

TACKLING THE INTANGIBLE: WHY THE SUPREME COURT NEEDS TO DEFINE INTELLECTUAL PROPERTY AND WHAT FACEBOOK STANDS TO LOSE (OR WIN)

JOHN PAUL A. GALGANO*

INTRODUCTION

Clickbait is bad enough without finding your face plastered onto it. “Meet and chat with single women near you” is unsavory enough to stumble upon online—but imagine you see yourself above just such a headline. Although many of us would feel a sense of extortion upon such a surprise, the vast majority of the population has no claim against the publisher of the ad for misappropriation of likeness. Now imagine you are a public figure, having garnered some publicity and trying to make a name for yourself. You come across the same advertisement with your (now-famous) face once again selling the seedy dating service. Not only do you feel the extortion of your personhood, but now there is an added layer: your livelihood is at stake. Such a scenario happened to Karen Hepp, a local Philadelphia news anchor, who had her image stolen to promote the same type of advertisement on Facebook.¹

However, Hepp set out into mostly untested waters by choosing to go after Facebook, rather than the creator of the ad, with such a claim. What ensued was a battle that split a panel of Third Circuit Court of Appeals judges over whether Facebook was immune from Hepp’s claim under § 230 of the Communications Decency Act (CDA).² § 230, as many will have already recognized, has become a hot-button issue in the media and in Congress as of late, with Senate hearings calling the CEOs of Google, Facebook, and Twitter to testify.³ The proper scope of § 230’s near-complete immunity for internet service providers (ISPs) in regards to the content posted by third parties on their websites has drawn increasingly-heated political criticism.⁴ The debate over § 230 has wandered mainly down the path of internet censorship, but a new split between the Third Circuit and Ninth Circuit Courts of Appeals threatens to strike first in the Supreme Court.⁵

* J.D. Candidate, Notre Dame Law School, Class of 2023. B.S. Mechanical Engineering, Minors in Mathematics and Catholic Studies, University of St. Thomas (St. Paul, MN), Class of 2019. I would like to thank my wife, Megan, for supporting me as I put in the hours to research and write this note, and I would also like to thank professors Rick Garnett and Stephen Yelderman for their help in understanding these issues and writing this note. Lastly, I would like to thank my parents and siblings for helping to form me in my life and career.

1. Hepp v. Facebook, 14 F.4th 204, 206 (3d Cir. 2021).

2. *Id.*

3. See Kaya Yurieff & Brian Fung, *CEOs of Google, Twitter and Facebook Grilled in Senate Hearing*, CNN BUSINESS (Oct. 28, 2020), <https://www.cnn.com/2020/10/28/tech/section-230-senate-hearing-wednesday/index.html>.

4. *Id.*

5. Hepp, 14 F.4th at 206.

The flavor of the debate over § 230 between these courts comes in the realm of intellectual property. Essentially, the Ninth Circuit has held that only *federal* intellectual property claims fall into the intellectual property exception from § 230 immunity, while the Third Circuit has recently taken a hard-and-fast stance against the Ninth Circuit's interpretation, holding that state law intellectual property claims are also good against an internet service provider.⁶ The real question at the forefront of it all: *what is a Facebook to do?* Amici for the social media giant say that allowing state law intellectual property claims to fit into the § 230 exception will open the door to massive liability for all ISPs, not to mention heavy transaction costs to keep abreast of each state's separate intellectual property laws, while Hepp contests that such a fear is largely overblown.⁷

The following writing will attempt to spell out the issue over ISP liability in the § 230 intellectual property exception. This will be accomplished by giving a background on the provision within § 230 in question in Part I, next moving to an analysis of the two federal Courts of Appeals cases that have directly addressed the issue in Part II, then debating the various interpretations of the meaning of intellectual property and how each could affect how courts view § 230 in Part III, and finally determining whether the Supreme Court should take up the *Hepp* case if Facebook sends it its way and how it should be decided in Part IV, with a brief conclusion to follow.

I. § 230'S POLICY GOALS AND THE INTELLECTUAL PROPERTY EXCEPTION

A. *What was § 230 truly enacted to do?*

The Third Circuit, in *Hepp*, took note of the legislative policy goal behind § 230 by pointing out, “[§ 230] specifically sought to preserve ‘the vibrant and competitive free market’—‘unfettered by Federal or State regulation.’”⁸ The fear motivating Congress in 1996, when the law was enacted,⁹ was clearly that if ISPs were held liable for what others said on websites hosted by them that this would create a disincentive to host these websites in the first place.¹⁰ Congress considered the growing internet to be a wealth of “educational and informational resources to our citizens.”¹¹ Although hindsight may make the heart of this proposition debatable, it is unmistakable that Congress wanted as much information to flow over the internet as possible. In this way, we could avoid restricting the growth and reach of the tool that has since changed the world before it could even get off the ground.

6. *Id.*; see also *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007).

7. See *Hepp*, 14 F.4th at 204; see also Brief for Electronic Frontier Foundation et al. as Amici Curiae Supporting Appellees at *1, *Hepp v. Facebook*, 14 F.4th 204 (3d Cir. 2021) (Nos. 20-2725, 20-2885), 2021 WL 1172572.

8. *Hepp*, 14 F.4th at 208 (quoting 47 U.S.C.A. § 230(b)(2) (West 2018)).

9. 47 U.S.C.A. § 230 (West 2018).

10. *Id.*

11. *Id.*

§ 230 accomplishes this goal by its sweeping proclamation 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.”¹² Thus, companies that have websites upon which anyone can post have come to be known as “platforms,” avoiding the liability of what was said by the “publisher” or “creator” of the actual content of said posts.

Congress did not, however, intend for *all* information to flow unfettered. § 230(c)(2)(A) allows ISPs to curate the information published on their platforms to filter out “material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected”¹³ The competing interests of the free flow of information and incentivizing parents to allow children to use ISPs, thus creating more users and allowing the internet to flourish economically, met in this provision. It thus created a soft incentive for ISPs to make their websites more friendly to a younger demographic and individuals sensitive to certain outlier information.

Although § 230 provides an exceptionally broad immunity for ISPs who host websites with potentially scandalous and offensive information, the protection is not absolute. Congress added § 230(e) to provide exceptions to this powerful immunity. This provision includes exceptions for criminal law, intellectual property law, state law, communications privacy law, and sex trafficking law.¹⁴ The main concern of this note is exploring the intellectual property law exception, in tandem with the state law exception.

B. How does the intellectual property exception fit into the legislative scheme?

§ 230(e)(2) provides, “[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property.”¹⁵ The very next provision, § 230(e)(3), further gives, “[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”¹⁶ The policy underlying the intellectual property exception is clear enough: Congress does not want to interfere with its Article I, Section 8, clause 8 power to “promote the . . . useful Arts”¹⁷ by creating a loophole for infringers to avoid liability. Such a loophole would diminish the power of the limited monopoly granted to inventors as a quid pro quo for their inventive labor. The problem is in the phrase “intellectual property.”

Patent rights and copyrights are well-defined federal schemes that are rooted in Article I, Section 8, clause 8 (“the Intellectual Property Clause”),

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. U.S. CONST. art. I, § 8, cl. 8.

whereas trademark rights find their origin in the Commerce Clause.¹⁸ Yet all three of these have come under the umbrella of the colloquial term “intellectual property” since their respective inceptions. While patent rights and copyrights share a common root in Venetian Printing Monopolies of the fifteenth and sixteenth centuries,¹⁹ trademark rights are rooted in the concern over consumer confusion (that consumers will not be able to determine the source of a product if a certain entity is not given the exclusive right to use an identifying mark). Such slight inconsistency may be overcome by simply looking the other direction, but more debate is imported when states have their own intellectual property regimes.

Although patent rights, copyrights, and trademark rights are either exclusively or almost completely housed in a federal regime, rights in other areas such as trade secrets and publicity are venerated as “intellectual property law” that is substantially state operated. Congress has mostly taken care of the problem by adopting legislation only as recently as 2016 for the protection of trade secrets,²⁰ but a right to publicity has a more troubling history and stature.

Lost between intellectual property law and information privacy law, the so-called “right to publicity” finds its roots in state common law torts infamously articulated by justices Warren and Brandeis.²¹ However, despite its roots, what was ideated as an action for *invasion of privacy* by misappropriation of name or likeness has developed into a simple *property* action akin to trademark law wherein the true harm to be found for the plaintiff is in the lost profits that she could have derived from endorsing a certain company, product, or service. Instead, the defendant has taken it upon itself to use the plaintiff’s endorsement without her consent or, indeed, without lining her pocketbook for it.²²

The question is whether the action for misappropriation has been completely subsumed within the “right to publicity” or whether the privacy roots maintain it within the sole realm of information privacy law. This question may seem innocuous—it has clearly trended toward the property right—but in some cases parties would argue it is the difference between a “vibrant and competitive free market”²³ on the internet and the end of the internet as we know

18. U.S. CONST. art. I, § 8, cl. 3.

19. Brief for Electronic Frontier Foundation et al. as Amici Curiae Supporting Appellees at *8–9, *Hepp v. Facebook*, 14 F.4th 204 (3d Cir. 2021) (Nos. 20-2725, 20-2885), 2021 WL 1172572.

20. See, e.g., 18 U.S.C.A. § 1832 (West 2016).

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

22. Compare *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983) (finding that celebrity Johnny Carson had good claim for misappropriation of name or likeness against portable toilet company that used Carson’s well-known slogan in its name), with *Raymen v. United Senior Association, Inc.*, 409 F. Supp. 2d 15 (D.D.C. 2006) (finding no cause of action for a gay couple whose image had been used by a conservative group to campaign against AARP).

23. 47 U.S.C.A. § 230 (West 2018).

it,²⁴ in large thanks to the exceptions to § 230. The crux of the issue, as will be explained in greater detail in part II, *infra*, is that the misappropriation tort or the right to publicity cause of action have slowly come to be known as intellectual property law governed under various state law regimes. However, § 230 seemingly deals with intellectual property law and state law separately; various inconsistencies are necessarily raised, namely whether state law intellectual property actions fit into the exemptions of § 230, thus opening ISPs to liability against an array of varying state laws on the right to publicity and other quasi-intellectual-property actions and whether ISPs ought to bear the cost of being responsible for this knowledge. These questions were first taken up by the Ninth Circuit's *Perfect 10* court, and they seemed to be settled for fourteen years until the decision of the Third Circuit's *Hepp* court.²⁵

II. THE CIRCUIT SPLIT: *HEPP* IN LIGHT OF *PERFECT 10*

Unfortunately, it is necessary to do a slight bit of reporting to set up the heart of each circuit's law, juxtapose those positions, and draw out the questions necessary to answer for a niche but important area of the law to find consistency. When the Ninth Circuit Court of Appeals decided *Perfect 10* in 2007, it answered a question no one had explicitly asked before: are state intellectual property laws actually considered intellectual property law in the view of federal legislation? The panel found that, “[w]hile the scope of federal intellectual property law is relatively well-established, state laws protecting ‘intellectual property,’ however defined, are by no means uniform.”²⁶ While true at face value, this statement does not get to the heart of the issue, and it in fact raises a further question: must intellectual property laws have an underlying uniform federal regime to be considered intellectual property laws at all? The Third Circuit Court of Appeals apparently felt no need to answer this question; rather, the court couched the issue in terms of the text and structure of § 230, noting that the statute goes out of its way to mention the role of state laws in exceptions other than the intellectual property one.²⁷ The *Hepp* court posited that “the structural evidence [Facebook] cites cuts both ways,” and that the Facebook position “strays too far from the natural reading of § 230(e)(2).”²⁸ While the court is arguably correct that the absolute nature of the language in the intellectual property exception alone naturally reads to include state laws, reading § 230(e)(2) in light of § 230(e)(3), conspicuously juxtaposed in the legislation, necessitates a structural analysis that challenges the “natural reading” of the intellectual property exception. The court's denial of this apparent inconsistency is especially surprising when the opinion clearly starts

24. See generally Brief for Electronic Frontier Foundation et al. as Amici Curiae Supporting Appellees, *Hepp v. Facebook*, 14 F.4th 204 (3d Cir. 2021) (Nos. 20-2725, 20-2885), 2021 WL 1172572.

25. See *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007); see also *Hepp v. Facebook*, 14 F.4th 204 (3d Cir. 2021).

26. *Perfect 10*, 488 F.3d at 1118.

27. *Hepp*, 14 F.4th at 209.

28. *Id.* at 210–11.

the analysis by stating, “Facebook’s appeal to text and structure rightly urges us to read § 230 as an integrated whole.”²⁹ One wonders how an interpretation based solely on the one subsection treats § 230 as an integrated whole, rather than as a conglomeration of discrete exceptions to a broad, absolute rule.

The dirty secret is that the Third Circuit did not actually use a pure natural reading of § 230(e)(2) on its own to make its decision, but rather relied upon the structure it found so ambiguous to decide that the intellectual property exception categorically applies to all state law intellectual property claims. However, the Court confuses itself on this point, most apparently when it declares,

Facebook is correct that the explicit references to state law in subsection (e) are coextensive with federal laws. But those references also suggest that when Congress wanted to cabin the interpretation about state law, it knew how to do so—and did so explicitly. Because the evidence cuts both ways, the structure does not change the natural meaning. So the text and structure tell us that § 230(e)(2) can apply to federal and state laws that pertain to intellectual property.³⁰

Notice the subtle shift in the court’s reasoning: (1) Congress deliberately built state law cabins into the structure of § 230; (2) Congress did not build in state law cabins to the intellectual property exception; (3) thus, the structure is ambiguous. But this result is non sequitur. The Court claims that Congress was explicit and deliberate with the structure of § 230 pertaining to state laws, but then says the structure cuts both ways. Addressing this may seem pedantic—the result is the same whether the Third Circuit got there on a purely textual basis or imported the structure of the statute—but this inconsistency can present some unintended consequences. Instead of bolstering the opinion by pointing out that the structure actually cuts toward the strict textualist argument because Congress deliberately cabined state laws in (e)(3) but not in (e)(2), the Third Circuit needlessly conceded ground to proponents of broad ISP immunity. Whether or not a reader agrees with the outcome of the opinion, it should be commonly acknowledged that the Third Circuit committed a faux pas by brushing off the structural argument at the same time it claimed to read § 230 as an integrated whole.

This judicial slothfulness would be bad enough on its own without the added pressure of splitting with another circuit to raise the stakes. Even worse, the *Hepp* opinion and the *Perfect 10* opinion show that the circuits are talking past each other in one key respect: who defines “intellectual property law” in general, and especially within the meaning of § 230. The Ninth Circuit does not address this question, punting to an opinion based on policy to the surprise of no one. The *Perfect 10* opinion is not shy about this, basing the decision on the fear that, “[b]ecause [state intellectual property laws] vary widely from state to state, no litigant will know if he is entitled to immunity for a state claim until a court decides the legal issue.”³¹ It is hard to tell whether this is an idealistic

29. *Id.* at 210.

30. *Id.* at 211.

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

paternalism on the part of ISPs, aiding them from an unreasonable and daunting amount of work to avoid liability, or whether this is driven economically, from a desire to lower transaction costs as much as possible for some of the largest corporate entities in the world. Either way, the argument should find some common ground among different political ideologies. The foundations of the argument, however, may be where the debate is hottest. Besides the reluctance of many textualist and originalist contemporaries to accept untethered policy-driven opinions, the theory of the *Perfect 10* majority remains untested for the most part.

In fact, there is a debate within the *Hepp* court over whether allowing state intellectual property claims into the § 230(e)(2) exception has been tested. The majority points to *Atlantic Recording Corp. v. Project Playlist, Inc.*, a district court case in the Southern District of New York, to demonstrate an area in which state intellectual property claims were imported into the § 230 exception without the sky caving in on ISPs.³² *Atlantic Recording* purported to answer the exact question at issue, wherein a defendant (there, Playlist) who qualifies for CDA immunity, is subject to claims of state law intellectual property liability. The court explicitly pitted federal and state intellectual property claims against each other, setting the stage:

Plaintiffs argue that, under the plain language of Section 230(e)(2), the CDA does not limit *any* law pertaining to intellectual property, and therefore their state law claims can proceed. Playlist argues that this provision really means that nothing in the CDA should be construed to limit any *federal* intellectual property law.³³

The district court went on to directly address the same textual and policy arguments that *Perfect 10* and later *Hepp* attempted to decide, plainly rejecting the policy views of the former in the process and allowing state intellectual property claims to proceed despite the CDA in New York.³⁴ Notably, this district has jurisdiction over New York City, with no shortage of potential litigants from both the commercial and personal pools.³⁵ Approximately thirteen years have passed since the *Atlantic Recording* decision, with the case remaining good law in the Southern District of New York, and in that span there have been two cases involving state law intellectual property claims that have § 230 implications.³⁶ Compare this to one case decided in 2001 before the *Atlantic Recording* decision came out, only dealing with a Lanham Act (federal trademark) violation, and the case can hardly be said to have any meaningful

32. *Hepp*, 14 F.4th at 210 (citing *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009)).

33. *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 702 (S.D.N.Y. 2009) (emphasis in original).

34. *See id.* at 703–04.

35. *See Welcome to the Southern District of New York*, U.S. DIST. CT.: S. DIST. OF N.Y., <https://www.nysd.uscourts.gov/> (last visited Jan. 14, 2022) (“The United States District Court for the Southern District of New York encompasses the counties of New York, Bronx, Westchester, Rockland, Putnam, Orange, Dutchess, and Sullivan . . .”).

36. *See infra* Appendix A.

effect on the transaction costs associated with ISPs.³⁷ Furthermore, there is no lack of ISPs with high risks of liability under state law claims, including right to publicity claims, in New York City.³⁸ Compound this with a plethora of litigants in the jurisdiction of the Southern District of New York who have massive amounts of commercial goodwill associated with their name and/or image and can easily bring a claim under diversity jurisdiction. Perhaps the simple answer to this whole conundrum is that there is not a lot of litigation to go around against ISPs for state law intellectual property violations, whether due to difficulty of private policing or disparate amounts of occurrences. In any case, the *Hepp* court finds at least some empirical support while eschewing the parade of horrors presented by the amici in support of Facebook.³⁹ However, the Third Circuit panel was not in sync on this point. Judge Cowen, in a partial dissent, downplays the role of *Atlantic Recording* for being only a district court decision, not having the sweeping breadth of the *Perfect 10* decision, leaving the scalding review:

While there may be district court cases (like [*Atlantic Recording*]) that have applied the intellectual property exception to state law claims, we are the first circuit to take such a step. The majority takes issue with Facebook’s assertion that its reading would increase uncertainty about the precise contours of immunity in cases involving purported state intellectual property laws. However, the 2007 *Perfect 10* decision was the only circuit court clearly on point, and it kept the proverbial door closed on a potential influx of disparate and downright confusing state law “intellectual property” claims that would be contrary to Congress’s express goals in enacting § 230. We now open this door and . . . this drastic step undermines the broad policy objectives codified in § 230.⁴⁰

Clearly there is strong opinion on both sides as to whether allowing state law intellectual property claims to proceed despite typical § 230 immunity will spell the end of the free market on the internet as we know it.

Perhaps the problem is that no court is directly hitting the correct question. One way to resolve this is to ask not whether Congress intended state law intellectual property claims to fall under the umbrella of intellectual property, but rather to ask what the definition of intellectual property is in the first place. The *Hepp* court came close to this approach, but never explicitly adopted it, rather relying on the text of the statute. The majority in *Hepp* did, however, leave a plethora of various dictionary definitions in an appendix to the opinion.⁴¹

37. *See id.*

38. Examples include SoundCloud, Spotify, Vimeo, Etsy, and Shutterstock, to name only some of the most well-known.

39. *Hepp v. Facebook*, 14 F.4th 204, 212 (3d Cir. 2021).

40. *Hepp*, 14 F.4th at 219 (Cowen, J., dissenting in part) (citations omitted).

41. *See Hepp*, 14 F.4th at 215–16 (citing Black’s Law Dictionary 7th–11th eds., Ballentine’s Law Dictionary, Dictionary of Modern Legal Usage, The Wolter’s Kluwer Bouvier Law Dictionary, McCarthy’s Desk Encyclopedia of Intellectual Property, The American Heritage Dictionary of the

These definitions were used by the majority to either show that the right to publicity is directly housed within the term “intellectual property,” or to show that the right to publicity is analogous to the terms found in legal definitions of “intellectual property.”⁴² Here, the majority loses track of the question, however. There is hardly any doubt that some people (perhaps even most people) consider the right to publicity to be a clear part of “intellectual property” law proper, and there are even more who would be willing to say it has a direct and unmistakable analogy in trademark law (which is undoubtedly in the realm of intellectual property law proper). This is not the threshold question—what ultimately needs to be decided is whether Congress intended *state* claims, which are much more variable in breadth when it comes to the right to publicity and other quasi-intellectual property claims, to supersede the immunity it granted to Internet Service Providers and platform websites under the Communications Decency Act—but defining intellectual property will guide the answer to that threshold question.

III. WHAT IS “INTELLECTUAL PROPERTY” ANYWAYS—AND WHO GETS TO DECIDE?

The majority in *Hepp* may have been haphazard in which question it was answering—whether the right to publicity is an intellectual property claim in its own right or whether state law intellectual property claims are categorically rejected from § 230(e)(2) exclusions. However, the law and lay dictionaries demonstrate that a workable definition of intellectual property is possible, and it could help resolve the question at bar—the law is just waiting on some authoritative entity to say so after the circuits have split.

There are many possible ways this could shake out, including: (1) the Supreme Court takes up the *Hepp* case or a similar one and decides either (a) whether the right to publicity is a true intellectual property claim, (b) upon a definition of intellectual property, (c) provides a standard to use in deciding whether something is “intellectual property,” or (d) whether state intellectual property claims were contemplated as part of the intellectual property exclusion in § 230(e)(2) of the CDA; (2) Congress takes it upon itself either to define intellectual property somewhere in the CDA (or elsewhere in the United States Code) or to clarify § 230(e)(2) by adding “federal,” “state,” or both; or (3) neither Congress nor the Supreme Court acts, and the circuit split remains active for the foreseeable future. It may not be apparent who gets to decide what happens, but certainly something should happen, because there now exists an area of the law that could have significant latent downstream effects once litigants take notice of the opportunity to take on companies with some of the deepest pockets in the world with a state intellectual property claim.

Suppose the Supreme Court takes up the mantle and goes with option (1). This would have the benefit, as expounded upon in Part IV, *infra*, of binding authority upon the lower circuits instantly, and creating more consistency in a

English Language 4th–5th eds., Random House Webster’s School and Office Dictionary, Merriam Webster’s Collegiate Dictionary, and Oxford English Dictionary 2d–3d eds.).

42. *See id.* at 213–14.

more efficient way, whatever the outcome may be. The problem is that Congress may have a different idea of what it intended in § 230(e)(2) than what the Supreme Court decides. Congress could take up the mantle and become its own lexicographer to define intellectual property in the CDA or clarify which sorts of intellectual property laws count for the § 230(e)(2) exception, but this does not seem to be on the radar of any legislative agenda (which will come as no surprise to most readers). The irony inherent in this option is that in order to spur Congress to action, the quickest route would be to get Facebook and other internet platforms and ISPs involved in heavy lobbying in Congress to get this change passed. Where this becomes ironic is that Facebook et al. may not find it worthwhile until more circuits, or the Supreme Court, decide the issue against their interests, so it may take Facebook losing a few more battles for them to win the war. The irony is compounded when it is realized that Facebook could save itself a lot of time and energy by bringing this to the attention of Congress now, especially if it is the existential crisis that it and its amici claim that it is.

The least desirable option would be for the circuits to decide the issue one at a time until there is a hodge-podge of jurisdictions that allow state law intellectual property claims to proceed against tech giants and jurisdictions that grant categorical immunity to tech giants facing these claims. I would posit that such a variety is virtually certain based on the blatant ambiguity of the legislation. There is simply no correct answer: the text is silent on the crucial part of stating what counts as intellectual property, the structure shows two opposite but equally likely views depending on the lens one uses, and both sides have First Amendment and policy driven implications. It would be best to nip this problem in the bud and clear up such an ambiguous piece of legislation which is under so much political fire for other reasons in the first place. As it stands, for better or for worse, the Supreme Court is currently the best option for action.

However, even if one branch chooses to act, the correct answer to the question is not clear cut. The split goes deeper than *Hepp* and *Perfect 10*; these two cases, rather, demonstrate a fundamental uncertainty about intellectual property law. One that can be described as a positivist view of intellectual property, and one that can be described as a pragmatist view of intellectual property.

On the one hand, there is what I will call the “positivist view” of intellectual property. A positivist view would assert that only the categories of intellectual property positively enacted by Congress fit in the definition of intellectual property law. These would be patents (in Title 35 of the U.S.C.),⁴³ trademarks (in Title 15 of the U.S.C.),⁴⁴ and copyright (in Title 17 of the U.S.C.).⁴⁵ Since these forms of intellectual property (especially patents and

43. See 35 U.S.C §§ 101–103 (2011).

44. See Lanham Act, 15 U.S.C. §§ 1051–1141n (2020).

45. See 17 U.S.C. §§ 101–1511 (2022).

copyrights, which find their basis in Article I, § 8 of the Constitution,⁴⁶ while trademarks find their basis in the Commerce Clause of the Constitution⁴⁷) have their power couched *directly* in the Constitution, they hold a firmer grip, so to speak, in the eyes of federal law regarding intellectual property. Even at this side of the aisle, trademarks have a strained relationship with “intellectual property” law—often being labeled a mere subset of the law of unfair competition because it is a necessity of trading and not a product of labor of the human mind.

On the other side are those who embrace what is often referred to as “soft IP” (which, for purposes of this argument, can be defined as anything other than patent law but still falls under the auspices of intellectual property). It is most convenient to describe this group as intellectual property pragmatists, since the definition of intellectual property in this sphere is flexible; anything that is useful or practical to think of in terms of intellectual property (mostly for licensing reasons in all probability) counts as intellectual property for all intents and purposes. Adopting this view of intellectual property would mean an expansive definition of the term.

The difference between these views is the exact crux of the argument between the parties in *Hepp* and *Perfect 10*, but neither court has seemed to address it directly. If a positivist view of intellectual property is adopted, the answer becomes crystal clear: only those sets of laws posited by Congress with a basis in the Constitution constitute true “intellectual property,” so only federal intellectual property laws (or, perhaps, those state laws which are directly analogous to federal intellectual property laws) ought to fall within the intellectual property exception in § 230. In such a case, Hepp’s claim must fail for not having a cognizable intellectual property basis. Similarly, if a pragmatist view of intellectual property is adopted, the opposite answer is inescapable. In this case, the right to publicity is a prime example of a pragmatist intellectual property claim, with clear analog and relationship to trademark and unfair competition laws. Hepp’s right to publicity claim against Facebook would be absolutely within the scope of “intellectual property” as stated in the plain meaning of the text of § 230(e) because it functions as an intellectual property claim. It would be up to Congress to clear up any unintended consequences of miscalculated language in the intellectual property exception, but this should not stop the court from ruling as such.

Of course, any entity attempting to define the scope of intellectual property will not be starting from scratch. As the *Hepp* court noted in the Appendix to the decision, there is a plethora of persuasive authority on the subject, not all of which aligns with each other.⁴⁸ It is worth noting the differing

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

47. See U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”).

48. See *Hepp v. Facebook*, 14 F. 4th 204, 215–16 (3d Cir. 2021).

conceptions of intellectual property even within the authorities cited in the *Hepp* majority opinion, as the following table demonstrates:⁴⁹

Source	Positivist	Pragmatist
Black's Law Dictionary, 7 th Edition ⁵⁰		x
Black's Law Dictionary, 8 th – 11 th Editions ⁵¹		x
Ballentine's Law Dictionary, 3 rd Edition ⁵²	x	
Dictionary of Modern Legal Usage, 2 nd Edition ⁵³	x	
The Wolters Kluwer Bouvier Law Dictionary ⁵⁴	x	
McCarthy's Desk Encyclopedia of Intellectual Property ⁵⁵		x
The American Heritage Dictionary of the English Language, 5 th Edition ⁵⁶	x	
The American Heritage Dictionary of the English Language, 4 th Edition ⁵⁷	x	
Random House Webster's School & Office Dictionary, 11 th Edition ⁵⁸	x	

49. Although it may appear from this table that the overwhelming weight of authority supports a positivist view of intellectual property, it should be noted that a few of the definitions listed under the "Positivist" column were "close calls," so to speak. For instance, the definitions from the American Heritage Dictionary of the English Language emphasize *commercial value* as the underpinning of intellectual property, but these have still been listed as positivist views of intellectual property because the examples given in the definition all fall under the auspices of federal intellectual property regimes. See *Intellectual Property*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011); see also *Intellectual Property*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2009).

50 *Intellectual Property*, BLACK'S LAW DICTIONARY (7th ed. 1999).

51 *Intellectual Property*, *id.* (8th ed. 2004); *id.* (9th ed. 2009); *id.* (10th ed. 2014); *id.* (11th ed. 2019).

52 *Intellectual Property*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969).

53 *Intellectual Property*, DICTIONARY OF MODERN LEGAL USAGE (2d ed. 1995).

54 *Intellectual Property*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (2012).

55 *Intellectual Property*, MCCARTHY'S DESK ENCYCLOPEDIA OF INTELLECTUAL PROPERTY (1991).

56 *Intellectual Property*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011).

57 *Intellectual Property*, *id.* (4th ed. 2009).

58 *Intellectual Property*, RANDOM HOUSE WEBSTER'S SCHOOL & OFFICE DICTIONARY (1999).

Merriam-Webster's Collegiate Dictionary, 11 th Edition ⁵⁹	x	
The Oxford English Dictionary, 2 nd Edition ⁶⁰	x	
Oxford English Dictionary, 3 rd Edition ⁶¹	x	

While this table shows the range of authority relied on by the *Hepp* court to make a “plain language” assessment, there is a notable discrepancy in at least one place; the two definitions offered from the Oxford English Dictionary are incorrect on their faces. Both definitions are essentially identical, but the more recent entry defines intellectual property as “[p]roperty (such as patents, trademarks, and copyright material) which is the product of invention or creativity, and does not exist in a tangible, physical form.” Both definitions contain this last clause, which is in fact directly adverse to the legislative language which gives rise to both patent and copyright. In the first place, there is nothing which keeps patented material from existing in a tangible, physical form. In fact, most patents are based on compositions, apparatuses, systems, and methods that have already been developed and exist in tangible form or are intended to be manufactured. It is for this exact reason that there is a one-year grace period given to inventors after “disclosing” their inventions to the public where they are still allowed to apply for a patent.⁶² Furthermore, it is a *requirement* to obtaining a patent that the inventor “enables” the public, meaning that the inventor must describe the invention fully enough that a “person of ordinary skill in the art” is able to actually make the thing.⁶³ In many instances, this could not practically be done without actually making or producing the invention first.⁶⁴ Even if that does not convince you that patents deal with the tangible, an inventor cannot obtain a patent on an abstract idea.⁶⁵ If the tangible requirement of patent law is not enough to prove the error of the Oxford English Dictionary definition, consider that it is an *express* and *affirmative* requirement of copyright law that the thing copyrighted be “fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly

59 *Intellectual Property*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

60 *Intellectual Property*, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989).

61 *Intellectual Property*, <http://oed.com/view/Entry/97387> (last visited Oct. 27, 2015).

62. See 35 U.S.C. § 102(b)(1) (“A disclosure made 1 year or less before the effective filing date of a claimed invention shall not be prior art to the claimed invention . . .”).

63. See 35 U.S.C. § 112(a) (“The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art . . . to make and use the same, and shall set forth the best mode contemplated by the inventor . . . of carrying out the invention.”).

64. For instance, the body of law surrounding patent rights in the “unpredictable arts” often requires that the invention be made in order to know that the invention does what the inventor says that it does.

65. See *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208 (2014).

or with the aid of a machine or device.”⁶⁶ Thus, no one has a copyright in anything *unless* that thing is tangible, directly averse to Oxford’s definition of “does not exist in a tangible, physical form.”⁶⁷ What is most disheartening about this apparent discrepancy is not that the Oxford English Dictionary could get the definition so blatantly wrong, but rather that the *Hepp* court offered the definition at all in its plain meaning interpretation of § 230(e). Much is left to the imagination about how much the court actually thought about and engaged with these definitions when making its decision.

In any event, it is clear that there is a split in definitional authority over the roots of intellectual property law as a whole. However pedantic these semantic differences may seem, it is this exact struggle which could open the door to harsh liability for some of the largest corporations in the United States, with all of this due, in the most part, to a Congress too distracted about whether to revoke § 230 protection altogether to add a definition of “intellectual property” to the act, or put the word “state” or “federal” in front of the term “intellectual property” in the intellectual property exception of § 230(e). In the absence of such legislative action, the courts are left to their own devices, and as of the *Hepp* decision, this approach has become potentially problematic.

IV. THE SUPREME COURT SHOULD GRANT CERT IF GIVEN THE CHANCE

Please note that while this note was being prepared, Facebook petitioned for a rehearing *en banc* in the Court of Appeals for the Third Circuit which was denied. It further appears that the parties have let the deadline for certification to the Supreme Court of the United States pass without taking advantage of the opportunity. Karen Hepp has filed a second amended complaint and the case remains ongoing, however, with new amici briefs filed. Although it appears that the *Hepp* case may not find its ultimate destination at the Supreme Court, if Facebook and its amici are correct that opening the door to this sort of liability is the proverbial opening of the floodgates, then it is still worth arguing that the Supreme Court should grant cert. in a subsequent case, and the facts of *Hepp* should remain a good analog for any future instances the Supreme Court may be able to take on.

The most efficient method of clearing up the great intellectual property conundrum of our time is in the Supreme Court, as the situation stands now. The time is ripe—there is an official circuit split on an issue that needs to be clarified and which has strong arguments underpinning both sides (with deep-pocket litigants at stake to boot), and Congress does not seem to be doing any visible leg work on the issue. The only problem is determining which way the Supreme Court would and should come down on the issue.

It is this author’s personal view that the pragmatist view of intellectual property should be asserted, the state law right to publicity held within the purview of § 230(e) of the CDA, and the Third Circuit ruling in *Hepp* be affirmed (in the judgment, not the reasoning). When taken at face value, it may be absurd to hold this viewpoint: why should a website that is a mere platform,

66. 17 U.S.C. § 102(a).

67. See *Intellectual Property*, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989).

like Facebook, be liable for a third party posting that includes the face of a local celebrity used without her permission? How is Facebook supposed to know and why should it care? Simply put, because Facebook is in the best position to catch and extinguish this content. The platform has had the ability to automatically recognize identities based on facial recognition software since at least 2015.⁶⁸ Granted, this feature has gone through harsh scrutiny more recently, and Facebook has ended its use of the feature on individual accounts (not even allowing an opt-in version of the feature after high profile lawsuits).⁶⁹ However, the company continues to explore avenues of use for the dystopian software.⁷⁰ Certainly a large social media company with access to this technology would be able to alert a person to the use of her image on the site, and give the option to ban posting or advertising using that person's image (perhaps pending a review of the post). This does not seem so outlandishly outside the capabilities and scope of a player such as Facebook.

However, just because Facebook *could* handle the task does not mean opening platforms to state law intellectual property claims is in the interests of justice. The question is whether the possible remedies that could be levied against Facebook match the share of the blame it holds when a situation like that in *Hepp* or *Perfect10* arises. Luckily, there are cases dealing with the right to publicity under state law, such as one of the seminal cases of positive outcomes for the right to publicity: *Carson v. Here's Johnny Portable Toilets, Inc.*⁷¹ In that case, the Sixth Circuit Court of Appeals recognized the right to publicity claim that the famous Johnny Carson, host of "The Tonight Show," asserted against a Michigan company using his catchphrase "Here's Johnny" on its portable toilets for rent.⁷² Upon remand, the district court awarded \$31,661.96 in damages, as well as an injunction.⁷³ This would amount to an award of about \$80,782.42 today.⁷⁴ More importantly, the damages amount was calculated by the district court as "the defendant's profits, plus costs."⁷⁵ The upshot is not only that an enormous celebrity like Johnny Carson

68. See Victoria Woollaston, *Facebook Can Tag You in Photos AUTOMATICALLY: Social Network Starts Rolling Out DeepFace Recognition Feature*, DAILY MAIL (last updated Feb. 10, 2015), <https://www.dailymail.co.uk/sciencetech/article-2946186/Facebook-soon-tag-photos-AUTOMATICALLY-Social-network-starts-rolling-DeepFace-feature.html>.

69. See Adi Robertson, *Facebook Is Shutting Down Its Face Recognition Tagging Program*, VERGE (Nov. 2, 2021, 1:53 PM EDT) <https://www.theverge.com/2021/11/2/22759613/meta-facebook-face-recognition-automatic-tagging-feature-shutdown>.

70. *Id.*

71. See *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835-37 (6th Cir. 1983).

72. *Id.*

73. See *Carson v. Here's Johnny Portable Toilets, Inc.*, 810 F.2d 104, 105 (6th Cir. 1987) [hereinafter "*Carson II*"]. The cited case affirmed the damages award to the plaintiff, Johnny Carson.

74. This amount was calculated using the Bureau of Labor Statistics online inflation calculator (found at https://www.bls.gov/data/inflation_calculator.htm). \$31,661.96 was entered with a starting date of January 1987 (the approximate date of the *Carson II* decision) and the output date was set to February 2022 (the most recent date range available as of the time of this writing).

75. *Carson II*, 810 F.2d at 105.

can only collect relatively minimal damages on a right of publicity claim. *Carson* and *Carson II* show that even if the plaintiff in *Hepp* can make a state law intellectual property claim for right of publicity against Facebook or any ISP, the recovery could conceivably be \$0 in damages. Plaintiffs such as those in *Hepp* may go after the platforms hosting these advertisements because they cannot track down those who bear the brunt of the blame, or the advertisers may be judgment-proof, but their headaches remain when it comes time to proving damages.⁷⁶

Furthermore, Facebook and its kin may not be the end of the line for this sort of litigation. Many social media sites and other platforms are in the best position to find the entity that caused the controversy and attempt something along the lines of a joint and several liability claim against it. Put it this way: if Facebook is reaping the rewards of collecting advertising fees on its platform, and the advertiser from whom Facebook is collecting these fees is breaking the law (whether or not it is a state law or a federal law), Facebook should share the bulk of the responsibility for tracking down the advertiser and helping to mend the wrong done by that advertiser. One would be hard pressed to find another area of the law in which this is not true. The only reason Facebook can put forward in the *Hepp* case to be shielded from this liability is a wholly ambiguous bit of legislation that may or may not purport to immunize the social media behemoth.

However, let us not lose the forest for the trees. All may seem well under a microscope, and here it would be foolish to simply say that § 230(e) of the CDA should apply to state law intellectual property claims as much as federal ones because it fits the interests of justice in this one fact pattern. We must look beyond the pale and see what effect such a ruling would have on ISPs (especially social media platforms) and the general consumer public. Let us assume that a person who has garnered some local celebrity, like Karen Hepp, is able to collect a small damages award from Facebook and an injunction barring use of that advertisement after a favorable ruling by the Supreme Court of the United States, interpreting § 230(e) of the Communications Decency Act to include state law intellectual property claims and allowing states to set their own reasonable definitions of intellectual property.

76. In the spirit of fairness, I would be remiss not to mention that the plaintiff in the *Hepp* case sought relief in the range of \$10,000,000. See Complaint at 8, *Hepp v. Facebook*, 14 F.4th 204, 206 (3d Cir. 2021) 2:19-cv-04034-JS, 2019 WL 4239901. Of course, just because that amount is in the pleadings does not mean that the plaintiff could receive that amount in a jury verdict, and thus the point still stands. Also, it should be noted that the damages problem is not the only path to Facebook being found not liable – the Pennsylvania right to publicity statute has, built into it, an actual knowledge requirement. 42 PA. STAT. AND CONS. STAT. ANN. § 8316(d) (West 2003). That provision states:

No . . . corporation . . . in the business of . . . publishing or disseminating material for commercial or advertising purposes by any communications medium shall be held liable under this section unless they had actual knowledge of the unauthorized use of the name or likeness of a natural person as prohibited by this section.

It is not clear why Facebook did not bring this issue up at any point in the proceedings. See also Appendix B, *infra*, for a survey of which states have this immunity provision.

There are a few ways this could play out. First, it is possible that the sky does not fall. Perhaps Facebook and its amici overestimate just how many state law intellectual property claims are out there waiting for *Hepp* to blow the door open to liability. In this case, Karen Hepp has been made whole and Facebook is not in immediate danger. Second, let us also assume that the amici for Facebook were correct, and this opens the door to a plethora of lawsuits against Facebook for claims along the vein of state law right to publicity actions. The company could face a “death by a thousand cuts” as a handful of people happen to find their images used in rogue advertisements. This could be avoided by allowing a joint and several liability system for Facebook to track down and collect on the true offenders. Then again, if the advertiser is judgment-proof, Facebook et al. are simply out of luck on that account. The Karen Hepps of the world have been made whole at the expense of Facebook and the social media giant eats the cost. Third, Facebook makes a cost-benefit analysis of the risks that liability imposes and decides to implement a system, using already-existing technology under their control, to detect and root out illicit use of user’s images in advertisements.

Not only is the third option the most likely result of such a decision, but it is also a win for the injured party (Karen Hepp and those that may or may not come after her) and for the general consumer public. Advertisements will get cleaned up, to put it simply; advertisers will no longer be able to use shady, unlicensed images in their nuisance advertisements behind an ISP’s § 230 shield from liability – something in which society writ large has an interest. The best part is that Facebook could kill more than one bird with this one proverbial stone. It is somewhat comical that Facebook and its amici are so worried about right to publicity claims when they could face the same, or indistinguishably similar claims with a federal intellectual property basis. As discussed in Part I.B, the right to publicity which was formed on the basis of privacy law has become a clear extension of trademark law – an area of law with a well-defined federal regime and almost unarguably a member of the “intellectual property” club.⁷⁷ Further, trademark rights have been held to extend even as far as the distinctive vocal style of a somewhat-well-known singer in federal courts.⁷⁸ It would appear as though Facebook and its competitors should still worry about the same advertisements even if the *Hepp* case ends in their favor - § 230(e) would not protect ISPs from liability if Karen Hepp had claimed trademark infringement based on the use of her image and likeness. If these social media companies have to expend resources to root out trademark violations, why should it be such a burden to root out right of publicity violations? They are essentially the same act. In fact, applying § 230(e) exceptions to federal trademark laws and not to state intellectual property laws seems to defeat the purpose of the statutory exception in the first place: presumably the starting point is liability for these ISPs, § 230 is the carve out to promote the expansion

77. See *supra* Part I.B.

78. See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *reh’g denied*, 1992 U.S. App. LEXIS 24838 (9th Cir. Oct. 6, 1992). This case is arguably an outlier in trademark law, but it is worth noting that the controversy at issue was the use of the singer’s style in an *advertisement* as in the *Hepp* case.

of the internet, and § 230(e) reins § 230 back in to ensure that people's intellectual property is protected despite the free range of the internet.⁷⁹ The state versus federal intellectual property debate is completely tangential to the origin the § 230(e) exception, which focused on the property being protected, not the regime protecting it.

This brings up a final point on the subject of § 230(e)(2): why shouldn't states be able to define intellectual property claims for themselves? When such an ambiguity in the statutory language exists, it would be quite hard to argue that any construction of that statute should limit the ability of states to enact and enforce certain laws.⁸⁰ States have a clear interest in promoting the welfare of their citizens, including the protection of the property (real, intellectual, or otherwise) of those citizens. Congress of course has the ability to preempt such state laws⁸¹, but without an express preemption it would be quite uncouth to restrict the legislative agenda of any state. For this reason, it is best for the Supreme Court to adopt a pragmatist view of intellectual property as the baseline for presumption of legal validity within the meaning of § 230(e)(2) of the CDA and allow Congress and the states to determine whether laws are grounded in intellectual property and if those laws will be preempted by federal legislation.

In any event, this controversy has certain consequences that should be left to the Supreme Court to hash out. There is now a body of companies and their amici with billions of dollars in revenue trying to win a favorable interpretation of a controversial statutory scheme. There are at least two circuits now that have split over the correct interpretation in essentially identical cases. There is a trickle of data from a singular circuit suggesting that Facebook and its amici are plainly wrong about the volume of liability ISPs will face if they do not get a favorable outcome in the issue of statutory interpretation.⁸² It would be better to make a ruling, test the hypothesis that ISPs will survive an unfavorable interpretation, and allow Congress to simply add the word "federal" to § 230(e)(2) if it does prove so utterly problematic.

Nor would this be a waste of judicial resources; if Facebook is correct in its argument that such liability would be disastrous for itself and its competition, one would be hard-pressed to find a better use of judicial resources. The issues inherent in *Hepp* are also quite novel, considering that there is no set definition

79. The Communications Decency Act does not have legislative history directly addressing § 230(e)(2). See *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 417 (S.D.N.Y. 2001). It is worth noting that Judge Cowen, in his dissent in the *Hepp* case, seemed to think that there was "express" policy pertaining to § 230(e)(2) from the text of the statute itself; *Hepp*, *supra* note 40; see also *Hepp*, 14 F.4th at 219 (Cowen, J. dissenting) ("The "Findings" and "Policy" explicitly set forth in § 230(a) and (b) emphasize, inter alia, the importance of the Internet, its continued development, the free exchange of information, and the need to keep governmental regulation of this forum to a minimum . . .").

80. See U.S. CONST. amend. X.

81. Congress did so within the CDA, as discussed *supra*, Part I.B.

82. Please note that, in this instance, I am positing that a lack of cases over a period of years does itself constitute data.

of “intellectual property,” but such laws find root in the Constitution itself⁸³ (the wheelhouse of the Supreme Court), and that the internet has brought about forms of third-party advertising which garner billions of dollars in revenue essentially unchecked until now due to § 230 of the Communications Decency Act. All in all, the Supreme Court could save the lower courts much time and many resources in litigation over the CDA by taking a case such as the *Hepp* one.

CONCLUSION

The controversy in *Hepp* reveals two important layers of the law. On the surface, it adds fire to a contemporary debate about whether social media platforms should bear any responsibility for what is posted on their websites and forces us to reflect on whether the internet has become engrained enough in the modern world to no longer warrant the extra protections of § 230 of the Communications Decency Act. Below that surface, it highlights not only an ambiguity in the text of § 230, but also a strong reaction for a favorable interpretation by certain players with a lot of lobbying ability. Finally, at its core, this controversy demonstrates a need for a working definition of what comprises intellectual property – a definition only a select few would bother over if it did not suddenly affect Facebook and other deep-pocket parties.

This definition of intellectual property need not be a rigid one. Although a positivist view of intellectual property provides a cleaner line between what causes of action fall within the purview of intellectual property, this would necessarily come at the expense of certain parts of state sovereignty. A pragmatist view, although harder to distinguish at the boundaries (such as the right to publicity) provides a workable standard to determine whether certain laws are in the realm of intellectual property. The flexibility of such a rule comes with transaction costs to entities surviving under the umbrella of CDA § 230, however, and in the absence of Congress weighing these interests the Supreme Court should provide guidance.

83. U.S. CONST. art. I, § 8, cl. 8.

APPENDIX A

Table 1. List of lawsuits in the United States District Court for the Southern District of New York which involve intellectual property claims and implicate Communications Decency Act immunity provisions.

Case Name/Citation	State Law IP Claim?	Claim Allowed?
Gucci America, Inc. v. Hall & Associates ⁸⁴	No – federal trademark claim	Yes (§ 230 immunity denied based on § 230(e)(2))
Atlantic Recording Corp. v. Project Playlist, Inc. ⁸⁵	Yes – state copyright claim	Yes (§ 230 immunity denied based on § 230(e)(2)) ⁸⁶
Enigma Software Group USA, LLC v. Bleeping Computer LLC ⁸⁷	No – federal trademark claim	Yes (§ 230 immunity denied based on § 230(e)(2))
Mosha v. Facebook, Inc. ⁸⁸	No	No ⁸⁹

APPENDIX B

Table 2. Survey of state laws demonstrating which states have right to publicity statutes, and which states with those statutes include an actual knowledge requirement.

84 Gucci Am., Inc. v. Hall & Assocs., 135 F. Supp. 2d 409 (S.D.N.Y. 2001).

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

86 This case is of special importance in the present argument because it held liable a website that posted links to third-party websites which hosted free, pirated versions of songs – something that could easily happen on Facebook (and probably has happened on Facebook).

87 Enigma Software Grp. USA, LLC v. Bleeping Comput. LLC, 194 F. Supp. 3d 263 (S.D.N.Y. 2016).

88 Mosha v. Facebook, Inc., 2021 WL 230180 (S.D.N.Y. 2021).

89 Although *Mosha* did not itself include an intellectual property claim at all, that area of law under the CDA did garner some attention in the case, albeit in what is most likely dicta. The plaintiff in *Mosha* was acting pro se, and had his claim dismissed in the district court for failure to state a claim under Fed. R. Civ. Proc. Rule 12(b)(6). The problem in that case was that the plaintiff stated a cause of action for libel, and only brought up the issue of state law copyright infringement on the opposition to the motion to dismiss for failure to state a claim. The court noted in dicta that had the plaintiff made out a case of state law copyright infringement in the complaint, it would not have been barred by § 230 immunity. *See id.* at 3.

<i>State</i>	<i>Right to Publicity Statute?</i>	<i>Actual Knowledge Required?</i>
Alabama ⁹⁰	Yes	No
Alaska	No	N/A
Arizona ⁹¹	Yes	No
Arkansas ⁹²	Yes	Yes
California ⁹³	Yes	Yes
Colorado	No	N/A
Connecticut ⁹⁴	No	N/A
Delaware ⁹⁵	No	N/A
Florida ⁹⁶	Yes	Yes
Georgia ⁹⁷	No	N/A
Hawaii ⁹⁸	Yes	Yes
Idaho	No	N/A
Illinois ⁹⁹	Yes	No
Indiana ¹⁰⁰	Yes	Yes
Kentucky ¹⁰¹	Yes	No
Louisiana	No	N/A
Maine	No	N/A
Maryland	No	N/A
Massachusetts ¹⁰²	Yes	No
Michigan ¹⁰³	No	N/A

90 ALA. CODE § 6-5-770 *et seq.* (LexisNexis 2015).

91 ARIZ. REV. STAT. ANN. § 12-761 (LexisNexis 2007). Note that this statute only applies to soldiers.

92 ARK. CODE ANN. § 4-75-1108 (LexisNexis 2016); ARK. CODE ANN. § 4-75-1107 (LexisNexis 2016).

93 CAL. CIV. CODE § 3344 (Deering 1984); *see also* CAL. CIV. CODE § 3344.1(l) (LexisNexis 1984).

94 Note that Connecticut does recognize a common law right to publicity.

95 Note that Delaware might recognize a common law right to publicity.

96 FLA. STAT. ANN. § 540.08 (LexisNexis 2022); *see also* FLA. STAT. ANN. § 540.10 (LexisNexis 2022).

97 Note that Georgia does recognize a common law right to publicity.

98 HAW. REV. STAT. ANN. § 482P-2 (LexisNexis 2021); *see also* HAW. REV. STAT. ANN. § 482P-7(d) (LexisNexis 2009).

99 765 ILL. COMP. STAT. ANN. 1075/10 (LexisNexis 1998).

100 IND. CODE ANN. § 32-36-1-0.2 (LexisNexis 2011); *see also* IND. CODE ANN. § 32-36-1-9(4) (LexisNexis 2002).

101 KY. REV. STAT. ANN. § 391.170 (West 2022).

102 MASS. GEN. LAWS ANN. ch. 214, § 3A (West 2022).

103 Note that Michigan does recognize a common law right to publicity.

Minnesota ¹⁰⁴	No	N/A
Mississippi	No	N/A
Missouri ¹⁰⁵	No	N/A
Montana	No	N/A
Nebraska ¹⁰⁶	Yes	No
Nevada ¹⁰⁷	Yes	Yes
New Hampshire	No	N/A
New Jersey	No	N/A
New Mexico ¹⁰⁸	No	N/A
New York ¹⁰⁹	Yes	Yes
North Carolina	No	N/A
North Dakota ¹¹⁰	Yes	No
Ohio ¹¹¹	Yes	Yes
Oklahoma ¹¹²	Yes	Yes
Oregon	No	N/A
Pennsylvania ¹¹³	Yes	Yes
Rhode Island ¹¹⁴	Yes	No
South Carolina ¹¹⁵	No	N/A
South Dakota ¹¹⁶	Yes	No
Tennessee ¹¹⁷	Yes	Yes
Texas ¹¹⁸	Yes	Yes
Utah ¹¹⁹	Yes	No
Vermont	No	No

104 Note that Minnesota does recognize a common law right to publicity.

105 Note that Missouri does recognize a common law right to publicity.

106 NEB. REV. STAT. § 20-202 (2022).

107 NEV. REV. STAT. § 597.770 (2021); *see also* NEV. REV. STAT. § 597.810 (2021).

108 Note that New Mexico does recognize a common law right to publicity.

109 N.Y. CIV. RIGHTS LAW § 50-f (McKinney 2022); *see also* N.Y. CIV. RIGHTS LAW § 50-f(9) (McKinney 2022).

110 N.D. CENT. CODE § 21-64-2 (2022).

111 OHIO REV. CODE ANN. § 2741.02 (LexisNexis 2022); *see also* OHIO REV. CODE ANN. § 2741.02(e) (LexisNexis 2022).

112 OKLA. STAT. tit. 12, § 1448 (2022); *see also* OKLA. STAT. tit. 12, § 1448(L) (2022).

113 42 PA. CONS. STAT. § 8316 (2022).

114 R.I. GEN. LAWS ANN. § 9-1-28 (West 2022).

115 Note that South Carolina does recognize a common law right to publicity.

116 S.D. CODIFIED LAWS § 21-64-2 (2022).

117 TENN. CODE ANN. § 47-25-1103 (2022); *see also* TENN. CODE ANN. § 47-25-1107(c) (2022).

118 TEX. PROP. CODE ANN. § 26.002 (West 2021); *see also* TEX. PROP. CODE ANN. § 26.012(c)(1) (West 2021).

119 UTAH CODE ANN. § 45-3-3 (LexisNexis 2022).

Virginia ¹²⁰	Yes	No
Washington ¹²¹	Yes	Yes
West Virginia ¹²²	No	N/A
Wisconsin ¹²³	Yes	No
Wyoming	No	N/A
Washington, D.C.	No	N/A

120 VA. CODE ANN. § 8.01-40 (2022).

121 WASH. REV. CODE § 63.60.010 (2022); *see also* WASH. REV. CODE § 63.60.070(c)(4) (2022).

122 Note that West Virginia does recognize a common law right to publicity.

123 WIS. STAT. § 995.50(2) (2022).