs who are concerned about the posting of sexually explicit content regarding themselves. Therefore, monitoring for such false postings will aid the policy goal of protecting children from obscene materials.

Right of publicity law developed to protect an individuals' rights in their own identities, whereas § 230 was passed by Congress in order to protect the dissemination of free speech on the internet and the voluntary self-monitoring for offensive material by internet service providers. Despite their seeming opposition, both sets of public policy goals can be furthered by exempting right of publicity claims from § 230 immunity.

V. CONCLUSION

Traditionally, courts have interpreted § 230 of the CDA to provide immunity from tort liability to operators and users of interactive computer services who publish information provided by a third party.¹²⁸ However, circuits are in dispute regarding the scope of this immunity with respect to the misappropriation of the right of publicity tort.¹²⁹ The Ninth Circuit has held that this claim is barred under § 230.¹³⁰ However, the District Court of New Hampshire has held that the First Circuit's characterization of this tort as an intellectual property right

127. Because the First Amendment does not protect false and misleading commercial speech and because even non-misleading commercial speech is generally subject to somewhat lesser First Amendment protection, the right of publicity may often trump the right of advertisers to make use of celebrity figures. *Comedy III Prod., Inc., v. Saderup, Inc.*, 21 P.3d 797 (Cal. 2001) (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-64, 566 (1980)).

128. *See supra* Part II.A.

129. *See supra* Part III.

130. *See supra* Part III.A.

precludes the application of CDA immunity.¹³¹ Section 230(e)(2) requires courts to construe the CDA in a manner that would neither limit nor expand any existing law relating to intellectual property. There is general agreement that Congress meant to exclude federal intellectual property claims such as copyright and trademark, but there is debate over whether state-law claims, such as the right of publicity, are exempted from the broad immunity provided under the CDA. The First Circuit's approach, in treating even state-created intellectual property rights as exempted from CDA immunity under the language of § 230(e)(2), is the approach most faithful to statutory interpretation, legal history, and public policy. By allowing plaintiffs to bring misappropriation of the right of publicity claims, despite the immunity that § 230 gives to other tort claims, courts will protect victims of virtual identity theft while maintaining the CDA's goals.

Perhaps, the most effective way to remedy the circuit split is to have the legislature clarify the language of § 230(e)(2) by including an express statutory definition of "intellectual property." By listing the right of publicity among the different types of intellectual property protected under § 230(e)(2), courts will be bound by the strict literal interpretation of the statute, resulting in uniform application of the law across the circuits.

Think back to the hypothetical situation in the Introduction and imagine it is one year later. Congress has passed an amendment to § 230(e)(2) expressly listing the right of publicity as a protected intellectual property claim, exempt from § 230 immunity. You now have a legitimate cause of action and may have your day in court to defend your reputation that was unfairly tarnished by a stranger who decided to post a false profile on the Internet featuring your name and likeness. You now file a complaint listing a misappropriation of the right of publicity as grounds for recovery and your claim is not denied on a pre-trial motion. After successfully litigating your claim, in addition to damages, your reputation is finally cleared and you can begin to rebuild the commercial value that you had lost.

In the age of the internet, anyone could be the victim of a stranger who with access to a photo or biographical information, could convince the outside world that you are living a secret double life. In order to prevent such "publicity stunts" and protect citizens against the unfair use of their commercial identity, reading § 230 (e)(2) to allow right of publicity claims could be a key first step in allowing citizens to take control of their lives and futures.

131. *See supra* Part III.B.