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**Ensuring Innovation as the Internet Matures:
Competing Interpretations of the Intellectual Property
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By Joshua Dubnow*

I. INTRODUCTION

¶1 As the Internet transitions from a new and emerging technology to a mature and developed medium, its overall effect continues to grow. In a relatively short period of time, this multimedia form of communication now influences almost all aspects of a person's daily life. The Internet has enabled users to reach out to and hear from other users throughout the world. While it now has the potential for a worldwide impact, completely unique forms and methods of communication have developed at the same time. Tools, such as message boards, blogs, and other social networking features, allow an individual opinion to reach an incredible audience with extreme speed and simplicity.

¶2 With these new tools and possibilities have come new questions about their consequences. Because much of what is written in blogs and on message boards is done anonymously, internet services and websites have quickly garnered negative and defamatory postings about individual non-public people. These pieces of information could easily threaten individuals' reputations and privacy. In spite of these negative consequences, Congress chose to further incentivize the development and expansion of new types of internet services because of tremendous social and economic opportunities. With the passage of the Communications Decency Act of 1996 (CDA), interactive computer service providers were granted immunity from suits over content created by third-parties posted on their services.¹ However, the CDA also carves out an exception to this immunity for intellectual property claims. While it is generally clear that intellectual property includes federal intellectual property laws, such as patents, copyrights, and trademarks, it is less clear whether state claims, such as right of publicity, are also exempt from the CDA's immunity.

¶3 Several cases have arisen recently, where an individual has sued a website or internet service for allowing a third-party to write or publish information that could damage the individual's reputation. That individual then sued to hold the internet service liable. A split is likely developing between circuit courts regarding whether the CDA

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¹ 47 U.S.C. § 230 (2006). The statute defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 42 U.S.C. § 230(f)(2).

covers claims such as right of publicity, or whether it only applies to federal intellectual property laws. This distinction is likely to become more prominent as more people seek to hold websites and internet services liable.

¶4 This Comment examines the circuit split, how best to resolve it, and the potential need for Congress to rethink the CDA. Part II looks at the background and development of the CDA and at the right of publicity. Part III examines the emerging circuit split between interpreting the CDA to include or exclude the right of publicity and in which direction the courts should ultimately side based on where the law currently stands. Part IV addresses the potential effects and outcomes of this split and how Congress may need to readdress the CDA. Part V concludes that the goals and incentives that Congress intended to achieve and implement are still necessary, but the statute's provisions require further defining.

II. BACKGROUND OF THE RIGHT TO PUBLICITY AND EARLY INTERNET LIABILITY

A. *Right of Publicity*

¶5 In general, the right of publicity is “the inherent right of every human being to control the commercial use of his or her identity.”² The claim stems from the broader right to privacy in which a person has a basic right “to be let alone.”³ On the other hand, the right of publicity has also been characterized as “an inherent property right of all individuals,” which is distinct from the right to privacy.⁴ Consequently, everyone has a right of publicity, the commercial value of which each person can control, license, and market.⁵ Regardless of the different bases and developments of the right of publicity, it has important consequences in modern technological contexts. The right of publicity varies by state. Different states require different elements, and a number of states do not recognize the claim at all.⁶ In states that do recognize it, a right of publicity would prevent another party from unauthorized use of someone's image or likeness.⁷ Consequently, the right of publicity may apply in situations where false information is written about someone on an internet website. In other words, plaintiffs have attempted to assert this right to protect themselves and to hold another party liable.

B. *Liability for Internet Providers/Services*

¶6 The potential for, and consequences of, holding internet providers liable for a third-party's use of an individual's image or likeness was highlighted in 1995 in *Stratton*

² J. Thomas McCarthy, *Melville B. Nimmer and the Right of Publicity: A Tribute*, 34 UCLA L. REV. 1703, 1704 (1987). See also *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316 (11th Cir. 2006) (reviewing how several cases and other sources have defined the right of publicity).

³ Matthew Minora, Comment, *Rumor Has It That Non-Celebrity Gossip Web Site Operators Are Overestimating Their Immunity Under the Communications Decency Act*, 17 COMM.LAW CONSP. 821, 848–49 (2009) (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890)).

⁴ *Id.* at 851.

⁵ McCarthy, *supra* note 2, at 1710–11.

⁶ Minora, *supra* note 3, at 853–54.

⁷ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

*Oakmont, Inc. v. Prodigy Services Co.*⁸ Prodigy controlled a network of two million subscribers who could communicate with each other through various electronic bulletin boards.⁹ One of these electronic bulletin boards enabled users to post and discuss financial and investment information.¹⁰ One particular user made several negative statements and criminal accusations about Stratton Oakmont.¹¹ Stratton Oakmont did not identify the specific user who posted the statements but instead chose to sue Prodigy. Specifically, Stratton Oakmont claimed that Prodigy should be considered a publisher, “subject to liability as if [it] had originally published” the defamatory and libelous statements.¹² In response, Prodigy argued that it is more appropriate to treat the situation as analogous to a distributor, “such as book stores and libraries [that] may be liable for defamatory statements of others only if they knew or had reason to know of the defamatory statement at issue.”¹³

¶7 Ultimately, the court relied on two issues when determining that Prodigy should be treated as a publisher. First, “Prodigy held itself out to the public and its members as controlling the content of its computer bulletin boards.”¹⁴ Second, it utilized a combination of a software screening program and board leaders to remove certain content.¹⁵ As a result, Prodigy was found liable for defamatory statements made on its service.

¶8 In other words, Prodigy had placed itself in a position where it could exercise some degree of editorial control. Specifically, the court explained, “Prodigy has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards.”¹⁶ Unlike a bookstore or library, Prodigy chose to implement certain policies and services to achieve the benefits of control.¹⁷ By doing so, it transformed itself into a publisher subject to broader liability.¹⁸ However, the court did note that these issues “may ultimately be preempted by federal law if the Communications Decency Act of 1995” was passed by Congress.¹⁹

¶9 It quickly became clear that the potential for liability could distort incentives and create severe consequences for a new media company. Prodigy had been found liable, in part, because it had implemented some degree of control and made some effort to exert editorial influence. In effect, Prodigy opened itself up to liability, because it attempted to monitor the content posted on its service. In other words, “an operator . . . which assumed the responsibility for at least attempting to keep defamatory or offensive material from being posted on its bulletin boards, was liable as a publisher for defamatory postings, but an operator . . . which made no such attempt escaped publisher liability.”²⁰

⁸ *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

⁹ *Id.* at *1.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at *3.

¹³ *Id.*

¹⁴ *Id.* at *4.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at *5.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act*

¶10 This decision could drastically impact new internet services. It seemed likely to have a direct influence on policy decisions at these new companies. From a government standpoint, “Congress feared that these sorts of decisions would result in a chilling effect on Internet speech because the potential to face publisher liability would create a disincentive for [Internet Service Providers] to function.”²¹ As newer technologies enabled larger numbers of people to create and post content very quickly, companies could not realistically monitor their services to the degree necessary to protect themselves from liability. Consequently, Congress became very concerned about restricting innovation and development.

III. THE COMMUNICATIONS DECENCY ACT AND EMERGING CIRCUIT SPLIT

A. *The Communications Decency Act*

¶11 Congress enacted the Communications Decency Act in 1996.²² The statute was written partially in response to the recent *Stratton Oakmont* decision. One major goal was to give greater protections to service providers by ensuring 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.”²³ Because *Stratton Oakmont* exposed the potential for liability, “Congress enacted [the CDA] to remove the disincentives to self regulation created by the *Stratton Oakmont* decision.”²⁴ Overall, Congress hoped the new legislation would correct the misaligned incentives for an internet provider attempting to regulate its content.²⁵

¶12 Furthermore, as the Internet was still in its very early stages, it greatly benefited from public policy “to promote [its] continued development . . . to preserve the vibrant and competitive free market that presently exists for the Internet . . . to encourage the development of technologies which maximize user control . . . [and] to remove disincentives for the development and utilization of blocking and filtering technologies”²⁶ Through the statute, Congress hoped to promote the continued development of the Internet, while acknowledging that it would be impossible for service providers to review for defamatory information in all of the content within their control.²⁷ Congress desired to achieve these objectives with little government regulation by creating the correct incentives and removing liability disincentives. By reducing risks and regulations, Congress made a “policy choice by providing immunity even where the

upon Liability for Defamation on the Internet, 61 ALB. L. REV. 147, 158 (1997).

²¹ Melissa A. Troiano, Comment, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447, 1456 (2006).

²² 47 U.S.C. § 230 (2006).

²³ 47 U.S.C. § 230(c)(1). “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.” 47 U.S.C. § 230(f)(2).

²⁴ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). See also *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003) (discussing legislative history of § 230); Sheridan, *supra* note 20, at 161 (discussing conference report of § 230).

²⁵ Troiano, *supra* note 21, at 1455–56.

²⁶ 47 U.S.C. § 230(b)(1)–(5).

²⁷ Troiano, *supra* note 21, at 1456.

interactive service provider has an active, even aggressive role in making available content prepared by others.”²⁸

¶13 The primary method by which Congress hoped to accomplish these goals was to provide immunity from liability for internet service providers and users. In *Stratton Oakmont*, the court evaluated Prodigy as a re-publisher. In order to protect other service providers, the CDA specifies that interactive computer service providers will not be treated as publishers of the content on their services provided by others.²⁹ Shortly after the passage of the act, the courts began to interpret and apply this provision. As the court in *Zeran v. America Online, Inc.*, explained:

By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher’s role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial function—such as deciding whether to publish, withdraw, postpone or alter content—are barred.³⁰

Lawsuits aimed at service providers for third-party content created an obvious threat to free speech, so Congress established broad federal immunity.³¹

¶14 Congress did create an important exception to this broad immunity. While service providers would be protected from most claims, the CDA would not protect them from intellectual property claims: “[n]othing in [§ 230] shall be construed to limit or expand any law pertaining to intellectual property.”³² While this provision is relatively straightforward, it is not always clear what is considered a “law pertaining to intellectual property.”³³ There is little doubt that federal IP laws, such as patent, copyright, and trademark, qualify as pertaining to intellectual property. On the other hand, there are several other types, mostly state laws, which partially pertain to intellectual property.³⁴ These areas have caused significant confusion. Plaintiffs hope that the courts will consider claims like the right of publicity as intellectual property based ones, while the internet providers argue otherwise.

B. Excluding Right of Publicity from the CDA’s Intellectual Property Exception

¶15 The Ninth Circuit confronted the question of how far the CDA’s immunity extends in *Carafano v. Metrosplash.com, Inc.*³⁵ Plaintiff Christianne Carafano began receiving

²⁸ Robert T. Langdon, Note, *The Communications Decency Act § 230: Make Sense? Or Nonsense?—A Private Person’s Inability to Recover If Defamed in Cyberspace*, 73 ST. JOHN’S L. REV. 829, 852 (1999).

²⁹ See 47 U.S.C. § 230(c)(1).

³⁰ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

³¹ *Id.* at 330–31.

³² 47 U.S.C. § 230(e)(2).

³³ *Id.*

³⁴ See *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 n.5 (9th Cir. 2007) (State laws that may be characterized as intellectual property laws include “trademark, unfair competition, dilution, right of publicity and trade defamation.”).

³⁵ *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003).

numerous threatening and sexually explicit phone calls, emails, and written letters.³⁶ She soon discovered that several days earlier, an unknown person had posted a personal profile of her on Matchmaker.com, an internet dating service.³⁷ Although the profile was not authorized by Carafano and was done without her knowledge, the creator posted pictures of her and listed several movies and television shows in which she had previously acted.³⁸ The profile also displayed her home address, telephone number, and a fake contact email address.³⁹ Soon after she began receiving the threatening calls, Carafano's representative contacted Matchmaker.com. The company first blocked access to the profile and later deleted it entirely.⁴⁰ Carafano then proceeded to file a complaint against Matchmaker.com alleging several claims, including misappropriation of the right of publicity.⁴¹

¶16 After the trial court rejected the claim for misappropriation, Carafano appealed. The Ninth Circuit addressed "whether [her] claims are barred by 47 U.S.C. § 230(c)(1)"⁴² The court first determined that Matchmaker.com is closer to an interactive computer service than an information content provider, because the profile created by the user does not have any content until that content is provided by the user.⁴³ In other words, "so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process."⁴⁴

¶17 Furthermore, the court was reluctant to hold the defendant accountable, because "Congress made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages."⁴⁵ By imposing this type of liability, these new intermediary types of services could easily restrict free speech. Congress was unwilling to allow this result. Although Carafano argued that Matchmaker.com partially contributed to the content of the posted information by providing structure, "Matchmaker still lacks responsibility for the 'underlying misinformation.'"⁴⁶ In *Carafano*, the Ninth Circuit relied heavily on policy implications when holding that the CDA's immunity for service providers also included protection from misappropriation of the right of publicity suits. Congress chose to protect free speech. More importantly, it granted websites the freedom to use third-party provided information to create and develop new services. Through this decision, the court implicitly signaled that it would not consider misappropriation of right of publicity as an intellectual property claim, because it would consequently be excluded from the CDA's immunity.⁴⁷

³⁶ *Id.* at 1121.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 1122.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1124.

⁴⁴ *Id.* See also *Jurin v. Google, Inc.*, 695 F. Supp. 2d 1117, 1122 (E.D. Cal. 2010).

⁴⁵ *Jurin*, 695 F. Supp. 2d at 1123 (quoting *Zeran v. Am. Online*, 129 F.3d 327, 330–31 (4th Cir. 1997)).

⁴⁶ *Id.* at 1125.

⁴⁷ See Patricia Sanchez Abril, *Reputational Sites and the Limits of § 230 Immunity*, 12 No. 7 J. INTERNET L. 3, 5 (2009).

¶18 Several years later, the Ninth Circuit more directly addressed how state claims such as the right of publicity relate to the CDA’s intellectual property provision in *Perfect 10, Inc. v. CCBill LLC*.⁴⁸ Perfect 10 is a publisher of a magazine and website featuring models, most of whom have released and assigned their rights of publicity to Perfect 10.⁴⁹ Defendants provide services, such as web hosting and data center connections as well as allowing customers to use credit cards.⁵⁰ Perfect 10 alleged various claims against the defendants, including violation of right of publicity.⁵¹

¶19 Unlike the earlier *Carafano* case, the Ninth Circuit in *Perfect 10* directly addressed the CDA’s intellectual property exception.⁵² While courts have interpreted the CDA to protect internet services from liability for information provided by third-parties, this immunity is not unlimited. Courts must “construe Section 230(c)(1) in a manner that would neither ‘limit or expand any law pertaining to intellectual property.’”⁵³ While the CDA makes a clear exception, it “does not contain an express definition of ‘intellectual property,’ and there are many types of claims in both state and federal law which may—or may not—be characterized as ‘intellectual property’ claims.”⁵⁴

¶20 If a broad interpretation of intellectual property were adopted that included many of these claims, the court would be “permitting the reach of any particular state’s definition of intellectual property to dictate the contours of this federal immunity”⁵⁵ In other words, a state would have the ability to alter and restrict the congressionally created immunity merely by creating its own definition of intellectual property. The court held that this “would be contrary to Congress’s expressed goal of insulating the development of the Internet from the various state-law regimes.”⁵⁶

¶21 Because the CDA’s intellectual property exception constrains the general liability immunity, the broader a court’s interpretation of intellectual property, the narrower the CDA’s immunity becomes. Therefore, because Congress did not explicitly define intellectual property but did state an explicit policy of fostering innovation and free speech, the court construed intellectual property to mean only federal intellectual property.⁵⁷

¶22 The Ninth Circuit has chosen to interpret the CDA to not include state intellectual property claims, including the right of publicity, within the exception to the statute’s liability protection. In order to resolve the statute’s lack of explicit definition for intellectual property, the court looked to various policy implications.⁵⁸ By granting any immunity in the first place, “Congress intended to treat the Internet differently from

⁴⁸ *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007).

⁴⁹ *Id.* at 1108.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *See also Almeida v. Amazon.com, Inc.*, 456 F.3d 1316 (11th Cir. 2006) (general discussion of right of publicity and § 230, but unnecessary for district court to address whether the CDA preempts right of publicity claim).

⁵³ *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 413 (S.D.N.Y. 2001) (quoting 47 U.S.C. § 230(e)(2) (2006)).

⁵⁴ *Perfect 10*, 488 F.3d at 1118.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 1119.

⁵⁸ *Id.* at 1118.

traditional forms of communication such as newspapers, radio, and television.”⁵⁹ The court likely wanted to draw a clear line, because “[s]tates have any number of laws that could be characterized as intellectual property laws: trademark, unfair competition, dilution, right of publicity and trade defamation”⁶⁰ Despite the significance of such an interpretation, the Ninth Circuit is unique in how it directly and explicitly analyzed this provision of the CDA.⁶¹ It still remains to be seen exactly how this will affect potential plaintiffs within the Ninth Circuit’s jurisdiction.

¶23 By broadening the immunity exception to include a number of claims beyond federal intellectual property, the court risked eliminating the protections that Congress intended to provide. In contrast, the Ninth Circuit focused on the policy of fostering free speech and encouraging innovation in new internet services.⁶² This policy requires broad immunity protection and therefore a narrow intellectual property exception.

C. Including the Right of Publicity in the CDA’s Intellectual Property Exception

¶24 While the Ninth Circuit has interpreted the CDA’s intellectual property exception to exclude state claims, other courts have proceeded in the opposite direction. The First Circuit indirectly addressed the issue in *Universal Communications Systems, Inc. v. Lycos, Inc.*⁶³ Defendant Lycos operates various websites related to stock and financial information. One feature of these websites is message board hosting. Message board hosting allows users to post and discuss information about publicly traded companies.⁶⁴ Plaintiff Universal Communications Systems (UCS) alleged that one or more third-party users posted false and misleading information about UCS’s financial condition and management.⁶⁵ Consequently, the company sued Lycos on various grounds, including a state claim of dilution of trade name.⁶⁶ This charge differs from the misappropriation of the right of publicity charge in the Ninth Circuit cases. Nonetheless, it is a state claim arguably pertaining to intellectual property, which was indirectly addressed by the court. The district court held that § 230 of the CDA extended immunity to Lycos, and it dismissed the claims.⁶⁷

¶25 Ultimately, the court affirmed the dismissal on other grounds, specifically “because of the serious First Amendment issues that would be raised by allowing UCS’s claim”⁶⁸ However, the court still stated when first referring to the trademark dilution claim, that “[c]laims based on intellectual property laws are not subject to Section 230 immunity.”⁶⁹ Because the court directly dismissed the claim on First Amendment grounds, any discussion of its relation to the CDA’s liability immunity and

⁵⁹ Minora, *supra* note 3, at 840.

⁶⁰ *Perfect 10*, 488 F.3d at 1119 n.5.

⁶¹ Dylan M. Spaduzzi, Note, *Publicity Enemy Number One: Federal Immunity for a Virtual World*, 40 U. MEM. L. REV. 603, 636 (2010).

⁶² *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997) (“The specter of tort liability in an area of such prolific speech would have an obvious chilling effect.”).

⁶³ *Universal Commc’ns Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007).

⁶⁴ *Id.* at 415.

⁶⁵ *Id.* at 416.

⁶⁶ *Id.*

⁶⁷ *Id.* at 417.

⁶⁸ *Id.* at 423.

⁶⁹ *Id.* at 422–23 (citing 47 U.S.C. § 230(e)(2) (2006)).

intellectual exception was merely dicta. However, the fact that the CDA's intellectual property provision was discussed in the context of a state intellectual property claim provides precedent for later opinions to cite.

¶26 The following year, another case, *Doe v. Friendfinder Network, Inc.*,⁷⁰ directly addressed § 230 and state intellectual property claims in its decision. Defendant Friendfinder operates various electronic groups that allow members to search for and meet others using personal online advertisements.⁷¹ Specifically, each user creates a profile that contains personal information that is viewable by other members.⁷² In 2005, an unknown user posting under a screen name created a profile for a female member.⁷³ This profile contained personal information including biographical data, a nude photograph, and sexual proclivities.⁷⁴ For over a year, the plaintiff was unaware of, and certainly had not authorized, the profile's existence, although she claimed that it reasonably identified her.⁷⁵

¶27 After discovering the profile, the plaintiff contacted Friendfinder and requested that the profile be removed.⁷⁶ The defendant first replaced the profile with a message indicating its removal, but the profile continued to appear on other similar websites, search engines, and advertisements.⁷⁷ Ultimately, the plaintiff filed suit against the defendants putting forth several claims, including invasion of privacy.⁷⁸

¶28 Similar to the analysis in previous cases, the court first noted that CDA provisions dictate that interactive computer service providers must be treated as publishers. Consequently, the providers are not liable for state law claims for publishing content provided by another information content provider.⁷⁹ However, the CDA also provides that it does not expand or limit intellectual property laws.⁸⁰ On this basis, the defendants argued that the CDA bars all of the state law claims. In contrast, the plaintiff argued that "her claim for invasion of privacy is premised on a 'law pertaining to intellectual property' unaffected by the Act."⁸¹ The court was directly confronted with the issue of how to interpret the intellectual property exception to the CDA's service provider immunity.

¶29 In analyzing the CDA, the *Doe* court took a more formal approach, focusing on the plain meaning of the text. The court began with *Universal's* dicta implying that § 230 does not protect these types of claims.⁸² First, the intellectual property exception is drafted specifically as *any* law implying that there is no limit to only federal laws.⁸³

⁷⁰ *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008).

⁷¹ *Id.* at 291.

⁷² *Id.*

⁷³ *Id.* at 292.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* The plaintiff also argued that the message indicating the profile's removal "was itself false in communicating that she was a member of the service and that the profile had been hers in the first place."
Id.

⁷⁸ *Id.* at 298.

⁷⁹ *Id.* at 293 (citing 47 U.S.C. § 230(c)(1), (e)(3) (2006)).

⁸⁰ *Id.* at 294 (citing 47 U.S.C. § 230(e)(2)).

⁸¹ *Id.*

⁸² *Id.* at 299.

⁸³ *Id.*

Second, the court noted that other provisions of the statute specify federal or state laws.⁸⁴ In other words, Congress was aware of situations in which provisions could apply to either state or federal laws. In other provisions, Congress directly specified a level of government when clearly referring to only state or only federal laws. By not modifying intellectual property with the word “state” or “federal,” Congress did not intend to limit the immunity to either level of government.⁸⁵

¶30 Moreover, the court dismissed the policy arguments set forth by the Ninth Circuit in *Perfect 10*. While allowing service providers to be held liable for state law intellectual property claims may create “some challenges for service providers like the defendants, those challenges would appear to be simply a cost of doing business on-line.”⁸⁶ Consequently, the court found it an acceptable tradeoff to granting providers complete immunity. The court ultimately followed the *Universal* dicta. It focused on the plain language of the law instead of following the Ninth Circuit’s attention to the policy’s implications and effects. Both state and federal intellectual property laws were exempt from the CDA’s § 230 service provider immunity, and the defendant’s motion to dismiss the right of publicity claim was denied.⁸⁷

¶31 While some circuit courts have not definitively ruled on their own interpretations of § 230(c)(1) and (e)(2), other district courts have addressed the issue. In *Atlantic Recording Corp. v. Project Playlist, Inc.*,⁸⁸ defendant Project Playlist operates a website that compiles links to sound recordings on other websites so that users can search for, listen to, and share songs.⁸⁹ The plaintiffs own the copyrights to many of the songs Project Playlist posted, and they sued on several grounds, including claims for common-law copyright infringement and unfair competition.⁹⁰ Although copyright is normally a federal issue, the plaintiffs alleged a state law copyright infringement claim. Consequently, the court’s analysis is the same as other courts’ analysis of the right of publicity under the CDA.

¶32 The court first concluded that Project Playlist first fell under the general immunity of § 230(c)(1). The plaintiffs then argued that § 230(e)(2) applied, and that “the CDA does not limit *any* law pertaining to intellectual property, and therefore their state law claims can proceed.”⁹¹ The court followed a textual analysis of the statute and rejected the defendant’s motion to dismiss.⁹² Similar to the *Doe* court’s focus on the literal statutory text, the court held that the inclusion of the word “any” and the lack of the words “federal” or “state” indicated that the provision includes all types of intellectual property claims.⁹³ Furthermore, the court reasoned that any analysis of the CDA’s history or purpose, such as in the Ninth Circuit’s reading, was inappropriate because the

⁸⁴ *Id.* at 299–300. See 47 U.S.C. § 230(e)(1) (“Nothing in this section shall be construed to impair the enforcement of . . . any other Federal criminal statute.”); 47 U.S.C. § 230(e)(3) (“Nothing in this section shall be construed to prevent any State from enforcing any State law . . .”).

⁸⁵ *Doe*, 540 F. Supp. 2d at 300.

⁸⁶ *Id.* at 302.

⁸⁷ *Id.* at 304.

⁸⁸ *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009).

⁸⁹ *Id.* at 693–94.

⁹⁰ *Id.* at 693, 698.

⁹¹ *Id.* at 702.

⁹² *Id.* at 704.

⁹³ *Id.* at 703–04.

plain language was clear.⁹⁴ While looking to the specific policy goals of the CDA may lead courts to interpret § 230(e)(2) to exempt only federal intellectual property claims from the liability immunity, a plain textual analysis leads to the conclusion that all forms of intellectual property claims are exempt.

D. Reconciling the Circuit Split

¶33 While the courts have reached two competing interpretations of § 230(c)(1) and (e)(2) of the Communications Decency Act, this split must ultimately be resolved because of the vastly different outcomes to which each interpretation leads. Based on the current views of certain state intellectual property claims and on the text of the act, all forms of intellectual property claims should be exempt from the CDA’s immunity exception provision.

¶34 One of the first areas in which this issue arose was in the context of a person’s right of publicity.⁹⁵ Because only some consider this a true intellectual property right, a service provider infringer may not be immune from liability. Although the right of publicity is not based in federal law and has grown from a variety of rights and areas,⁹⁶ it has “matured into a distinctive legal category occupying an important place in the law of intellectual property.”⁹⁷ Furthermore, the right serves a purpose similar to other types of intellectual property, such as protecting an intangible quality or idea.⁹⁸ The main difference between federal intellectual property rights (e.g., patents and copyrights) and state law claims (e.g., right of publicity) is merely how they were developed by Congress or state legislatures.

¶35 When holding that the CDA only exempts federal intellectual property claims from its immunity, the Ninth Circuit focused on Congress’s intent to promote the development of the Internet.⁹⁹ However, the fact that Congress intended to remove liability as an impediment to innovation does not explain how far the immunity exception should be extended. Although the statute expressly states a goal of promoting Internet growth, it is clear that Congress did not intend to remove all liability.¹⁰⁰ The exceptions to immunity were included precisely because Congress did not intend to grant complete and total protection.

¶36 The Ninth Circuit went directly to what it perceived as the purpose of the CDA to guide its interpretation. However, it may not even be necessary to look beyond the text itself,¹⁰¹ which is the case for this provision of the statute. There are four clarifications in

⁹⁴ *Id.* at 704.

⁹⁵ *See, e.g.,* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003); Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (9th Cir. 2007); Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288 (D.N.H. 2008).

⁹⁶ *See supra* Part II.A.

⁹⁷ McCarthy, *supra* note 2, at 1712.

⁹⁸ *See* Allison v. Vintage Sports Plaques, 136 F.3d 1443, 1448 (11th Cir. 1998) (“[T]he distinction that appellants draw between what is protected by the right of publicity and what is protected by other forms of intellectual property rights, such as copyright, is not sound.”). *See also* ETW Corp. v. Jireh Publ’g, Inc., 332 F.3d 915, 928 (6th Cir. 2003).

⁹⁹ Carafano, 339 F.3d at 1125 (citing 47 U.S.C. § 230(b)(1) (2006)).

¹⁰⁰ *See* 47 U.S.C. § 230(e)(2).

¹⁰¹ *See* Atl. Recording Corp. v. Project Playlist, Inc., 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009) (“Because the plain language of the CDA is clear . . . the Court need not engage in an analysis of the

the statute regarding how it will affect other laws. Each of these subsections, other than the intellectual property provision, specifies either state or federal law.¹⁰² Specifically, there is no effect on any *federal* criminal law, states are not prevented from enforcing consistent *state* law, and the Act does not limit application of any *state* law similar to the Electronic Communications Privacy Act.¹⁰³ The lack of any state or federal modifier for the intellectual property exception clearly indicates an intention to not further limit its exception. In contrast to the three other exceptions, intellectual property must refer to both state and federal claims. As a result, “a court that interprets § 230(e)(2) to only apply to federal intellectual property law is improperly adding words to the statute and disregarding Congress’s obvious intention to remove federal immunity from state and federal intellectual property law claims.”¹⁰⁴ If Congress had only intended to exclude federal intellectual property rights, it would have been as explicit as it was elsewhere in the statute.

¶37 Moreover, this broad interpretation is further emphasized by the fact that the section applies to “any” intellectual property law.¹⁰⁵ The use of “any” together with the lack of a “federal” or “state” modifier results in an unambiguous meaning of the statute’s plain language. Courts should follow the First Circuit’s reading of the CDA and hold that service providers may be liable for all forms of intellectual property claims.

IV. EFFECTS, OUTCOMES, AND FUTURE OF INTELLECTUAL PROPERTY EXCEPTION TO CDA IMMUNITY

¶38 Courts should interpret the Communications Decency Act to exclude both state and federal intellectual property claims from the service provider immunity. This reading most accurately follows the current text. However, Congress should reevaluate this outcome based on the goals of the statute and because of the latest effects. In other words, the First Circuit’s interpretation may be the most correct, but the Ninth Circuit’s view may produce a better outcome.

¶39 While § 230(e)(2) is meant to keep the CDA from interfering with existing intellectual property rights, it has also created a large exception to the law’s goal of immunizing service providers. This exception may likely overtake the rule as injured individuals continue to seek compensation for their injuries. Allowing service providers to continue to be held liable for state law claims such as the right of publicity “is inconsistent with the values hierarchy established by the [CDA] and with its underlying policy.”¹⁰⁶ One of the consequences of the Internet’s openness, availability, and ease of

CDA’s legislative history or purpose.”) (citing *Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir. 1999) (holding that plain meaning of a statute controls and legislative history only used if terms are ambiguous)).

¹⁰² 47 U.S.C. § 230(e)(1)–(4).

¹⁰³ *Id.*

¹⁰⁴ Spaduzzi, *supra* note 61, at 640.

¹⁰⁵ *Atl. Recording*, 603 F. Supp. 2d at 704 (citing *ACLU v. Dep’t of Def.*, 543 F.3d 59, 69 (2d Cir. 2008) (holding “any” should be given “expansive application where the surrounding statutory language and other relevant legislative context support it”)).

¹⁰⁶ Rachel A. Purcell, Note, *Is That Really Me?: Social Networking and the Right of Publicity*, 12 VAND. J. ENT. & TECH. L. 611, 634 (2010). Furthermore, federal intellectual property rights are much more in need of protection because they directly lead to the creation of new ideas. “While traditional intellectual property rights foster and reward innovation and invention, nothing need be created to take advantage of the inherent right of publicity.” *Id.* at 634.

use is that many more people can be potential victims of defamation and suffer harm to their reputations.¹⁰⁷ In other words, “technology makes us all public figures in a way that had never been anticipated by . . . the CDA.”¹⁰⁸ Because anyone can be a victim, it is inevitable that many more people will look for a defendant to hold accountable.

¶40 Although the CDA attempts to immunize service providers for liability from most of these injuries, the exceptions provide an opportunity for people to exploit. An injured person may try to evade the CDA immunity and seek out new ways to hold internet service providers accountable.¹⁰⁹ When plaintiffs are unable to hold service providers liable for defamatory content under normal theories of liability, they have “argu[ed] some novel theories of liability.”¹¹⁰ If all forms of intellectual property claims continue to be exempted, plaintiffs will continue to exploit this exception, eliminating much of the immunity that the CDA was meant to provide. Based on Congress’s original goal of fostering innovation, it is unlikely that Congress meant to broaden the intellectual property exception to such an extent.

¶41 Furthermore, Congress should reevaluate the CDA to revisit some of its original goals now that it has had several years to observe the effects. One of the defined goals of the CDA was to encourage self-regulation.¹¹¹ Because of the clear line the CDA draws between liability for service providers and content providers, services are incentivized to remain inactive. Specifically, “[s]o long as the ISPs remain passive interactive computer services and do not cross the elusive line into ‘information content providers,’ the safe harbor applies, and they are immune.”¹¹² This incentive has only increased as the amount of third-party information provided increases, and services find it harder to effectively monitor.

¶42 In addition, a significant amount of time has passed since the CDA was adopted, and “the Internet is no longer a burgeoning medium that needs special protections in order to grow.”¹¹³ Consequently, defamation laws as they relate to the Internet may need to adapt as well. What Congress needs and wants to encourage may change over time. Such a broad, but relatively undefined immunity is not necessary, nor is it appropriate at this time.¹¹⁴ Revisiting the CDA will allow Congress to evaluate and adjust its original goals. It will be able to better focus liability immunity on the parties for which it was intended.

¶43 Redefining the intellectual property exception to service provider immunity so it does not include state claims is also necessary because of the lack of uniformity among state intellectual property rights. While federal intellectual property laws are well defined, “[s]tates have any number of laws that could be characterized as intellectual

¹⁰⁷ Abril, *supra* note 47, at 6.

¹⁰⁸ *Id.*

¹⁰⁹ See Bradley C. Nahrstadt & Jeremy T. Burton, *Must You Watch What You Say? Application of CDA to Publications on the Internet*, 12 No. 9 J. INTERNET L. 1, 21–22 (2009).

¹¹⁰ *Id.* at 17. See also Laurin H. Mills & Leslie Paul Machado, *ISP Immunity Provision is Broadly Interpreted but One Exception Exists When a Violation of Trademark Law is Alleged*, NAT’L L.J., Apr. 15, 2002, at 6 (Protecting ISPs from most tort claims but not trademark claims is “certain to inspire some strained trademark claims as creative plaintiffs’ attorneys attempt to circumvent the § 230 immunities in search of deep pockets.”).

¹¹¹ 47 U.S.C. § 230(a)–(b) (2006).

¹¹² Abril, *supra* note 47, at 4.

¹¹³ Troiano, *supra* note 21, at 1467–68.

¹¹⁴ See *id.* at 1470–71. See also Abril, *supra* note 47, at 5.

property laws: trademark, unfair competition, dilution, right of publicity and trade defamation”¹¹⁵ If all possible state intellectual property claims are included in the CDA’s immunity exception, service providers must be aware of all the widely varied laws.¹¹⁶ This unfortunately adds a greater burden to service providers as they struggle to comply with differing state laws.¹¹⁷

¶44 In order to effectively and efficiently encourage innovation, as Congress originally intended, there must be a clear boundary demarking the claims for which an internet service provider is immune or liable.¹¹⁸ This lack of a clear definition is further complicated by the fact that information on the Internet is visible in multiple states and jurisdictions.¹¹⁹ Consequently, any single state’s definition of an intellectual property claim directly defines a service provider’s immunity.¹²⁰ The likely result in this situation is that the lowest applicable state law standard becomes the bar that a website or service provider must meet.¹²¹ In other words, the issues caused by the lack of uniformity among different state intellectual property laws further highlight why Congress should specify the exact extent of the § 230(e)(2) exception.

¶45 Finally, the overall policy of the Communications Decency Act and § 230 point in favor of only federal intellectual property claims being excluded from the service provider immunity. Although the Internet has grown from an emerging medium to a mature and established platform, Congress’s original First Amendment concerns are still applicable. When first considering the CDA, Congress felt that the Internet had great potential for making information available to citizens and for providing necessary “political, educational, cultural, and entertainment services.”¹²² Furthermore, it “recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.”¹²³ The service provider liability immunity attempts to eliminate what could otherwise be a chilling effect on free speech.¹²⁴ However, these concerns still exist. If the new and innovative services that exist today are partially a result of the freedom from fear of liability for service providers, further innovation will slow when the immunity is removed. Immunity is just as important today as when the

¹¹⁵ *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 n.5 (9th Cir. 2007). The court further explained, “[S]tate 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.” *Id.* at 1118. See also *Minora*, *supra* note 3, at 852 (“The right of publicity is a state law doctrine; therefore, its acceptance and application vary among the twenty-four jurisdictions that recognize it.”).

¹¹⁶ See *Perfect 10*, 488 F.3d at 1118.

¹¹⁷ *Purcell*, *supra* note 106, at 626.

¹¹⁸ See *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 703 (S.D.N.Y. 2009).

¹¹⁹ *Purcell*, *supra* note 106, at 626–27.

¹²⁰ See *Perfect 10*, 488 F.3d at 1119.

¹²¹ The *Doe* court states that the Ninth Circuit in *Perfect 10* and the defendants in its own case argued but could not state an example of state law’s definition of intellectual property that differs from the federal law. *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 301 (D.N.H. 2008). However, even the possibility of a difference injects uncertainty into the CDA’s coverage which restricts the statute from achieving its intended goals.

¹²² 47 U.S.C. § 230(a) (2006).

¹²³ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

¹²⁴ *Id.* at 331.

Internet was first being developed, because new technologies and applications still continue to be created and evolve.¹²⁵

¶46 Practicality concerns also play an important role. As new services continue to evolve, service providers desire a degree of predictability. Certainty allows a provider to know when it can freely innovate and when it can only do so while risking a lawsuit. Interpreting § 230(e)(2) to include all types of intellectual property claims forces service providers to be even more diligent in monitoring the information on their services. While this is an admirable goal, it is likely an impossible task considering the growth of the amount of information content being produced and provided on the Internet. Overall, a narrow intellectual property exception to the CDA is necessary to continue to foster growth and provide incentives to innovate. Innovation on the Internet has not slowed from its incredible beginning as services continue to evolve and new applications develop. The open nature, minimal regulation, and protection from harmful liability are still necessary components to that rapid growth and evolution. Because the current text of the CDA exempts state law claims that pertain to intellectual property from service provider immunity, Congress should reevaluate the statute. It should clarify and specifically define the boundaries of the intellectual property exception in a narrow manner.

V. CONCLUSION

¶47 The passage of the Communications Decency Act has removed much of the potential liability for internet services providing third-party content. This immunity has coincided with extensive growth and innovation of new internet services. There does remain an important exception for laws pertaining to intellectual property rights. Because it is unclear whether service providers are immune from state intellectual property laws, a split in interpretation has developed among several circuit courts of appeals.

¶48 By analyzing the plain language of the statute's text and not focusing on uncertain policy implications, courts should hold that state intellectual property claims, such as the right of publicity, are exempt from the CDA's grant of immunity. However, because this interpretation will likely have important policy implications, Congress should reevaluate the CDA and its intellectual property exception. The exception may eventually overtake the general rule of liability immunity. This will cause needless uncertainty because of the differences and lack of uniformity among various state interpretations of state intellectual property rights. Finally, Congress should further define the intellectual property exception, because its original policy goals of maintaining free speech and fostering growth and innovation are still applicable and necessary today.

¶49 Congress chose to allow some potential harm to individuals in favor of not stifling growth of the newly created Internet. Even in its developed form, the Internet continues to experience growth and innovation, while becoming even more a part of people's lives. These issues are unlikely to disappear, so it is necessary to continue to evaluate the purposes and effects of legislation like the Communications Decency Act. Although it is far more developed since its beginning, the Internet is still a relatively new medium, and

¹²⁵ See Abril, *supra* note 47, at 4; Purcell, *supra* note 106, at 632.

favorable policies are necessary to maintain its growth. By granting immunity to service providers, individuals harmed by third-party content do lose a potential party to hold liable, but there always remains the possibility of holding the content provider responsible.

¶50 In addition, the service providers themselves always have an incentive to protect their users as they are forced to compete for business with other service providers. With clear and well-defined boundaries for service provider liability, both the service provider and the individual user can adjust behavior and operate based on known risks. Furthermore, because the pace of change and development for internet services is so quick, legislation and policies, even if only a few years old, may no longer be achieving the goals for which they were originally written. Congress must continually evaluate and adjust the incentives and protections, because, with these goals in mind, it is possible to maintain the growth and online innovation all parties desire.